

STERN Submission to the South African National Assembly Portfolio Committee on Police Regarding Amendments to the Protection of Constitutional Democracy Against Terrorist and Related Activities Act

1. STERN

The [Sussex Terrorism and Extremism Research Network \(STERN\)](#) is based in the School of Law, Politics and Sociology at the University of Sussex in the United Kingdom. The aims of STERN are:

To promote research on the causes of terrorism and violent extremism and how to understand and counter these occurrences;

To develop links and partnerships with experts, nationally and internationally, including research institutions, Non-Government Organisations (NGOs), intergovernmental organisations and policy makers;

To generate research on policy, law and practice.

This submission for the Portfolio Committee on Police has been written by Dr Albertus Schoeman and Dr Matthew Garrod.

Dr Albertus Schoeman is a former researcher at the University of Sussex funded by the Chancellor's International Research Scholarship. He's worked on projects with organizations including the Brookings Institute, INTERPOL, UNODC and the World Bank. His research focuses on the democratic governance and state-building in Africa and developing countries around the world. He previously worked as a consultant for the Institute for Security Studies where he worked on violent extremism in Africa. He has worked with Interpol and various African governments in developing the regional counter-terrorism strategies for East Africa and the Great Lakes Region. He has also trained national security services on contemporary terrorist challenges and has advised various governments on security issues in Africa.

Dr Matthew Garrod is a senior lecturer and researcher at the University of Sussex, United Kingdom, and an independent expert adviser on countering terrorism and organised crime at the United Nations. As part of his role at the United Nations, Dr Garrod works with governments across the world providing technical assistance and guidance on how to implement counterterrorism obligations contained in international instruments and UN Security Council resolutions. In 2017, Dr Garrod led the first ever project commissioned by UNODC examining the linkages between terrorism and organised crime across different regions of the world including Africa. The report for this project was not published in the public domain, but its findings subsequently informed the United Nations Security Council in the adoption of resolutions aimed at countering the threat posed by terrorism and organised crime including resolution

2482 (2019). Dr Garrod also had an advisory role in the drafting of the Hague Good Practices on the Nexus between Transnational Organized Crime and Terrorism. Dr Garrod has also co-organised workshops with the Royal United Services Institute, located in Whitehall, United Kingdom, on the links between terrorism and organised crime.

Contact:

Dr Albertus Schoeman

A.Schoeman@sussex.ac.uk

2. Understanding the context of violent extremism and terrorism in South Africa

2.1. The threat of violent extremism and terrorism in South Africa is constantly changing as new groups emerge and the international landscape changes. South Africa has faced terrorist threats both internally and externally. Historically, domestic groups include threats such as far-right extremist groups such as the *Boeremag* and more recently members of the National Christian Resistance Movement arrested in 2019 as well as Islamist-inspired groups such as People Against Gangsterism and Drugs (Pagad). International terrorist groups such as al-Shabaab, al-Qaeda and the Islamic State (IS) group have primarily used South Africa as a place to hide out, plan operations and source funding. More recently, with the emergence of IS, the group has attempted to recruit South Africans to their cause and lured an estimated 60-100 South Africans to the conflict in Syria and Iraq.

2.2. South Africa's most high-profile terrorism case tried using the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 (POCDATARA) is the Henry Okah case. In January 2013, Okah the leader of the Movement for the Emancipation of the Niger-Delta was found guilty of 13 charges related to terrorism for his role in planning car bombings in Abuja, Nigeria.¹ This was the first instance of using POCDATARA to prosecute a terrorism act outside of South Africa and the successful prosecution of Okah proved both South Africa's capability to prosecute international terrorism cases and South Africa's commitment to preventing international terrorism as obligated under the UN Convention for the Suppression of Terrorist Bombings of 1997 and the UN Convention for the Suppression of the Financing of Terrorism of 1999. However, the Okah case was not without problems and as indicated in judgments by both the Constitutional Court and the Supreme Court of Appeal, some language in sections of POCDATARA are difficult to interpret and unclear.

2.3. Further, since the Okah case, the nature of international terrorism has significantly changed with the emergence of IS which has adopted new tactics for recruitment and

¹ Salifu, U. (2013). Henry Okah counter-terrorism ruling is a judicial triumph for South Africa and the continent, ISS Today, 1 February 2013, www.issafrica.org/iss-today/henry-okah-counter-terrorism-ruling-is-a-judicial-triumph-for-south-africa-and-the-continent

has used the Internet to extend the group's reach. The phenomenon of "Foreign Terrorist Fighters" has particularly become an international challenge with individuals travelling to conflict zones to join terrorist organisations. In the case of the Iraq/Syria conflict at least 41,490 individuals from 80 countries travelled to Syria and Iraq, a quarter of which were women and minors.² The challenge to South Africa is illustrated through the ongoing case against the "Thulsie Twins", two brothers allegedly radicalised online who sought to join IS in Syria and after failing to travel to Syria were allegedly instructed to carry out attacks in South Africa on symbolic targets including foreign embassies.

2.4. The threat of international terrorism has also come closer to South Africa as the conflict in northern Mozambique with links to IS groups in East Africa expands. A group of South Africans linked to the Thulsie Twins have reportedly joined IS in the conflict in northern Mozambique and the threat of returning foreign fighters is a concern. Further, there are ongoing concerns of training occurring in South Africa for extremist groups as well as suspected financing of international terrorist organisations.

2.5. For a more comprehensive overview of violent extremism in South Africa see: [Cachalia, R. & Schoeman, A. \(2017\). *Violent extremism in South Africa: Assessing the current threat*, *Southern Africa Report*, vol. 7, May 2017.](#)

and

[Buchanan-Clarke, S. \(2021\) *Strengthening South Africa's response to the threat of international terrorism*, *South African Journal of International Affairs*, 28:2, 187-202.](#)

3. Comments and proposals to the Amendment

3.1. Amendment of section 1 of Act 33 of 2004

3.1.1. The reference to terrorist motive in the definition of terrorist activity can be removed. The amendment proposes to add the following to the definition:

(c) which is committed, directly or indirectly, in whole or in part, for the purpose of the advancement of an individual or collective political, religious, ideological or philosophical motive, objective, cause or undertaking;

International instruments and UN Security Council resolutions generally do not require a special terrorist motive, which may be difficult and burdensome to prove, and the criminal law does not normally require proof of motive. It is true that the special terrorist motive is what makes a terrorist act distinctive from other types of criminality

² Cook, J. & Vale, G. (2019). 'From Daesh to 'Diaspora': Tracing the Women and Minors of the Islamic State', Major Report, International Centre for the Study of Radicalisation, <https://giwps.georgetown.edu/resource/from-daesh-to-diaspora/>

and there is a legitimate concern that the absence of a motive requirement may make the definition of terrorist activity overly broad. However, such distinction is more theoretical than one that is borne out by empirical evidence. Carrying out a violent act to inspire terror should be sufficient grounds for prosecution. For instance, Colombian drug lord Pablo Escobar's narcoterrorism presents a case where his organisation engaged in terrorist attacks including the bombing of a passenger plane to intimidate the Colombian government for purely criminal financial motive.

3.1.2. Indeed, many (if not all) of the most lethal and resilient terrorist groups in the African continent (and beyond) are 'hybrid' groups; that is to say, groups which are terrorist and heavily involved, directly or indirectly, in a range of organised criminal activities. Terrorists benefit from organised crime financially, logistically, and operationally. Some of these groups are far more active in organised crime than the advancement of a political, religious, ideological or philosophical cause. The UN Security Council has adopted a series of resolutions, since 2014, requiring states to counter organised crime and its linkages with terrorist groups, irrespective of whether such crime is domestic or transnational, because of the threat that it poses to international peace and security. Therefore, it is essential that any modern definition of terrorist activity is based on emerging and growing empirical data and reflects the reality that terrorist activity includes involvement in or benefit from organised crime.

3.2. Amendment of section 15 of Act 33 of 2004

3.2.1. We welcome amendments to clarify the law's jurisdiction. As noted in the Constitutional Court's judgement in *S v Okah* [2018] ZACC 3³, some of the language around the law's jurisdiction is unclear. The difficulty of both the Supreme Court of Appeal⁴ and the Constitutional Court's interpretation of the language in POCDATARA in the *Okah* case shows the importance of specificity and clarity in drafting legislation.

3.3. Amendment of section 3 of Act 33 of 2004

3.3.1. The importance of specificity and clear guidelines for applying the law is similarly applicable to the proposed amendments around training directed at foreign terrorist fighters. The amendment proposes to add the following subsection:

(4) A person commits an offence if he or she receives training and is aware that such training is, wholly or partly, provided for purposes connected with the commission or preparation of terrorist activities or Convention offences.

3.3.2. The issue of criminalising training related to terrorist activities is important to address as it provides an opportunity to interrupt terrorist activity before an attack can occur. In this way, preparation for committing terrorism-related offences should be

³ *S v Okah* [2018] ZACC 3 <http://www.saflii.org/za/cases/ZACC/2018/3.html>

⁴ *Okah v S* (19/2014) [2016] ZASCA 155 <http://www.saflii.org/za/cases/ZASCA/2016/155.html>

criminalised as well as the preparation of a non-specific terrorism-related offence. Regarding training, the [Australian Criminal Code Act 1995](#)⁵ in Division 101.2. on providing or receiving training connected with terrorist acts specifies that:

- (3) A person commits an offence under this section even if:
 - (a) a terrorist act does not occur; or
 - (b) the training is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or
 - (c) the training is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act.

In this way, the Australian law on terrorist training clarifies that the act of training is itself an offence even if there is no specific attack planned. Terrorist training can also occur online, including on social media platforms. Consequently, the Bill should further consider a clause addressing the provision or receiving of training online.

3.4. Insertion of section 3A - Prohibition of publication with terrorism related content

3.4.1. We welcome the insertion of a clause affirming the right of journalists and researchers to access terrorism related content for legitimate professional uses in the public interest in the updated Bill. A major concern around the expansion of terrorism-related laws often lies with its concerns that this will lead to restrictions on freedom of expression. See for instance [Schoeman 2017](#)⁶. Laws aimed at addressing terrorism related content need to balance security priorities with democratic rights such as privacy and free speech that are foundational to a well-functioning democracy.

3.4.2. Provisions such as this are important for protecting researchers and journalists. For instance, prior to the addition of the “reasonable excuse” clause to the UK’s Terrorism Act of 2000, Rizwaan Sabir, a Masters student from the University of Nottingham in the UK was arrested and detained for a week after an Al Qaeda Training Manual which he downloaded for his research was found on a computer.⁷ Laws such as this can have a chilling effect on freedom of speech if journalists and academics fear that their research can lead to their arrest.

4. Conclusion

Many of the proposed amendments are overdue such as the inclusion of the various conventions to which South Africa is party. We therefore welcome the amendments

⁵ Australia Criminal Code Act 1995 <https://www.legislation.gov.au/Details/C2021C00183>

⁶ [Schoeman, A. \(2017\). Will limits on free expression prevent terrorism?, Africa in the World Report, vol. 2, September 2017. https://community-democracies.org/app/uploads/2018/06/aitwr-2-1.pdf](#)

⁷ Jones, S. (2011). Student in al-Qaida raid paid £20,000 by police. The Guardian. <https://www.theguardian.com/uk/2011/sep/14/police-pay-student-damages-al-qaida>

and their intention to address contemporary terrorism challenges such as foreign terrorist fighters and the distribution of online terrorism-related content. It is important to recall the full title of the Act - Protection of Constitutional Democracy Against Terrorist and Related Activities. The underlying principle throughout the act should be with the preservation of democratic rights and civil liberties in mind. Consequently, it is vital to uphold democratic values such as the freedom of expression which includes protecting journalists and researchers. Further, it is important to consider Africa's unique terrorist challenges particularly regarding the relationship between organised crime and terrorist groups and appropriate provisions should be made to address the domestic and regional context.

STERN is grateful for the opportunity to submit comments to the Portfolio Committee on Police and is available for further engagement with the Committee if requested.

References

Australia Criminal Code Act 1995
<https://www.legislation.gov.au/Details/C2021C00183>

[Buchanan-Clarke, S. \(2021\) Strengthening South Africa's response to the threat of international terrorism, *South African Journal of International Affairs*, 28:2, 187-202.](#)

[Cachalia, R. & Schoeman, A. \(2017\). Violent extremism in South Africa: Assessing the current threat, *Southern Africa Report*, vol. 7, May 2017. <http://issafrica.s3.amazonaws.com/site/uploads/sareport7-v2.pdf>](#)

Cook, J. & Vale, G. (2019). 'From Daesh to 'Diaspora': Tracing the Women and Minors of the Islamic State', Major Report, International Centre for the Study of Radicalisation, <https://giwps.georgetown.edu/resource/from-daesh-to-diaspora/>

France Loi n° 2017-258 du 28 Février 2017 Relative à la Sécurité Publique
<https://www.legifrance.gouv.fr/loda/id/JORFTEXT000034104023/>

Jones, S. (2011). Student in al-Qaida raid paid £20,000 by police. The Guardian.
<https://www.theguardian.com/uk/2011/sep/14/police-pay-student-damages-al-qaida>

[Jupp, J. & Garrod, M. \(2019\). Legacies of the Troubles: The Links between Organized Crime and Terrorism in Northern Ireland, *Studies in Conflict & Terrorism*.](#)

Okah v S (19/2014) [2016] ZASCA 155
<http://www.saflii.org/za/cases/ZASCA/2016/155.html>

S v Okah [2018] ZACC 3 <http://www.saflii.org/za/cases/ZACC/2018/3.html>

Salifu, U. (2013). Henry Okah counter-terrorism ruling is a judicial triumph for South Africa and the continent, ISS Today, 1 February 2013, www.issafrica.org/iss-today/henry-okah-counter-terrorism-ruling-is-a-judicial-triumph-for-south-africa-and-the-continent

[Schoeman, A. \(2017\). Will limits on free expression prevent terrorism?, *Africa in the World Report*, vol. 2, September 2017. <https://community-democracies.org/app/uploads/2018/06/aitwr-2-1.pdf>](#)

The Constitution of the Republic of South Africa. (1996).
<https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1>

United Kingdom Terrorism Act 2000
<https://www.legislation.gov.uk/ukpga/2000/11/section/58>