**Report of the Select Committee on Security and Justice on Public Participation: Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Bill [B15B – 2022] (National Assembly – sec 75), dated 12 December 2022.**

The Select Committee on Security and Justice, having held public hearings on the Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Bill [B15B – 2022], referred to and classified by the Joint Tagging Mechanism (JTM) as a section 75 Bill, reports as follows:

**1. Introduction**

The Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Bill [B15B – 2022] (“Bill”) was introduced to Parliament on 19 July 2022 and classified by the JTM as a Section 75 Bill. The Bill was referred to the Select Committee on Security and Justice on 29 November 2022.

**2. Purpose of the POCDATARA Bill**

In summary, the proposals in the Bill aims to:

1) Amend certain definitions in the principal Act.

2) Insert some new offences related to maritime and aviation security.

3) Address the problem of foreign terrorist fighters.

4) Shift the responsibility for the publication of United Nations Security Council Resolutions in a notice in the *Gazette.*

In more detail. the Bill provides for:

* offences related to terrorist training and the joining and establishment of terrorist organisations;
* offences related to foreign travel and attempts to leave the Republic under certain circumstances;
* offences in respect of the possession and distribution of publications with unlawful terrorism related content;
* authorisation to be obtained from the Director of Public Prosecutions in respect of the investigation and prosecution of certain offences;
* the issuing of warrants for the search and cordoning off of vehicles, persons and premises;
* a direction requiring the disclosure of a decryption key and the effect of a direction to disclose a decryption key;
* the removal of, or making inaccessible, publications with unlawful terrorism related content; and to provide for matters connected therewith.

**3. Clauses of the Bill**

The Portfolio Committee on Police made several amendments to the Bill and the B-version of the Bill contains the following clauses:

**Clause 1** This clause proposes the substitution, deletion and insertion of certain definitions in section 1 of the principal Act.

**Clause 2** Clause 2 proposes to amend section 3 of the principal Act by providing for an offence in respect of entering, departing from, or transiting through or remaining in any country, for purposes of joining or supporting terrorist groups, in other words, to address ‘‘Foreign Terrorist Fighters’’. The clause further seeks to provide that it is an offence to support an entity engaged in terrorist activities.

**Clause 3** proposes the amendment of section 4 of the principal Act by providing that it is an offence to facilitate the retention or control of property on behalf of, or for the benefit of, a specific entity identified by a Resolution of the United Nations Security Council and which is announced, or in a notice referred to in terms of section 26A(3) of the Financial Intelligence Centre Act.

**Clause 4** seeks to insert section 4A in the principal Act, in order to provide for an offence in respect of an attempt to leave the Republic for the benefit of, at the direction of, or in association with a terrorist group.

**Clause 5** seeks to amend section 5 of the principal Act by extending the offence related to terrorist bombings from only public places to include private places.

**Clause 6** proposes to amend section 6 of the principal Act, by inserting additional offences in accordance with international law.

**Clause 7** Clause 7 proposes to amend the heading to section 7 in accordance with legislative drafting practices.

**Clause 8** proposes the amendment of section 9 of the principal Act to provide that it will be an offence to, by any other means**,** seize or exercise control of an aircraft for the purposes listed in section 9.

**Clause 9** proposes to amend section 10 of the principal Act by providing for additional offences in accordance with the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, as amended by the Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005.

**Clause 10** proposes to amend section 11 of the principal Act by substituting the reference to a specified offence with the offence of terrorism referred to in section 2, an offence associated or connected with terrorist activities referred to in section 3, any Convention offence, or an offence referred to in section 13 or 14.

**Clause 11** proposes to amend section 12 of the principal Act by providing that 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, supervisory body, reporting institution as defined in the Financial Intelligence Centre Act or any other person.

**Clause 12** seeks to amend section 13 of the principal Act by providing that the use of false threats to intimidate the public or to divert police resources in order to enable the commission of a crime is an offence.

**Clause 13** seeks to simplify the language of section 15 of the principal Act following the Constitutional Court judgment of ***S v Okah*** [2018] ZACC 3. It further amplifies the jurisdictional issues of the principal Act, as well as where a warrant in respect of offences in terms of the principal Act may be obtained under the Criminal Procedure Act, 1977 (Act No. 51 of 1977). The clause further provides that persons who are not citizens of the Republic, who are not ordinarily resident in the Republic or persons who are stateless, must be advised of their rights to consular assistance from the State, where they are ordinarily resident or of which they are citizens. The clause, in terms of international obligations, provides that the relevant governments must be informed of the arrest of such a person for a Convention offence.

**Clause 14** Clause 14 seeks to amend section 16 of the principal Act and provides that the prosecution for an offence under section 13 may be instituted without the written authority of the National Director and may be authorised by the relevant Director of Public Prosecutions.

**Clause 15** Clause 15 proposes the substitution in section 17 for the reference to the Department of Foreign Affairs with the Department responsible for International Relations and Cooperation.

**Clause 16** Clause 16 seeks to align the sentencing, as laid down in section 18 of the principal Act, with the severity of the offence, especially in relation to the financing of terrorism. It also provides for sentences in respect of the offences listed in sections 4A and 24A(10) and (11).

**Clause 17** Clause 17 proposes to substitute section 23 of the principal Act as a consequence of the proposed repeal of section 25 and expands on the ambit of, and what may be contained in, a freezing order, the making of ancillary orders, the publication of orders, the appointment of a *curator bonis* and interim orders.

**Clause 18** Clause 18 proposes to amend section 24 of the principal Act by providing for the inclusion of premises which may be cordoned off and searched in accordance with a warrant which may be issued by a judge.

**Clause 19** Clause 19 proposes the insertion of section 24A in the principal Act, which provides that a member of the Directorate may apply to a High Court for an order directing an electronic communications service provider to take-down or disable access to a terrorism publication hosted on its electronic communication service.

**Clause 20** proposes the repeal of sections 25 and 26 of the principal Act in respect of Parliamentary supervision.

**Clause 21** proposes amendments to section 27 of the principal Act by providing that any proclamations issued under section 25(1), before the commencement of the Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Act, 2022, remain valid and have the same force and effect as a notice referred to in section 26A(3) of the Financial Intelligence Centre Act.

**Clause 22** Clause 22 proposes amendments to the Preamble of the principal Act to reflect South Africa’s changed status in respect of having become a Party to certain counter-terrorism international instruments, including international instruments concluded after the adoption of the principal Act, but not yet in force.

**Clause 23** Clause 23 proposes amendments to the arrangement of sections of the principal Act.

**Clause 24** Clause 24 proposes to amend or repeal the laws to the extent indicated in the Schedule to the Bill. The proposed amendment to the Intimidation Act, 1982 (Act No. 72 of 1982) (‘‘Intimidation Act’’), gives effect to the Constitutional Court Judgment delivered on 22 October 2019 in the matters of *General Alfred Moyo and Another v Minister of Police and Others* and *Nokulunga Primrose Sonti and Another v Minister of Police and Others* [2019] ZACC 40, where sections 1(1)*(b)* and 1(2) of the Intimidation Act were ruled as unconstitutional. See also the recommendation of the South African Law Reform Commission in its Report on the Review of Security Legislation: Project 105, at page 1046.

**Clause 25** Clause 25 provides for the short title and commencement of the Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Act, 2022.

**4.** **Public Participation Process and Public Hearings**

The B-version of the Bill was advertised for public comment on social media platforms from 30 November to 6 December 2022. In addition, the Committee attempted to contact the organisations who had made submissions to the Portfolio Committee on Police to determine whether or not they had further submissions to make on this version of the Bill.

1. AfriForum – No submission received.
2. Banking Association of South Africa – BASA indicated they would not be submitting comment on the B-version of the Bill.
3. DearSA – Submitted a written submission and requested a verbal presentation.
4. International Committee of the Red Cross (ICRC) – Submitted a written submission.
5. The Sussex Terrorism and Extremism Research Network (STERN) – Submitted a written submission and requested a verbal presentation.

The following organisations and individuals made submissions to the Select Committee:

1. Freedom of Religion in South Africa (FOR-SA);
2. The Sussex Terrorism and Extremism Research Network (STERN);
3. The International Committee of the Red Cross (ICRC);
4. An individual, Nelius Pretorius;
5. Cape Independence Party; and
6. Dear South Africa.

The table below contains the written and oral representations made to the Committee, with the Departmental response thereto.

| **PROVISION IN QUESTION and COMMENTATOR** | **SUBMISSION/RECOMMENDATION** | **DEPARTMENT’S RESPONSE AND RECOMMENDATIONS**  |
| --- | --- | --- |
| **FORSA****Clause 1: Definition of Terrorist Activity** | **Definition of “terrorist activity”** – Clause 1 proposes amending the definition contained in section 1 of the principal Act. However, of concern is the wide definition of “*terrorist activity*”. The current definition runs over two (2) pages in length. It contains various broad phrases that are open to abuse. This is of specific concern given that recent events have seen where the Department of Health labelled civil society organisations involved in enabling public comments on the Department’s proposed health regulations as “*instigating terrorism*” and/or “*sabotage*”.It is problematic that “‘terrorist activity’… means any act— (a) committed in or outside the Republic, which (viii) creates a serious public emergency situation or a general insurrection in the Republic and (b) which is intended, or by its nature and context, can reasonably be regarded as being intended, in whole or in part, directly or indirectly, to— (iv) further the objectives of an entity engaged in terrorist activity.” The above is **vague**, with no specified criteria for either a “**serious public emergency**” or a “**general insurrection**”. As such, it is open to abuse and it is possible that it may be interpreted, as done in the aforementioned example of the Department of Health, to refer to civil society organisations and/or advocacy groups that are involved in facilitating public awareness of, and participation in, the legislative process and/or other Governmental activities. An unintended consequence of the Bill could therefore be to criminalise the voices of those opposing Government actions and/or curb civil society’s dialogue and actions in what is a participatory democracy. Given that the religious community is often at the forefront of criticising Government and/or facilitating public participation in elections, the legislative process and other civil society activities, this is particularly concerning to religious organisations and leaders. The principal Act criminalises involvement with and/or funding organisations that are deemed to be involved with “terrorist activity”. In light of the above, this is equally concerning to the religious community.The above definition, being open to abuse, could drastically limit the rights to: r**eligious freedom** which protects the right to hold opinions and beliefs and live these out publicly; **freedom of expression**, which protects all expression apart from propaganda for war, incitement of imminent violence, and the advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm; and **freedom of association**, which protects the right to freely associate with those one wishes to associate with. Narrowing the definition of what is “terrorist activity” to avoid abuse by a future Government is vital. The right to religious freedom and freedom of association are, *inter alia*, protected in the various international covenants / treaties and declarations. It would thus be prudent for the Committee to be take cognisance of South Africa’s international law obligations, when drafting legislation that directly affects fundamental rights. **FORSA argues:**Limiting a right: section 7(3) of the Constitution states that a right contained in the Bill of Rights can be limited by section 36, or “*elsewhere in the Bill*” – i.e. by an internal limitation clause as is the case in section 16(2). Interpreting a law: Importantly, in the current situation of drafting a proposed law, section 39(2) of the South African Constitution requires that any law must be interpreted in a way that promotes *“the spirit, purport and objects of the Bill of Rights*”. In particular, For SA reiterates the right to Religious Freedom contained in section 15 of the Constitution, the Right to Freedom of Expression contained in section 16 of the Constitution and the Right to Freedom of Association contained in Section 18 of the Constitution.**RECOMMENDATIONS:** Clause 1 - Wide definition of terrorist activity: *FOR SA* proposes that: The definition of “*terrorist activity*” be narrowed by excluding “*viii) creates a serious public emergency situation or a general insurrection in the Republic*”. The criteria to be met for a “serious public emergency situation” and “general insurrection” be expressly stipulated in the Bill. *Alternatively, that:*The criteria to be met for a “serious public emergency situation” and “general insurrection” be expressly stipulated in the Bill.  | * + The definition of “terrorist activity” rests on two legs:
* A = Any activity that can cause harm
* PLUS
* B = Achievement of any of the intended objectives with that activity EQUALS
* C = “Terrorist Activity”
* The definition seeks to explain that there needs to be a link between the activity that can cause harm and the intention to achieve the objectives. If activities lack the necessary terrorist intent which is usually aimed at terrorizing the civil population or government, it cannot be considered as terrorism under the Act. If one element is missing, the crime is not established. The circumstances and evidence of each particular case, will have to be looked at, to arrive at a conclusion. Prosecution under POCDATARA is only possible with the written authority of the National Director of Public Prosecutions. The function of the NDPP in this instance is to determine that the State has a *prima facie* case with a reasonable prospect of obtaining a conviction. The NDPP's decision to authorise a prosecution is therefore an important safeguard as it has to take account of all factors that may influence the prospects of obtaining a conviction.
* The examples mentioned by the Commentator that the actions of civil society organizations that facilitate public awareness into the legislative processes, will therefore not fall within the ambit of the definition of terrorist activity, because it lacks the intent to cause harm.
* The comments regarding acts that creates serious public emergency situations or a general insurrection in the Republic are noted, but yet again these acts will have to be tested against the definition of “terrorist activity” before any prosecution can be instituted.
* There is no intention to criminalize voices of those opposing Government processes. The Department concurs that Freedom of religion, expression and association are rights that are protected in terms of the Constitution of the Republic of South Africa, but are not without limitation in terms of section 36 of the Constitution. Any limitation of these rights must be justified and comply with all the requirements in section 36.
* The Committee’s attention is also drawn to the fact that this particular part in the definition was not a subject matter in the Bill. It has been part of the definition since the adoption of the principal Act in 2004. The only amendment made to this part was the omission of a comma and insertion of the word “or” in line with technical legislative drafting.
* The Commentator’s recommendation to narrow down the definition of “terrorist activity” is noted, but is not advisable. Substantive amendments to the definition that would seek to diminish the definition, and that are amendments other than those proposed in the Bill, will most likely compromise the legislative measures that are currently in place in the law to prevent and combat terrorism in the country. Further, if substantive amendments will be made to the definition at this stage in the legislative process, it will have a detrimental effect on other provisions in the Bill and may require substantial consequential amendments to other provisions in the principal Act, that is not advisable.

**RECOMMENDATION: The CSPS respectfully requests the Committee, not to amend the definition, outside the parameters of the current amendments proposed in the Bill. The definition in the principal Act has been in place since 2004 and only minor amendments are now proposed.** |
| **Dear SA****Clause 1 : Definition of Terrorist Activity** | DearSA harbours significant concerns regarding the contents of the Terrorist and Related Activities Amendment Bill. These concerns are in relation to the lack of concrete and clearly defined definitions of, among others, what constitutes terrorism, as well as terrorist acts and activities. The severe impact of loose interpretation from vaguely-defined and broad terms towards the constitutional rights of South African citizens is problematic.The Constitution is the supreme law of the land, and no law or proposed amendment can be in conflict with it. The Bill in its current form has the potential to significantly infringe upon: • Freedom of Expression • Freedom of association • Right to self-determinationOf particular concern regarding the right to self-determination is the proposed arbitrary removal of Sections 4 and 5 from Chapter 1 (Definitions). This section specifically refers to the right to self-determination as promoted and protected by the United Nations, to which South Africa is a member and bound signatory. There is no rational reason to remove this section if not to blatantly try to persecute anyone legally acting in accordance with the United Nations’ right to self-determination.Furthermore, potentially any person, group, or organisation that criticises the government or expresses opposition to government policy or positions can be labelled as a terrorist under the Bill due to the clauses on “encouragement” and “indirect facilitation of terrorism”.Hence the repercussions of this Bill for all NGOs, especially those who act as watchdogs and guardians of constitutional and democratic processes, are debilitating and destructiveAny additional amendments, primarily that which potentially conflicts with citizens’ constitutional rights and freedoms and criminalises them for exercising their hard-won democratic processes, must be written with unambiguous and plain definitions. South Africa has existing comprehensive and effective legislation to prosecute criminal and terrorist activity. As presented by Dr A Schoeman (STERN), extremist and terrorist groups and individuals including Boeremag, PAGAD, Henry Okah, Thulsie twins and others, were successfully intercepted, apprehended and charged under terrorism using the existing, un-amended POCDATARA Act and other existing legislation. 1. We believe that the POCDATARA Bill and proposed amendments provide no additional benefit to curbing terrorist and terrorist activities, as the current Act has proven to be extremely effective. 2. We also believe that the current POCDATARA Act, used in conjunction with the recently adopted General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill [B 18B-2022], more than adequately meets the demands of the Financial Action Task Force. Left un-amended, the POCDATARA Act will not have a negative impact on the potential grey-listing of South Africa.We strongly recommend that the POCDATARA Bill be sent back to the drawing board for reconsideration regarding its content, overall desirability and necessity. | * It is common cause that the principal Act does not meet the demands of FATF. The Bill addresses the recommendations of and guidance from oversight structures, especially from the 2018 report of the UN-Counter-Terrorism Executive Directorate and the 2021 mutual assessment report of the Eastern and Southern African Anti-Terrorism Group and the Financial Action Task Force.
* Further, the principal Act has to be brought in line with developments in International Law as well as oversight by the courts.

**RECOMMENDATION: The Department recommends that the deletion of section 1(4) remains unchanged.** |
| **Cape Independence Party****Clause 1: Definition of Terrorist Activity** | In “Amendments B-15B” pg6 a)(iiiA), it states that terrorism is “*any act*”, which “*is calculated to overthrow the government…*”, and such terms as “overthrow” are left open to interpretation without any context of self-determination. This could result in the most basic democratic process of a political party in favour of self-determination electorally defeating/“overthrowing” the national ruling party being interpreted as an act of terrorism. Furthermore, the above peaceful political acts taken in conjunction with pg7 b)i) which states terrorism is any act which “*threatens the unity or territorial integrity of the Republic*”, could also misconstrue self-determination as terrorism. And on pg7 b)ii) the net is cast so unreasonably wide so as to include the sharing of any ideas which “*may cause feelings of insecurity*”… in a *“person, government.. or institution.*” The above is made even worse on pg7 c) where it confuses matters further by stating that terrorism is any activity as contemplated above “*which is committed… for the purpose of the advancement of a… political, religious, ideological or philosophical motive, objective, cause or undertaking.*” The principles of international order were set out in a 2018 report (A/HRC/3763) to the General Assembly of the United Nations and the Human Rights Council. Section 14(h) categorically states that the principle of territorial integrity has external application and a state cannot use the principle of territorial integrity to deny or hollow out the right to self-determination. It is as if the above amendments have been constructed either with malicious intent or without any conscious understanding of the right to self-determination, the right to free speech, political protest, and a basic principle of democracy which is to protect the right to a plurality of opinions and opposition voices which keep a government accountable.The above is obviously not an unacceptable outcome or interpretation, but one that becomes possible with the inclusion of ambiguous and broad definitions, and by the removal of any reference to the right to self-determination. The absurdity of the proposed amendments to the POCDATARA Act is that, if enacted in its current form, many organisations and their supporters could now potentially be classified as terrorists.Therefore, we kindly request the Select Committee on Security and Justice to reconsider the proposed amendments, to ensure that the right to self-determination remains in the Act, that any ambiguity is removed which may threaten South African democracy, free speech, the right to report and share information freely, protest the government, and oppose its policies. | * Section 235 of the Constitution recognizes the collective right of the South African people to self-determination. Communities have rights to pursue self-determination in line with the collective right.
* Whilst the Bill of Rights protects basic human rights such as right to life, right to freedom and security of the person, it does not protect the right to self-determination.
* It follows that the right to self-determination cannot be protected at the cost of human rights.
* For an act to be regarded as a “terrorist activity” there has to be a link between the act that can cause harm and the intention to achieve the objectives. Any organisation that pursues the collective right to self-determination in a peaceful manner, would under no circumstances perpetrate any of the actions described in paragraph (a) of the definition and would therefore never be in the position where it could potentially be considered to be involved in terrorist activity.
* It should be noted that the activities described in paragraph (a) of the definition would in itself be regarded as very serious criminal offences, and if pursued in the exercise of the right to self-determination, would not be a defence against those offences, despite section 1(4) of the principal Act.
* Section 1(4) of the principal Act does not protect an organisation that pursues self-determination through the commission of the acts mentioned in the definition through means that threaten or harm civilian populations or non-military combatants, from a charge of terrorism. Such acts would not constitute a legitimate pursuit of self-determination, “in accordance with the principles of international law, especially international humanitarian law”.

**RECOMMENDATION: The CSPS respectfully requests the Committee, not to amend the definition, outside the parameters of the current amendments proposed in the Bill. The definition in the principal Act has been in place since 2004 and only minor amendments are now proposed.** |
| **Nelius Pretorius****Clause 1: Definition of Terrorist Activity** | This amendment bill is very broad and should be scrapped in its entirety.The specific concerning parts mentioned start from page 11[[1]](#footnote-1):q) by the substitution in subsection (1) for the definition of ''terrorist activity'' of the following definition:ii) intimidate, or to induce or cause feelings of insecurity within, the public, or a segment of the public, with regard to its security, including its economic security, or to induce, cause or spread feelings of terror, fear or panic in a civilian population; [or] (iii) unduly compel, intimidate, force, coerce, induce or cause a person, a government, the general public or a segment of the public, or a domestic or an international organisation or body or intergovernmental organisation or body, to do or to abstain or refrain from doing any act, or to adopt or abandon a particular standpoint, or to act in accordance with certain principles | * + The comments by the Commentator are noted, but do not take into account all of the elements of the crime that have to be proven for a successful prosecution.

**RECOMMENDATION: The CSPS respectfully requests the Committee, not to amend the definition, outside the parameters of the current amendments proposed in the Bill. The definition in the principal Act has been in place since 2004 and only minor amendments are now proposed.** |
| **ICRC****Clause 1: Deletion of Section 1(4) of the Act**Notwithstanding any provision of this Act or any other law, any act committed during a strugglewaged by peoples, including any action during an armed struggle, in the exercise or furtherance oftheir legitimate right to national liberation, self-determination and independence againstcolonialism, or occupation or aggression or domination by alien or foreign forces, in accordance withthe principles of international law, especially international humanitarian law, including the purposesand principles of the Charter of the United Nations and the Declaration on Principles of InternationalLaw concerning Friendly Relations and Cooperation among States in accordance with the saidCharter, shall not, for any reason, including for purposes of prosecution or extradition, be consideredas a terrorist activity, as defined in subsection (1). | South Africa is not the only State whose counter-terrorism legislation presents such a clause (so called ’IHL Saving clause’). For example, the counter-terrorism legislation of Ethiopia, Chad, the UK, Ireland, New Zealand and Canada, present similar clauses. The IHL Saving clause is also recommended by the African Union Model Anti-Terrorism law4 and by other regional organizations such as the European Union. Furthermore, United Nations Security Council Resolution 2462 and 2482 (2019) demands States to ensure that their counter-terrorism measures comply with IHL.The purpose of an IHL Saving clause is to separate the law applicable to the conduct that occurs in peacetime from the conduct that occurs during an armed conflict. If the conduct qualified as ‘terrorist’ occurs in peacetime, IHL would not apply, and the situation would remain governed by domestic law, including by the relevant counter-terrorism legislation, and by international human rights law. Conversely, if the conduct occurs within the context of an international or a non-international armed conflict, IHL is better suited to govern the situations.Deleting South Africa’s IHL Saving clause (i.e., the current section 1 (4) of the POCDATRA), would mean there is no longer separation of the legal framework for conduct that occurs within an armed conflict, and the legal framework for the conduct that occurs in peacetime. This would be inconsistent with South Africa’s international obligations which has accepted IHL as the legal framework governing armed conflictsIn engagements with the Parliamentary Portfolio Committee on Police during their consideration of the Amendment Bill, it became clear that there was a concern that the deletion of s1(4) of the POCDTARA Act was a recommendation in the Mutual Evaluation Report of the Financial Action Task Force (“FATF”). The ICRC response is as follows:* Unlike IHL, the FATF Recommendations are non-binding. They do not carry the same value as international instruments such as relevant counter-terrorism conventions or IHL. As such, the Government of South Africa must favour provisions in its national legislation that comply with IHL.
* The ICRC, in its capacity as guardian of IHL, would like to respectfully submit that the FATF approach towards IHL as well as its interpretation of the 1999 International Convention for the Suppression of the Financing of Terrorism are incorrect. The FATF argues that by excluding certain actions from the scope of POCDATARA, the IHL Savings clause unduly restricts the scope of the offence of financing terrorism. The ICRC respectfully disagrees with this observation. From the ICRC’s perspective, incorporating an IHL Saving Clause in counter-terrorism completely aligns with the requirements of the 1999 Convention.
* Indeed, the 1999 Convention includes provisions expressly excluding certain acts from the scope of financing terrorism offences. Article 2 of this instrument contains two elements already limiting the scope of crimes based on IHL. As such, the IHL Saving clause in s1(4) of POCDATARA, together with the amendments previously suggested by the ICRC, is perfectly in line with the 1999 Convention and cannot be considered as restricting the scope of counter-terrorism crimes under international counter-terrorism conventions.
* It is also important to highlight that incorporating an IHL Saving clause in counter-terrorism legislation does not prevent the State from prosecuting the offence of ‘financing of terrorism’ and ‘participation to a terrorist group’. For instance, current s1(4) of POCDTARA as amended by the ICRC’s suggestion would still allow South Africa to prosecute actionsconsisting of channeling funds to non-State armed groups for the purposes of committing acts of terrorism against the civilian population and/or civilian objects. Such acts would not be protected by the IHL Saving clause.
 | The deletion of s1(4) stems from the following:1. Aligning the principal Act to developments in International law since its adoption eg. Geneva Conventions and Additional Protocol I and II (Relating to the Protection of Victims of International and Non-International Armed Conflicts).
2. The Financial Action Task Force (“FATF”) Mutual Evaluation Report, Oct. 2021

Although the FATF assessment team considered the view that the clause did not constitute a limitation on the ambit of the crime of terrorism as it derived from the Geneva Conventions, it concluded that the clause narrows down the scope of the terrorist financing offence in section 4 in its comparison to the requirements of Articles 2 and 6 of the United Nations Convention on Suppressing the Financing Terrorism that was adopted in 1999. In particular, Article 6 of this Convention requires countries to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of the Convention (terrorist financing offences) are under no circumstances justifiable on political, philosophical, ideological, racial, ethnic, religious or other similar considerations.The FATF considered this as a major factor in their assessment of the recommendation on the criminalization of terrorist financing.It also played a role in the assessment of the country’s ability to provide international co-operation in extradition matters relating to terrorist financing offences. **RECOMMENDATION: The Depart-ment recommends that the deletion of section 1(4) remains unchanged.**  |
| **Cape Independence Party****Clause 1: Deletion of Section 1(4) of the Act** | In particular, we object to the removal of Chapter 1. Subsection 4, which defines and protects the constitutional right to self-determination from being incorrectly interpreted as terrorism. We note that the Red Cross, DearSA, as well as Afriforum, amongst others, have also raised serious concerns surrounding the dangers of the removal of this subsection.This section was intentionally included in the original Act, under “*Definitions and Interpretation*”, for the exact purpose of making it clear to all, the public and the courts, that self-determination is NOT to be defined or interpreted as terrorism. There can be no logical reason to remove this entire section. Its removal creates confusion within the intent of the law, and thereby suggests that acts of self-determination could be confused as acts of terrorism. Since its very inception in the Act, Chapter 1. Subsection 4 has helped to define the law surrounding terrorism and to help ensure that acts of self-determination are not misinterpreted as terrorism. It therefore provided clarity and the correct interpretation to the law. Nothing is gained by its removal. Its removal is arbitrary and dangerous as it could lead to the persecution of acts protected in the constitution, such as self-determination.In complete opposition to the above, the removal of Subsection. 4 does nothing to strengthen the definition of terrorism - as the Bill was intended to do - instead it weakens the definition, provides less clarity, and creates confusion in the interpretation of the law. If there is a specific part of the subsection that the Committee is concerned with then that specific part should be addressed. But removal of the entire subsection protecting the right to self-determination goes against the intended interpretation of the law and may result in conflict with Section 235 of the South African constitution, as well as international law.**Recommendation that arose from Cape Independence Party during the Public Hearings**:The FATF recommendations states: “*Generally, the criminalization of TF in South Africa is broadly consistent (****84****) with most of the TF Convention. The POCDATARA, however, does exclude from the definition of terrorist activity certain acts committed during an armed struggle. (****85****) This exemption therefore narrows the scope of the TF Convention.*” (FATF Recommendations: reference #84 and #85) First of all the FATF congratulates South Africa in its recommendations on pg 165, reference #84, stating that South Africa is “*broadly consistent with most of the TF Convention*”. Then when one looks at the POCTDATARA S.1(4) referred to in the FATF Recommendations, reference #85, the phrase they state is of concern to them is: “***however,*** (The POCDATARA) ***does exclude from the definition of terrorist activity*** *certain* ***acts committed during an armed struggle****. This exemption therefore narrows the scope of the TF Convention.*”Let us now look at the entire POCDATARA S.1(4), referred to in the FATF Recommendations as, reference #85: *“(4) Notwithstanding any provision of this Act or any other law,* ***any act*** *committed during a struggle waged by peoples,* ***including any action during an armed struggle****, in the exercise or furtherance of their legitimate right to national liberation,* ***self-determination*** *and independence against colonialism, or occupation or aggression or domination by alien or foreign forces,* ***in accordance with the principles of international law****,* ***especially international humanitarian law****, including the purposes and principles of the* ***Charter of the United Nations*** *and the* ***Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States*** *in accordance with the said Charter,* ***shall not****, for any reason, including for purposes of prosecution or extradition,* ***be considered as a terrorist activity****, as defined in subsection (1).”*It is the aspect of violence that is the fundamental issue. And according to the FATF’s very own recommendations, they too chose to specifically highlight and identify this one specific phrase of an “*armed struggle*” within S.1(4) that was of concern to them. If then, one was to remove the phrase, “***including any action during an armed struggle***”, this would immediately remove any possibility for acts of violence from being condoned under S1(4), and therefore open up the definition to easily prosecute anyone engaging in any acts of violence. This would also clearly limit any acts of self-determination to remain purely within the legitimate realm of the peaceful and democratic, political process. However, the inverse is true if one removes the entire clause S.1(4), then the broad terminology such as “is calculated to overthrow the government” (Amendments: a) iiiA) could then interpret peaceful, political, democratic acts of self-determination that seek to defeat/“overthrow” a government, by winning elections, as terrorism. Just as acts of violence are unacceptable, this would not be an acceptable outcome either, nor would it be consistent with the laws listed above that protect the right to self-determination.Therefore, we believe that the proposed amendment does a very good job of satisfying the concerns of the FATF, thereby showing South Africa’s good faith and willingness to compromise and comply. It also preserves the original Acts intention to ensure that self-determination is clearly defined and not mistakenly interpreted as terrorism, and at the same time, does not unnecessarily threaten or undermine this long-standing constitutional right. | * The wording “including any action during an armed struggle”, means that these acts are excluded from the definition of terrorist activity and shall not be considered as a terrorist activity.
* The deletion of s1(4) was a recommendation in the Mutual Evaluation Report of the FATF.
* Although the FATF assessment team considered the view that the clause did not constitute a limitation on the ambit of the crime of terrorism as it derived from the Geneva Conventions, it concluded that the clause narrows down the scope of the terrorist financing offence in section 4 in its comparison to the requirements of Articles 2 and 6 of the United Nations Convention on Suppressing the Financing that was adopted in 1999. In particular, Article 6 of this Convention requires countries to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of the Convention (terrorist financing offences) are under no circumstances justifiable on political, philosophical, ideological, racial, ethnic, religious or other similar considerations.
* The FATF considered this as a major factor in their assessment of the recommendation on the criminaliza-tion of terrorist financing.
* It also played a role in the assessment of the country’s ability to provide international co-operation in extradition matters relating to terrorist financing offences. A limited narrowing of the exemption, as proposed by the commentator, would therefore not address the underlying concern that was pointed out in the mutual evaluation report.

**RECOMMENDATION: The Depart-ment recommends that the deletion of section 1(4) remains unchanged.** |
| **ICRC** : Parliament to consider including a clause in the Amendment Bill to provide for exemption from criminal sanctions of impartial humanitarian assistance provided by organizations that operate with State consent, reference is made to:**Section 3(2) of the Act:**(2) Any person who- (a) provides or offers to provide any weapon to any other person for use by or for the benefit of an entity; (b) solicits support for or gives support to an entity; (c) provides, receives or participates in training or instruction, or recruits an entity to receive training or instruction; (d) recruits any entity; (e) collects or makes a document; or (f) possesses a thing, connected with the engagement in a terrorist activity, and who knows or ought reasonably to have known or suspected that such weapons, soliciting, training, recruitment, document or thing is so connected, is guilty of an offence connected with terrorist activities. | The ICRC is also concerned by the absence of a clause within POCDATRA to exempt from criminalization exclusively humanitarian action carried out by humanitarian and impartial organizations. The current wording of the Bill may unintentionally criminalize the provision of humanitarian assistance. For instance, section 3 (2) of POCDATRA could potentially criminalize provision of medical assistance to wounded people in areas controlled by a Non-State Armed Group.The potential criminalization of exclusively humanitarian activities does not accord with the letter and spirit of IHL. Article 3 Common to the Geneva Conventions provide that impartial organizations may offer their services for the benefit of the victims of armed conflict. Impartiality requires that the humanitarian services are offered without any adverse distinction based on criteria such race, nationality, religion or ethnicity. In order to avoid the potential criminalization of humanitarian aid, it is important to provide for a ‘humanitarian exemption clause’ in counter-terrorism legislation. Such clauses have been included in the counterterrorism legislation in various jurisdictions such as Ethiopia, Chad, Philippines, Switzerland, the United Kingdom, New Zealand and Australia. Like the IHL Saving clause, the humanitarian exemption clause is also recommended by the African Union Model Law on Counter-terrorism10 and by other organizations such as the European Union. Furthermore, United Nations Security Council resolution 2462 (2019) urges States “when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.The ICRC appeals to Parliament to consider including a clause in the Amendment Bill to providefor exemption from criminal sanctions of impartial humanitarian assistance provided by organizations that operate with State consent. As currently worded, section 3(2) of POCDATRA could criminalize the work of exclusively humanitarian and impartial organizations such as the ICRC. Such a clause would entrench in law a targeted approach in dealing with the threat of terrorism in the Non-Profit Sector as recommended under the Financial Action Task Force1 (FATF) regulations. | The inclusion of a humanitarian exemption clause is not supported due to the following:The Terror Financing provisions in the Bill are derived from the Convention for the Suppression of the Financing of Terrorism (TF).The crime only applies to financing terrorist entities and activities.The ICRC renders humanitarian assistance to victims of armed conflicts, and these cannot remotely fall within the ambit of the TF.Open ended reference to humanitarian organisations would open the door to terrorist entities impersonating such organisations.Immunities recognized for the ICRC in terms of international law, exempt if from having to testify in criminal proceedings of tribunals and domestic courts.Treatment of victims would constitute proof that they were in fact victims of war crime sought to be prosecuted.Giving evidence of such, the ICRC would either not be allowed into conflict zones or being itself targeted.Immunity exists, due to the interests of alleviating human suffering that outweigh the giving of evidence.This is entirely different from exempting the ICRC from the provisions of a criminal offence.There is therefore no necessity for an exemption as per the ICRC submission.The National Director for Public Prosecutions must authorize all TF prosecutions and it is therefore sufficiently safeguarded against any potential abuse.**RECOMMENDATION: The Department recommends that an Exemption clause not be included in the Bill.** |
| **STERN****Deletion of Clause 3 in original version of the Bill** | In the original amendment Bill, a clause was proposed dealing with the “Prohibition of publication with unlawful terrorism related content” which created an offence related to the publishing, distribution, or circulation of content “intended to directly or indirectly encourage or otherwise induce the commission, preparation or instigation of any offence under this Act”. This clause was removed from the Bill in the Portfolio Committee’s deliberations, which we believe is a mistake and will undermine South African’s security. The removal of this important clause likely stems from concerns that this will overly prohibit freedom of expression and lead to abuses by the state. However, public comments making these claims fail to understand the boundaries and specificity of the law when it comes to the proposed criminalisation of terrorist contentStern refers to Section 16 of the Constitution in relation to Freedom of Speech and argues the Constitution clearly states that propaganda for war and the incitement of violence do not qualify as protected speech. Considering the security threat that this type of material poses to the country and South Africans, the incitement of violence and terrorist-related acts should rightfully be criminalised. Many countries have criminalised these acts for this reason. Further, the legislation places clear and appropriate limits on the use of these powers by limiting it to the promotion of offences criminalised under the Act and tying it to the extensively defined definition of terrorist activity. Most importantly, the current definition of terrorist activity includes the following caveat: (3) For the purposes of paragraph (o)(vi) and (vii) of the definition of **“terrorist activity”,** any act which is committed in pursuance of any advocacy, protest, dissent or industrial action and which does not intend the harm contemplated in paragraph (o)(i) to (v) of that definition, shall not be regarded as a terrorist activity within the meaning of that definition. This means that the definition is limited to the perpetration of terrorist acts criminalised under international law (the Convention Offences) and the proposed clause prohibiting the publication of terrorism content takes this into account. This places an appropriate limit on the application of the law and will prevent abuses of the legislation to suppress legitimate free speech and dissent. Any speech which does not advocate for or incite Convention offences will consequently not fall within the remit of this legislation. Concerns that the inclusion of this clause will restrict civil society groups and legitimate free speech fail to understand the boundaries of this legislation and the built-in restrictions to protect legitimate dissent. The Select Committee is asked that this clause prohibiting the publication of unlawful terrorist content should be returned to the Bill. This is an important tool for deterring the publication of such material which has been used to radicalise young South Africans to violent extremist causes and incite them to commit terrorist acts in South Africa. An intervention at this point will disrupt the chain leading from the radicalisation of an individual to the perpetration of terrorist acts. This is an important intervention which has the potential to prevent the loss of life and keep ordinary South Africans safe.. | * + The clause related to the prohibition of any publications with terrorist related content in the original amendment Bill, sought to create an offence related to the publishing, distribution or circulation of content to encourage or induce the commission of any offence under the principal Act.
	+ During the public participation process when the Bill served before the Portfolio Committee on Police (PCoP), the Department carefully considered all submissions that cautioned about the constitutionality of the clause and possible infringement on the right of freedom of expression and agreed to propose to the PCoP the deletion of the clause. It is our considered opinion that prosecutions of publications with terrorist related content, can be prosecuted under section 14 of the principal Act.
	+ Examples of problematic provisions in the clause:
* 3A(2)(d): “A person commits an offence if he or she, in respect of a publication with unlawful terrorism related content—

… *(d) provides a service to others that enables them to obtain, read, listen to, or look at such a publication, or to acquire it by means of a gift, sale or loan.”* * + Provision is onerous, especially for electronic communications service providers – the offence lies in **“enables them to obtain, read, listen to, or look at such a publication”** whereas such a provider may only provide the access mechanism but has no control over what content is accessed through its service. If the provider for example, enables broad internet access, and the user then chose to search and access prohibited material, the provider will be on the wrong side of

the law, and the provision is therefore too wide. * 3A(5)(b): ““A person charged with committing an offence under this section and section 3(2)*(e)* may raise as a defence—

…(b) the person's action or possession was for the purposes of— (i) carrying out work as a journalist; or (ii) academic research.".* + The provision on carrying out work as a “journalist” was identified as problematic. There is no specific definition of “journalist” in South African law. Mainstream journalists are not registered anywhere and are opposed to registration. The only safety net is that of the Persombudsman. For example, any person in possession of a cellphone device and a blog, can publish unlawful terrorism related content and is considered a journalist. It is therefore uncertain whom should be considered as a journalist for purposes of the defence. The defence of journalism was also debated by the previous Portfolio Committee on Police, in case of the Critical Infrastructure Protection Act, and the defence was not inserted.
	+ The aforementioned examples of complexities in the clause, as well as possible constitutional challenges and possible infringement of the right of freedom of expression, led to the proposal to the PCoP to delete the clause, that was accepted by the PCoP, and we respectfully make the same proposal to the Select Committee, not to reinstate the clause, because the offence can be successfully prosecuted under section 14 of the principal Act.

**RECOMMENDATION: The Depart-ment recommends that the deletion of clause 3A remains unchanged.** |
| **FORSA****Subsection 3 of the definition of terrorist activity** | The addition of a phase such as “is calculated to overthrow the government”, will fall within the sections mentioned in subsection 3. If you have “advocacy” that is deemed by the State as being “to overthrow the government”, subsection 3 offers no protection. | * + The proposed insertion related to overthrowing of a government must be read in conjunction with paragraph (a)(viii) of the definition: “creates a serious public emergency situation or a general insurrection in the Republic”. The title of the Act is Protection of Constitutional Democracy against Terrorist and Related Activities Act. Clearly in a constitutional democracy, overthrowing the government or the constitutional order by unconstitutional means such as crippling the country or by means of violence, should be a crime. ISIS in Syria has established its own government by means of violence.
	+ It is correct that subsection (iiiA) will fall within the ambit of subsection 3. Whether the “advocacy” will be deemed as a harmful action to overthrow the government, is a question on whether the advocacy is violent in nature and aimed at endangering the life or bodily integrity of persons. In addition to this, the advocacy must be intended to threaten the unity and territorial integrity of the Republic and intimidate the public in a manner that they feel unsafe. The State must prove this. If not proven, the “advocacy” enjoys protection under subsection 3.

**RECOMMENDATION: The CSPS respectfully requests the Committee, not to amend the definition., outside the parameters of the current amendments proposed in the Bill. The definition in the principal Act has been in place since 2004 and only minor amendments are now proposed.** |

1. **Public Hearings**

The Committee hosted public hearings on 7 and 8 December 2022. On 7 December, FORSA, Cape Independence Party and STERN made presentations to the Committee. On 8 December 2022, Dear SA tendered an apology and requested that the Committee considers its written submission in the course of deliberations. On 8 December 2022, the Committee received the Department’s responses to the written submissions received from the ICRC, a member of the public and Dear SA[[2]](#footnote-2).

The following key issues arose during the public hearings:

* Objections were raised with the definitions and offences that may unjustifiably impact on the constitutional rights to religious freedom (section 15), freedom of (religious) expression (section 16) and freedom of association (section 18);
* That the proposed clause prohibiting the publication of unlawful terrorist content be returned to the Bill as this is may be an important tool for preventing the radicalisation of South Africans;
* Objections to the removal of Section 1(4) of the Principal Act; Recommendation to remove the phrase, “***including any action during an armed struggle***”, it was argued that this would immediately remove any possibility for acts of violence from being condoned under S1(4), and therefore open up the definition to easily prosecute anyone engaging in any acts of violence;
* ICRC requested Parliament to introduce a humanitarian exemption clause in order to protect impartial humanitarian action carried out by trusted humanitarian and impartial organizations; and
* ***Definition of Terrorist Activity***: many commentators felt the definition was too wide, vague and broad.
1. **Discussions:**
	1. During the hearings FORSA raised concerns regarding the definition of “terrorist activity” in the Bill and recommended that the definition be narrowed. FORSA argued that an unintended consequence is to criminalize voices of those opposing Government and could limit the rights of religious freedom, freedom of expression and freedom of association. The Department responded that there is no intention to criminalize voices of those opposing Government processes. The Department concurs that freedom of religion, expression and association are rights that are protected in terms of the Constitution of the Republic of South Africa, but are not without limitation in terms of section 36 of the Constitution. Any limitation of these rights must be justified and comply with all the requirements in section 36.
	2. The Cape Independence Party’s main challenge with the Bill was regarding “self-determination”. The committee heard the party’s objection to the removal of Section 1(4) as it would create confusion and possibly lead to individuals and organizations that protect or promote self-determination, to be classified as terrorists, which it said defines and protects the constitutional right to self-determination from being incorrectly interpreted as terrorism. The Department responded that Section 235 of the Constitution recognizes the collective right of the South African people to self-determination. Communities have rights to pursue self-determination in line with the collective right.
	3. Stern’s main submission was that in the original amendment Bill, a clause was proposed dealing with the “Prohibition of publication with unlawful terrorism related content” which created an offence related to the publishing, distribution, or circulation of content “intended to directly or indirectly encourage or otherwise induce the commission, preparation or instigation of any offence under this Act”. The Select Committee was asked that this clause prohibiting the publication of unlawful terrorist content should be returned to the Bill. Stern was of the view that this clause is an important tool for deterring the publication of such material which has been used to radicalise young South Africans to violent extremist causes and incite them to commit terrorist acts in South Africa. The Department’s response was that during the public participation process when the Bill served before the Portfolio Committee on Police (PCoP), the Department carefully considered all submissions that cautioned about the constitutionality of the clause and possible infringement on the right of freedom of expression and agreed to propose to the PCoP the deletion of the clause. It is the Department’s view that prosecutions of publications with terrorist related content, can be prosecuted under section 14 of the principal Act.
2. **Conclusion**

The Select Committee was satisfied with the engagements on both the written and oral submissions by organisations and individuals on the POCDATARA Bill. The Committee expressed its gratitude to the public for their engagement on the Bill as it enhanced the public participation process and guided the Committee’s deliberations on the Bill.

**Report to be noted.**

1. Page 7 of B version of the Bill. [↑](#footnote-ref-1)
2. Responses contained in the table above. [↑](#footnote-ref-2)