**RESPONSE ON THE PUBLIC COMMENTS TO THE**

**PROTECTION OF CONSTITUTIONAL DEMOCRACY AGAINST**

**TERRORIST AND RELATED ACTIVITIES AMENDMENT BILL, 2022**

**CIVILIAN SECRETARIAT FOR POLICE SERVICE**

| **CLAUSE** | **SECTION** | **COMMENTS** | **RESPONSE** |
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|  |  | **AFRIFORUM**  **General comments:**  25. As revealed in a recent report authored by the Global Initiative Against Transnational Organised Crime group, which is quoted at length for its cogency:  “The institutions tasked with identifying, prosecuting, and preventing terrorism cases in South Africa are **fundamentally weak**. Investigators with close knowledge of Islamic State-linked groups told GI-TOC that South African authorities **do not currently have enough technical and specialist capacity to deal with cases of this nature.** An officer in the Hawks unit for Crimes Against the State expressed concerns that the unit is “seriously **understaffed**”, with only around 20 officers with the requisite knowledge and experience nationwide. Several sources told GI-TOC that there is a single South African Police Service expert who analyses data seized in terror raids... This **lack of investigative capacity has led to delays in prosecutions**. The magistrate in the Verulam mosque attack prosecution criticised “unreasonable” delays, which led to the case being dropped.” (own emphasis) | The issue of capacity to deal with investigations into terrorist and related activities is important. However, there had been a number of convictions in terms of the Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Act, including the conviction of Mr H Okah in respect of terrorism committed in Nigeria.  The South African law on the subject needs to be updated to comply with all the requirements of the International Law: The capacity of South African law enforcement institutions is important, especially from an oversight point of view to ensure that crime threats can be dealt with, but this should not delay the improvement of the legislation. |
| **1** | **1(4)** | AfriForum, for example, welcomes certain aspects of the Amendment such as, removing infamous ‘national liberation’ clause, s1(4) to address tension between commitments to African Union and United Nations. | The repeal of section 1(4) of the Act, must be understood within the context of International Law and the implementation thereof in South Africa. In respect of the two additional Protocols to the Geneva Conventions, South Africa’s position is as follows:  "Protocol I": Protocol Additional to the Geneva Conventions of 12  August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted at Geneva on 10 June 1977, was signed by the Republic on 8 June 1977 and ratified by the Republic on 21 November 1995;  "Protocol II" means the Protocol Additional to the Geneva Conventions of 12  August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, adopted at Geneva on 8 June 1977, was signed by the Republic on 8 June 1977 and ratified by the Republic on 21 November 1995.  The Geneva Conventions and these two additional Protocols were incorporated in South African law by means of the Implementation of the Geneva Conventions Act, 2012 (Act No. 8 of 2012).  The two additional Protocols apply amongst others, to armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.  The Protocols make certain important principles in the Geneva Conventions applicable also to non-international armed conflicts. The Protocols lay down the obligations of both State Parties and other combatants which may include guerilla groups which want to benefit from the protection of the Protocols.  The Implementation of the Geneva Conventions Act, 2012 (Act No. 8 of 2012) was adopted quite some time after the adoption of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004.  South Africa is a member of the Financial Action Task Force (FATF) as well as the Eastern and Southern African Anti-Money Laundering group (ESAAMLG). The FATF and ESAAMLG conducted a joint Mutual Evaluation of South Africa’s measures against money laundering and terrorist financing, and published the final report in this regard in October 2021.  On page 165 of the Mutual Evaluation Report under Recommendation 5, the following is stated:  “Criterion 5.1 – The Protection of Constitutional Democracy Against Terrorist and Related Activities Act No. 33 of 2004 (POCDATARA) came into effect on 20 May 2005 and it contains several offenses related to TF (s.4).  Generally, the criminalization of TF in South Africa is broadly consistent with most of the TF Convention. The  POCDATARA, however, 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. Article 6 of the TF Convention states that ‘Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic  legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature’.” |
| **1** | **1** | **5.1.1 *“Property”***  5.1.1.1 The section was already overbroad and vague. The expansion thereof has exacerbated the problem. | The definition of "property” is aligned with the definitions of the same concept in the Prevention of Organised Crime Act (POC Act) and the Financial Intelligence Centre Act (FIC Act). These Acts have to be implemented in conjunction with each other to address illicit financial flows related to terrorism and therefore the definitions should be aligned.  2. The UN-CTED pointed out in its compliance Report following their follow-up visit from 7 – 9 May 2008, that the term property applies to assets of any kind, regardless of whether they are legitimate or illegitimate, or wholly or jointly owned or controlled, directly or indirectly, by one or more persons. The authorities indicated that the definition of “property” is broad enough to cover any type of property. Natural resources, economic resources or trade resources such as commodities or instruments for trade financing would either be moveable property, or rights in, or claims to moveable property, and would therefore be covered by the current definition. |
|  |  | **5.1.2 *“Terrorist activity”***  5.1.2.1 The addition of 1(b)(iv), to wit, “can reasonably be regarded as being intended, in whole or in part, directly or indirectly, to… further the objectives of an entity engaged in terrorist activity”, further complicates an already notoriously contested definition.  5.1.2.2 ‘Reasonably be regarded’ unacceptably introduces negligence as a form of *mens rea* for committing terrorist offences.  5.1.2.3 This is legally imprecise for purposes of criminal law and is a common issue with anti-terrorism legislation globally.  31. It should above all be recalled that **the definition of ‘terrorism’ is notoriously contested across the world**. There is no single internationally agreed upon meaning. The South African definition is generally no poorer or better than any other. The fact remains that the inherent uncertainty and vagueness associated with the act of ‘terrorism’ **enjoins the legislature to tread extremely carefully where criminal liability is tied to such a vague, flexible, and broad definition**, which is also politically loaded. | This part is the exact wording of the Act since its adoption in 2004 and there is no proposed amendment to this part. The only substantive amendment is the insertion of subparagraph (iv) namely:  or  (iv) further the objectives of an entity engaged in terrorist  Activity.  Wording is existing wording of the Act: It refers to intended or can be reasonably regarded as intended”.  It is correct that there is no globally accepted definition of terrorism. The Sixth Committee of the UN had not been successful in the quest to propose such a universally accepted definition. Following the recommendations of the South African Law Reform Commission, “terrorism” as such was not defined, but terrorist activity. The same model had been followed elsewhere in the word, e.g. Canada. A prosecution in terms of the POCDATARA Act, is only possible with the written authority of the National Director of Public Prosecutions, except in respect of section 13. |
| **3** | **New section 3A** | 5.2 Insertion of clause 3A  **Prohibition of publication with unlawful terrorism related content**  5.2.1 Unjustifiably violates rights to freedom of expression, association, and conscience.  5.2.2 Vulnerable to disproportionate, arbitrary, discretionary abuse.  5.2.3 Overbroad definition and form of intent violates principle of legality.  19. The state has not identified in its explanatory memorandum exactly why highly invasive measures such as the proposed s3A is necessary to combat terrorism at a local level.  26. The introduction of new measures such as the proposed s3A cannot address the problem as described. Any obstacles or issues experienced by the state are fundamentally capacity, training, and resource related.  31.1 To mention but one practical example – **the proposed s3A contains the word ‘encourage’ as an act or conduct attracting criminal liability**. The U.N has itself advised that the word ‘encourage’ is part of a package of terminology that is overbroad in terms of anti-terror legislation, with reference specifically to legislation adopted in Southern Africa.  31.3 S3A could also criminalise conduct that would not otherwise constitute terrorism. Criminalising the mere ownership of such material self-evidently creates enormous potential for abuse and is wholly disproportionate to the threat actually posed by domestic terrorism. The Amendment would criminalise curious individuals who may have no link whatsoever to terrorist groups or intend to act in any way. | The media and in particular electronic media and platforms are being used extensively to recruit persons to join terrorist organisations or to commit terrorist acts. Any prosecution in terms of these provisions may only be instituted with the written authorization of the National Director of Public Prosecutions.  There is no other law that deals with the decryption of encryption of information lawfully obtained. This measure is not only required in respect of the investigation of offences under the Terrorism Act but should extend to all criminal investigations.  Unlike the publication of terrorism-related content in document format, special measures are required to limit availability of terrorism-related content by means of electronic communications.  The section 3A is based on provisions in Chapter 11 in the United Kingdom Terrorism Act, 2006, in which the word “encourage” is also used.  The Bill does not address only “terrorist acts” or the commission of the offence of terrorism, but also issues such as training, support of and recruitment. |
| **5** | **New section 4A** | 5.3 Insertion of clause 4A  **Offence relating to attempt to leave the Republic**  5.3.1 Unjustifiable violation of freedom of movement and unnecessary duplication of pre-existing offence captured in other legislation. | The provision is necessary to provide legal certainty that the South African law criminalises situations where persons abuse the freedom of movement and use the South African territory as a springboard to join foreign terrorist organisations or further their objectives.  The United Nations Counter-terrorism Executive Directorate (UN-CTED) pointed out in its compliance Report following their follow-up visit from 7 – 9 May 2008: PRIORITY ACTION RECOMMENDED  3. Criminalize autonomously, in accordance with Council resolutions 2178 (2014) and 2396 (2017), travel or attempted travel to another State for the purpose of the perpetration, planning, preparation of, or participation in, terrorist acts, or participation in training. |
| **17** | **18** | Amendment of clause 18  **Penalties**  34.3 The Amendment **proposes severe increases in sentence for offences thereunder.** | The amendment relating to the penalties for terrorist financing offences is necessary to establish parity with equally serious offences of the POC Act such as the offence of money laundering.  The United Nations Counter-terrorism Executive Directorate (UN-CTED) pointed out in its compliance Report following their follow-up visit from 7 – 9 May 2008: “33. The ‘terrorism-financing’ offence defined in section 4 of the POCDATARA is punishable, by its article 18 (1)(c) (i), by a sanction not exceeding 15 years’ imprisonment or a fine not exceeding R100 million (c. $7.5 million). The interpretation of the relevant TF offences and related offences should be clarified in the POCDATARA independently from any linking to the offences stipulated under POCA (see recommendation 10).”. Recommendation 10: Clarify and align the scope of penalties for the terrorism-financing offence with the sanctions provided for money-laundering in the POCDATARA and the sanctions provided for in the Prevention of Organized Crime Act 121 of 1998. |
| **18** | **23(2)(a)** | 5.4 Amendment of s23(2)(a)  **Freezing Orders** – “**reasonable grounds**’  5.4.1 ‘Reasonably be regarded’ introduces a form of negligence as sufficient *mens rea* for criminal liability – see above. Overextends the power of police officials.  5.4.2 Likely to lead to complex litigation.  5.4.3 Soon to be dealt with in specialist amendments to FICA. | The term which is used in the proposed section 23(2)(a) is “reasonable grounds to believe” and not as stated “reasonably regarded”. “Reasonable grounds to believe” within the context of this section does not relate to criminal liability. Therefore, the phrase does not establish a form of *mens rea*. Instead it sets an evidentiary standard that the State must meet to obtain a freezing order. The evidentiary standard is applied by a judge when the National Director of Public Prosecutions brings an application for a freezing order. The power is not exercised by a police official.  A judge applies this standard to determine whether the State has proved the jurisdictional facts that are required for the granting of the freezing order.  This evidentiary standard is much lower than the standard for criminal prosecution, which is “beyond reasonable doubt”. The term “reasonable grounds to believe” is often used in legislation in respect of a discretion to be exercised by a judicial officer for example when a magistrate decides whether a search warrant should be issued in terms of section 21 of the Criminal Procedure Act, 1977.  The proposed amendments to the FIC Act that are contained in the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill, (B18-2022), are not aimed at addressing the objective of these amendments. |
| **20** | **New sections 24A and 24B** | 5.5 Insertion of s24A & s24B  **Application for Decryption Direction & Order to Disable Access to Internet or Social Media Site**  5.5.1 Potential for abuse as seen with RICA legislation.    5.5.2 Potentially unjustifiable violation of the right to privacy, given nebulous definition of ‘terrorist activity’ and relaxed burden of proof.  5.5.3 Impractical as it duplicates similar but tempered processes already tested and accepted by judiciary.  5.5.4 Likely to lead to litigation.  19. The state has not identified in its explanatory memorandum exactly why highly invasive measures such as the proposed s24A and B are necessary to combat terrorism at a local level.  27. This is not to mention the fact that measures like the proposed s24B will likely prove **unenforceable**, given that most of the content on the internet is hosted and/or disseminated by massive supranational companies such as Meta, who act as secondary publishers, or alternatively not hosted on traceable servers at all – such as on the so-called ‘dark web’.    30. Measures such as s24B ostensibly violate all established principles of due process by disdaining the *audi alteram partem* doctrine and the right to be presumed innocent without any concomitant justification. Such a step is self-evidently capable of abuse, particularly in South Africa, and allows for disproportionate and discretionary utilization and enforcement. | 5.5.1 The requirements for a decryption direction are discussed in paragraphs 2.1 and 2.2 of the discussion document. It is submitted that these requirements provide sufficient safeguards against abuses.  5.5.2 The constitutional right to privacy is not meant to shield criminal activity or to conceal evidence of crime from criminal investigations. The powers of law enforcement to investigate crimes have been interpreted extensively in relation to the right to privacy and it is submitted that the Bill complies with these standards. The infringement on the right of privacy caused by the decryption of information is on par with the infringement caused by searches and seizures in terms of Chapter 2 of the Criminal Procedure Act, 1977 (Act 51 of 1977).  In ***INVESTIGATING DIRECTORATE: SERIOUS ECONOMIC OFFENCES AND OTHERS v HYUNDAI MOTOR DISTRIBUTORS (PTY) LTD AND OTHERS; IN RE HYUNDAI MOTOR DISTRIBUTORS (PTY) LTD AND OTHERS v SMIT NO AND OTHERS*** 2000 (2) SACR 349 (CC), the court remarked:  [53] It is a notorious fact that the rate of crime in South Africa is unacceptably high. There are frequent reports of violent crime and incessant disclosures of fraudulent activity. This has a seriously adverse effect not only on the security of citizens and the morale of the community but also on the country's economy. This ultimately affects the Government's ability to address the pressing social welfare problems in South Africa. The need to fight crime is thus an important objective in our society, and the setting up of special Investigating Directorates should be seen in that light. The Legislature has sought to prioritise the investigation of certain serious offences detrimentally affecting our communities and has set up a specialised structure, the Investigating Directorate, to deal with them. For purposes of conducting its investigatory functions, the Investigating Directorates have been granted the powers of search and seizure. The importance of these powers for the purposes of a preparatory investigation has been canvassed above.  [54] I now turn to weigh the extent of the limitation of the right against the purpose for which the legislation was enacted. There is no doubt that search and seizure provisions, in the context of a preparatory investigation, serve an important purpose in the fight against crime. That the State has a pressing interest which involves the security and freedom of the community as a whole is beyond question. It is an objective which is sufficiently important to justify the limitation of the right to privacy of an individual in certain circumstances. The right is not meant to shield criminal activity or to conceal evidence of crime from the criminal justice process (See California v Ciraolo 476 US 207 (1985) at 213-4, where Chief Justice Warren Burger held that a person who was using a garden to grow illicit drugs could not expect it not to be searched by the State. The following has been said in Colb 'Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence' (1996) 96 Columbia Law Review 1456, 1460: '[I]f a government official knows that an individual is using her privacy to commit crimes and to hide evidence of those crimes, the official is legally entitled to a warrant authorizing a search of the individual's premises. By committing a crime, the individual in effect creates the circumstances that may ultimately relieve the government of its obligation to respect her privacy). On the other hand, State officials are not entitled without good cause to invade the premises of persons for purposes of searching and seizing property; there would otherwise be little content left to the right to privacy. A balance must therefore be struck between the interests of the individual and that of the State, a task that lies at the heart of the inquiry into the limitation of rights.".  Also see among others ***MAGAJANE v CHAIRPERSON, NORTH WEST GAMBLING BOARD AND OTHERS*** 2006 (2) SACR 447 (CC);and ***MISTRY v INTERIM MEDICAL AND DENTAL COUNCIL OF SOUTH AFRICA AND OTHERS 1998 (4) SA 1127 (CC) at 1147D - 1148B*,** that deals with the appropriate safeguards before a search and seizure can take place.  It is submitted that the protected rights of freedom of expression and opinion are mainly limited in terms of section 24B, and not the right of privacy. See paragraph 2.2, above regarding the limitation of the right to privacy in respect of criminal conduct. Although the rights to freedom of expression are of the utmost importance in an open and democratic society, it is neither absolute nor does it rank higher than other protected rights and is therefore susceptible to limitation by a law of general application – see ***ECONOMIC FREEDOM FIGHTERS AND OTHERS V MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS*** (Case CCT 201/19).  5.5.3 A decryption direction in section 21 of the RICA applies only in respect of the interception of indirect communications and does not extend to encrypted information contained in "computer hardware or electronic storage instrument or equipment" that was obtained as contemplated in section 24A of the Bill. There is also no other law that deals with the encryption of information. Section 24A of the Bill aims to address this shortcoming by providing for the decryption of encrypted information that was lawfully obtained, other by means of the interception of communications, in terms of the exercise of a statutory power.  The only measure available on the Statute Book to achieve the objectives of section 24B of the Bill are those provided for in section 77 of the ECTA, which does not provide for adequate safeguards against infringements of the protected rights concerned. Section 24B is similar to the laws referred to in paragraph 3.4.2 of the discussion document and provide for adequate safeguards against the infringement of protected rights.  5.5.4 As indicated in paragraph 2.3(d) of the discussion document, section 21 of the RICA, if applied in the context of section 24A, will give rise to interpretational uncertainties. A decryption key holder, who contravenes or fails to comply with section 29(1), is in terms of see section 51(4) of the RICA, guilty of an offence. A person who is on reasonable grounds suspected to be involved in a terrorism offence who is in possession of a decryption key (or a password), will be under judicial compulsion to provide a decryption key or decryption assistance or face a period of imprisonment.  27. Section 24B relates to the removal of, or disabling access to a publication on an internet or social media site with unlawful terrorism-related content. The removal of a publication that is hosted by a foreign electronic communications service provider is in general problematic. However, most foreign electronic communications service providers do provide for the removal of harmful content in accordance with their legal systems and on the receipt of a warrant by a judicial officer. The second option is to impose obligations on local electronic communications service providers to disable access to a website that is hosted by a foreign electronic communications service provider.  To effectively enforce the order provided for in section 24B of the Bill, assistance by electronic communications service providers are required. A provision similar to section 21 of the Cybercrimes Act, need to be considered.  30. Section 24B provides for adequate safeguards against protected right infringements and abuse. |
| **21** | **26** | 5.6 Repeal of s26  **Parliamentary supervision**  5.6.1 Unjustifiable violation of separation of powers doctrine. S26A of Financial Intelligence Centre Act makes no provision for tabling of announcement/ designation in Parliament. | The submission of designations by the United Nations Security Council is, at most, for the information of Parliament, as Parliament cannot reject or amend resolutions of listings of the United Nations Security Council.  Moreover, the implementation of designations following the adoption of Resolutions by the United Nations Security Council under Chapter VII of the UN Charter, is an executive function.  The General Law (Anti-Money Laundering and Combating Terrorism) Amendment Bill, provides in effect that all notices that relate to the adoption of Resolutions of the UN Security Council and subsequent designations and delistings of entities under those Resolutions, will be issued by the Director of the FIC. |
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|  |  | **THE BANKING ASSOCIATION SOUTH AFRICA (“BASA”)** |  |
| **1** | **1(e)** | 1. Clarify if section 1(e) is limited to ‘independent’ service providers that operate such service as an only (sole) service – an independent Mobile Network Operator, or also applicable where this is provided as a service offering by another type of business, e.g., in collaboration with a primary 'electronic communications service provider’? 2. Clarify what is considered “who is deemed to be licensed”. Does this extend to a telecommunications service provided which comprises of a Mobile Virtual Network Operator (MVNO), which is characterised as a mobile virtual network operator that **does not operate under its own license** and does not have the infrastructure to provide mobile services to its customers. Instead, it leases wireless capacity from pre-existing Mobile Network Operator (MNO).   3. The clarity on this item will impact on comments below as this definition links to additional provisions of the Amendment Bill, to wit proposed section 3A that creates offences in relation to 'electronic communications service provider’. | 1. The definition applies to a person who provides an electronic communications service in terms of –  \* an individual licence (section 5(2) of ECA);  \* a class licence (section 5(4) of ECA);  \* a licence exemption (section 6 of ECA); and  \* section 15(2) or (3) of the ECA or in terms of any other law that deems such a person to be licenced to provide an electronic communications service. Section 3A(4), only applies to" publication on the internet and social media platforms". The definition of electronic communications service provider in the Cybercrimes Act excludes broadcasting services – see the definitions of "broadcasting" and "broadcasting service" in section 1 of the ECA.  The expression "deemed to be licensed” refers to an electronic communications service provider contemplated in section 15(2) or (3) of the ECA or a person who is deemed to be licenced in terms of any other law to provide an electronic communications service.  Whether the definition of electronic communications service provider extends to a so called "mobile virtual network operator" will be determined whether such a person is licenced, exempted to be licensed or deemed to be licensed as referred to in paragraph 1.1 *supra*.  Section 3A(3) and (4), must be interpreted in the context of section 78 of the ECTA which provides as follows:  **"No general obligation to monitor**  **78.** (1) When providing the services contemplated in this Chapter there is no general obligation on a service provider to—  *(a)*  monitor the data which it transmits or stores; or  *(b)* actively seek facts or circumstances indicating an unlawful activity.  (2) The Minister may, subject to section 14 of the Constitution, prescribe procedures for service providers to—  *(a)* inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service; and  *(b)* to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service."**.**  In general, criminal liability recognises four separate and distinct elements or requirements, namely: (i) an act (actus reus); (ii) which is unlawful (unlawfulness); (iii) causing the crime (causation); and (iv) committed with the necessary intent or culpa (mens rea). The basic principle in criminal matters is that the onus is on the State to prove all the elements. The mere fact that an act corresponds to the definitional elements of a crime does not mean that a person who performs the act is criminally liable.  Two other elements is further necessary, namely –  \* unlawfulness; and  \* culpability (also known as fault or mens rea).  Unlawfulness, in short means the absence of any ground of justification or defence which would justify the act that complies with the proscription. There is no *numerous clauses* of defences in the South African Criminal law. Although the Bill provides for certain defences in section 3A(5), other possible defences are not excluded.  Culpability is comprised of two elements, namely fault and criminal capacity. The fault requirement in terms of the Bill is intention in the form of *dolus directus*, *dolus indirectus* or *dolus eventualis*. Criminal capacity requires that at the time of the act, the perpetrator had the ability to appreciate the wrongfulness (in other words that he or she acts unlawfully) and to conduct him or her in accordance with this appreciation of the wrongfulness.  These elements do in many instances not form part of a statutory criminalising provision. Even if the Bill does not include these elements, courts will read the requirements in the proscriptions (see among other S v SELEBI 2012 (1) SACR 209 (SCA), paragraphs [8] and [9]). |
| **1** | **1(f)** | 1. BASA suggests that it must be clear that an “entity” that has subsequently been removed from a Resolution of the United Nations Security Council and from a notice announced by the Minister of finance under section 26A(1) of the Financial Intelligence Centre Act 38 of 2001 (the FIC Act), or from a notice given under section 26A(3) by the Director referred to in section 1 of the Financial Intelligence Centre Act will not be considered an “entity”. 2. Per paragraph 2.4 of the Memorandum on the Objects of POCDATARA Amendment Bill, all UNSC Resolutions, which include financial sanctions, must be published by the Minister of Finance in accordance with section 26A(1) of the FIC Act. BASA is in agreement with the above interpretation and requirements of section 26A(1). Therefore, the Minister does not have a discretion to publish or not publish. 3. Noting the above requirement, any UNSC Resolution, as amended (by the removal and/ or insertion of ‘entity’ (as defined) names, would also be required to be published in terms of section 26A(1). 4. In light of the above, it is unclear as to the purpose of section 26A(3)(a) – (b), as any such notice contemplated in these sections may only be done pursuant to a notice as gazetted under section 26A(1). The intention hereof would never be for the purposes of amending an initial UNSC Resolution only – as subsequent UNSC Resolutions would be issued amending (adding or removing) sanctions and / or ‘entities’ in or from the UNSC Resolution. 5. Furthermore, noting the concern expressed in the Memorandum, regarding the delay in publication of notifications of entities listed in the UNSC Resolution by the President in terms of POCDATARA, a similar concern is noted in relation to the publication by the Minister of Finance as contemplated in section 26A(1) of the FIC Act. Noting that ‘entities’/ accountable institutions should not be prejudiced by the delay in publication in instances where sanctions and/ or entities have been amended.   **BASA RECOMMENDATION:**  BASA suggests that the following wording be considered:    2) “entity”, with reference to sections 3, 4, and 14 (in so far as it relates to the aforementioned sections), 22, and 23 and 25, means a natural person, or a group of two or more natural persons (whether acting in the furtherance of a common purpose or conspiracy or not), or a syndicate, gang, agency, trust, partnership, fund or other unincorporated association or  organisation, or any incorporated association or organisation or other legal person, and includes, where appropriate, a cell,  unit, section, sub-group or branch thereof or any combination thereof, and also any entity referred to in a Resolution of the United Nations Security Council and announced in a notice by the Minister of Finance under section 26A(1) of the Financial Intelligence Centre Act, **[and]** or in a notice given under section 26A(3) by the Director referred to in section 1 of the Financial Intelligence Centre Act.  3) Alternatively, BSA suggests that the deletion of the words:  “in a notice given under section 26A(3) by the Director referred to in section 1 of the Financial Intelligence Centre Act.” | The question whether an entity falls within the definition or not, is a factual one. However, the application of the provisions of the FIC Act relating to targeted financial sanctions to an entity, is determined by details of the notices that the Director issues from time to time under the relevant provisions. This includes a notice by the Director that a designation by the UN Security Council no longer applies to an entity, in other words a de-listing of an entity by the UN Security Council.  Insertions or removals of entities (i.e. designations or delistings) by the UN Security Council are not considered to be new Resolutions or amendments of existing Resolutions. These are done by the UN Security Council pursuant to the provisions of a Resolutions during the lifetime of that Resolution. Therefore, designations and delistings under an existing Resolution do not require the issuing of a notice of the adoption of a new Resolution.  Section 26A(3)(a) and (b) of the FIC Act provide a mechanism for the implementation of designations and delistings under a Resolution of the UN Security Council.  This concern is addressed in proposed amendments to the FIC Act that are contained in clause 25 of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill, (B18-2022).  It has been noted that there is a conflict between the General Laws (Anti-Money-Laundering and Combating Financing Terrorism) Amendment Bill, 2022 and the proposals in the POCDATARA Amendment Bill, 2022, in that in the General Laws Amendment Bill, it is provided that all UN Security Council Resolutions must be published in a notice by the Director of the FIC. That will include the listing as well as the delisting of an entity. In the Schedule to the POCDATARA Amendment Bill section 26(2) is proposed to be repealed. That subsection provides that: ”(2) This section does not apply to resolutions of the Security Council of the United Nations contemplated in section 25 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004).”.  The proposed position between the two Bills is that all notices relating to the implementation of UN Security Council Resolutions will be published by the Director of the FIC. This includes notices relating to the adoption or withdrawal of Resolutions by the UN Security Councill and notices relating to the listing and delisting of entities during the lifetime of UN Security Council Resolutions.  It is therefore proposed that the highlighted words in the COMMENTS Column should read as follows:  **“and also any entity referred to in a Resolution of the United Nations Security Council and announced in a notice ~~by the Minister of Finance under section 26A(1) of the Financial Intelligence Centre Act, [and] or in a notice given under~~ referred to in section 26A(3) ~~by the Director referred to in section 1~~ of the Financial Intelligence Centre Act.**  Clause 29 of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill contains an amendment to section 28A of the FIC Act to align the legislation. |
| **1** | **1(n)** | 1. The definition of ‘property’ in the form prior to its proposed amendments, is already all-encompassing definition and would include any digital representation of perceived value, which would include i.e. crypto assets, fiat currency and securities.  2) The term ‘money’ in its broadest sense would include any tangible or intangible thing that functions as a means of exchange or debt settlement, a measure of value, a unit of account or as a store of value, and accordingly would include –  a) Cash or currency, being physical coins and notes, as contemplated in the SARB Act of 1989.  b) A credit against an account held at a banks and which is convertible to cash or currency by the bank on demand.  c) Electronic money or e-money, as contemplated in the SARB’s position paper on electronic money, which is defined as *"Monetary value represented by a claim on the issuer. This money is stored electronically and issued on receipt of funds, is generally accepted as a means of payment by persons other than the issuer and is redeemable for physical cash or a deposit into a bank account on demand."*   1. d) Virtual or digital currency (e.g., Ripple). In the SARB’s position paper on Virtual Currencies, it is defined as *"a digital representation of value that can be digitally traded and functions as a medium of exchange, a unit of account and/or a store of value, but does not have legal tender status."* 2. 3. If there is concern as to whether virtual or digital currency constitutes ‘money’, and hence the proposed inclusion of the following in the definition of property, which defines ‘digital representation of perceived value’, as being *‘that can be traded or transferred electronically within a community of users of the internet who consider it as a medium of exchange, unit of account, or store of value and use it for payment or investment purposes, but does not include a digital representation of a fiat currency or a security as defined in the Financial Markets Act, 2012 (Act No. 19 of 2012);"*   4) The above wording mirrors the proposed definition of ‘crypto assets’ contemplated in the prior and now more recent proposed amendments to schedule 1 to the FIC Act. In this regard, a definition of a crypto asset has been contemplated in a number of regulatory requirements / frameworks, namely –  i. IFWG Consultation Paper:  o “Crypto assets are digital representations or tokens that are accessed, verified, transacted, and traded electronically by a community of users. Crypto assets are issued electronically by decentralised entities and have no legal tender status, and consequently are not considered as electronic money either. It therefore does not have statutory compensation arrangements. Crypto assets have the ability to be used for payments (exchange of such value) and for investment purposes by crypto asset users. Crypto assets have the ability to function as a medium of exchange, and/or unit of account and/or store of value within a community of crypto asset users.”  ii. IFWG Position Paper which was published for comment  o ‘A crypto asset is a digital representation of value that is not issued by a central bank, but is traded, transferred and stored electronically by natural and legal persons for the purpose of payment, investment and other forms of utility, and applies cryptography techniques in the underlying technology’.  iv. Declaration of crypto assets as a financial product, under the Financial Advisory and Intermediary Services Act.  o “crypto assets” means any digital representation of value that can be digitally traded, or transferred, and can be used for payment or investment purposes, but excluding digital representations of fiat currencies or securities that already fall within the definition of financial product.  v. Prior version of the proposed amendments to the POCDATARA Bill.  o ‘virtual asset' means the digital representation of value that can be digitally traded, transferred or used for payment.  o Noting that the revised definition as contained in the current proposed amendments to POCDATARA, consideration has been given to the updated guidance issued by FATF in October / November 2021, with the term ‘virtual asset’ being defined as ‘a digital representation of value that can be digitally traded, or transferred, and can be used for payment or investment purposes. Virtual assets do not include digital representations of fiat currencies, securities and other financial assets that are already covered elsewhere in the FATF Recommendations.’  vi. Amendments to regulation 28 of the Pension Funds Act, which defines crypto asset “‘crypto-asset’ means a digital representation of value that is not issued by a central bank, but is capable of being traded, transferred or stored electronically by natural and legal persons for the purpose of payment, investment and other forms of utility; applies cryptographic techniques and uses distributed ledger technology.  o While the definition of section 28 of the Pension fund Act aligns with the definition as contained in the IFWG’s position paper 2020 that was issued for commentary and subsequently confirmed in the final IFWG position paper published in June 2021 it is important for South African Regulators to agree on a definition of ‘crypto asset’  5) We urge that Regulators should achieve consistency in the definitions across the board, since different definitions are being applied and there is a concern that differing definitions could bring about disparity in interpretation and treatment.  **BASA RECOMMENDATION:**  1. Noting the commentary, we propose the following: –  a) The definition of property remains unamended and hence propose the deletion of the words set out below:  *'property' means money or any other movable, immovable, corporeal or incorporeal thing, and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof, ~~or any digital representation of perceived value, such as a crypto-currency, that can be traded or transferred electronically within a community of users of the internet who consider it as a medium of exchange, unit of account, or store of value and use it for payment or investment purposes, but does not include a digital representation of a fiat currency or a security as defined in the Financial Markets Act, 2012 (Act No. 19 of 2012);";~~*   1. b) As an alternative if not in support of the above, cross reference the definition of crypto-asset as proposed in Schedule 1 to the FIC Act (which is currently under review). 2. 4) In relation to the definition of crypto asset (mentioned above), noting that within the next 12 – 18 months a crypto asset is contemplated as being declared a financial product, consideration to be given to deleting the following wording from the said definition ‘or a security as defined in the Financial Markets Act’ to refer to a financial product under FAIS? (Excluding crypto assets now, anticipating its declaration as a financial asset. | The response to Afriforum’s comment on this matter, as indicated above, also applies in this instance.  The addition of the reference to “crypto-currency” is aimed at providing legal certainty that these assets are included in the concept of “property” for purposes of the principal Act. This is because a virtual asset is neither money, movable or immovable property or a corporeal thing. Furthermore it is debatable whether a virtual asset would fall within the ordinary dictionary description of an incorporeal thing or a right, privilege, claim or security relating to money or property.  Noted.  It is proposed that the definition of “property” be replaced with the following definition:  “property” means any-   1. money **[or any other]**; 2. movable property**[,]**; 3. Immovable property**[,]**; 4. corporeal thing **[or]**; 5. incorporeal thing, **or** 6. crypto asset   and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof.**[,or any digital representation of perceived value, such as a crypto-currency, that can be traded or transferred electronically within a community of users of the internet who consider it as a medium of exchange, unit of account, or store of value and use it for payment or investment purposes, but does not include a digital representation of a fiat currency or a security as defined in the Financial Markets Act, 2012 (Act No. 19 of 2012)]**"    It is proposed that a definition of “crypto asset” be inserted in the Bill that is consistent with the definition used in the amended Schedule 1 of the FIC Act, which is currently under consideration by Parliament:  “crypto asset” means a digital representation of perceived value that can be traded or transferred electronically within a community of users of the internet who consider it as a medium of exchange, unit of account or store of value and use it for payment or investment purposes, but does not include a digital representation of a fiat currency or a security as defined in the Financial Markets Act, 2012 (Act 19 of 2012). |
| **3** | **3A(2)&(4)** | 1. Section 3A(2)(d) is very 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 – this is too wide a provision, especially in view of sub-section (4). 2. Given the nature of the services of accountable institution/s (see above), this could be directly applicable to them and impact business operations as it would potentially require content screening. This could have massive impact; may require additional due diligence/screening; changes to processes, etc.   **BASA RECOMMENDATIONS:**  1) It is proposed that the content of the proposed section 3A(2)(d) which states *‘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*, be deleted.  2) In the absence of its deletion, we propose the following amendment –  *(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.*  3) In the event that section 3A(2)(d) is not deleted, it is recommended that a new provision be drafted or amendment be made to draft section 3A(5) to allow the defence contemplated in section 3A(5)(a) to apply in relation to section 3A(2)(d) as well. | This proposal is noted.  The comments are accepted, but there is no necessity to amend the defence clause 3A(5), as the defences applicable in the clause finds application to the entire section 3A, and therefore includes s3A(2)(d). |
| **4** | **4(d)** | BASA requests to refer to comments above under section **1(f)**. | See the Department’s views on paragraph 1(f). |
| **4** | **4(g)** | BASA requests to refer to comments above under section **1(f)**. | See the Department’s views on paragraph 1(f). |
| **12** | **12(9)** | 1. Whilst there is no hierarchy in legislation, section 12(9) by creating the obligation to comply with this section, notwithstanding an obligation imposed by legislation creates a hierarchy without substantiation, therefore.  2) In relation to reference to “reporting institutions”, note that once the amendments to Schedule 1 to the FIC Act are effective, the reference to “reporting institution” may/ will be no longer applicable.  **BASA RECOMMENDATION:**  It is proposed that section 12(9) be reworded as follows:  “For the purposes of this Act, no duty of secrecy or confidentiality or any other restriction on the disclosure of information, may affect the duty of compliance with this section by an accountable institution, supervisory body or reporting institution as defined in section 1 of the Financial Intelligence Centre Act, or any other person.” | The Department disagrees that the addition of section 12(9) creates a hierarchy of reporting obligations.  Schedule 3 to the FIC Act will continue to provide for “reporting institutions”.  The proposal of BASA means that the words “whether imposed by legislation or arising from the common law or agreement” must be deleted from section 12(9). The proposed section 12(9), is, however, derived from a similar provision in the Financial Intelligence Centre Act, 2001, namely section 37(1) which provides 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…”. There is no reason why the reporting duty and the exclusion of privilege in the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004, should differ from that in the Financial Intelligence Centre Act, 2001. Clause 29 of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill contains a similar amendment to section 28A of the FIC Act. |
| **18** | **23(2)(b)** | BASA requests to refer to comments above under section **1(f)**. | See the Department’s views on paragraph 1(f). |
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|  |  | **SUSSEX TERRORISM AND EXTREMISM NETWORK** |  |
| **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 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.  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. | As explained on page 1 of the Bill, words in square brackets and in bold are proposed to be deleted from the Act. The following is proposed amongst others in the Bill in respect of the definition of “terrorist activity”:  **“[and**  **(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;]’’;**  The whole paragraph (c) (the motive requirement is in bold and square brackets and therefore are proposed to be deleted. The proposal in the Bill is therefore exactly what is proposed by STERN and STERN in fact therefore is in support of the proposed deletion of the motive requirement in the definition of “terrorist activity”. |
| **2** | **3(4)** | 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 criminalised as well as the preparation of a non-specific terrorism-related offence. Regarding training, the Australian Criminal Code Act 19955 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. | These comments are supported.  It is proposed that text on page 8 of the POCDATARA Amendment Bill, in line 9, be substituted for the following:  ‘‘(3) For the purposes of this section, training includes, but is not limited to, training in any of the following skills**, whether online or in any other manner:”.**  AND  On page 8 of the POCDATARA Amendment Bill, in line 23, to substitute the relevant text for the following:  **“(4) A person commits an offence if he or she provides** or 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** | **3A** | 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, is welcomed. 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 20176. 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. 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. | The concern raised by STERN during the public consultation process was addressed by the insertion of the following in the Bill, page 9, line 15:  “(5) A person charged with committing an offence under this section and  section 3(2)(e) may raise as a defence—  (a) the fact that at the time of the person’s action or possession, the person did not know, and had no reason to believe, that the document or record in question contained, or was likely to contain, information of a kind likely to be useful to a person preparing to engage in a terrorist activity; or  (b) the person’s action or possession was for the purposes of—  (i) carrying out work as a journalist; or  (ii) academic research.’’. |
| **14** | **15** | Amendments to clarify the law’s jurisdiction, are welcomed. 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. | These proposals regarding jurisdiction in the Bill, is supported by STERN. |
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|  |  | **INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC)** |  |
| **1** | **1(4)** | 1. The deletion of section 1(4) of the principal Act, must be reconsidered. This section has a fundamental purpose of separating the regulation of conduct that occurs in peace time from the conduct that occurs in an armed conflict. This separation is legally and practically important as it buttresses the fact that conduct that takes place within the context of an armed conflict is regulated by international humanitarian law. It is important to note that section 1(4) requires the existence of an armed conflict for its application can be triggered. Its deletion could potentially criminalize conducts that are otherwise lawful under international humanitarian law, contrary to South Africa’s international obligations. Many States across the world have clauses similar to section 1(4) in their counterterrorism legislation. A similar clause is also found in many counterterrorism conventions to which South Africa is a party. | The repeal of section 1(4) of the Act, must be understood within the context of International Law and the implementation thereof in South Africa. In respect of the two additional Protocols to the Geneva Conventions, South Africa’s position is as follows:  "Protocol I": the Protocol Additional to the Geneva Conventions of 12  August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted at Geneva on 10 June 1977, was signed by the Republic on 8 June 1977 and ratified by the Republic on 21 November 1995;  "Protocol II" means the Protocol Additional to the Geneva Conventions of 12  August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, adopted at Geneva on 8 June 1977, was signed by the Republic on 8 June 1977 and ratified by the Republic on 21 November 1995.  The Geneva Conventions and these two additional Protocols were incorporated in South African law by means of the Implementation of the Geneva Conventions Act, 2012 (Act No. 8 of 2012).  The two additional Protocols apply amongst others, to armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.  The Protocols make certain important principles in the Geneva Conventions applicable also to armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United non-international armed conflicts. The Protocols lay down the obligations of both State Parties and other combatants which may include guerilla groups which want to benefit from the protection of the Protocols.  The Implementation of the Geneva Conventions Act, 2012 (Act No. 8 of 2012) was adopted quite some time after the adoption of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004.  South Africa is a member of the Financial Action Task Force (FATF) as well as the Eastern and Southern African Anti-Money Laundering group (ESAAMLG). The FATF and ESAAMLG conducted a Mutual Evaluation of South Africa’s measures against money laundering and terrorist financing, and published the final report in this regard in October 2021.  On page 165 of the Mutual Evaluation Report under Recommendation 5, the following is stated:  “Criterion 5.1 – The Protection of Constitutional Democracy Against Terrorist and Related Activities Act No. 33 of 2004 (POCDATARA) came into effect on 20 May 2005 and it contains several offenses related to TF (s.4).  Generally, the criminalization of TF in South Africa is broadly consistent with most of the TF Convention. The  POCDATARA, however, 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. Article 6 of the TF Convention states that ‘Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic  legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature’.”  Protocol I also prohibits ‘acts or threats of violence  the primary purpose of which is to spread terror among the civilian population’ thus ‘prohibits acts of terror in both international and non-international armed conflict,  irrespective of whether they are committed by State or non-State parties’. |
|  | **3(2)** | The CRC appeals to Parliament to consider including a **new clause** in the law to provide for exemption of impartial humanitarian assistance from criminal sanctions. As currently worded, section 3 (2)(c) of the principal Act 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 Force regulations. | The ICRC is a reputable provider of humanitarian assistance and its role is recognized in international instruments, which have been incorporated in South African law, eg the Conventions and Protocols referred to and legislation incorporating them as indicated above in respect of section 1(4). Protocol I applies to include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. The ICRC may offer its services in an armed conflict, or during a legitimate liberation struggle, or during an international or non-international armed conflict. Protocol II above is not applicable to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts. The struggles for liberation and against alien occupation is in particular the topic of Protocol I. Protocol 1 in Article 16.1 provides: 1. Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting there from. Should the ICRC and “other humanitarian organisations” be excluded through the POCDATARA Act regarding the provision of humanitarian assistance, it affects consideration of the particular circumstances when the ICRC offers its assistance. In this regard Protocol I provides the mechanism for protection of themselves in respect of humanitarian assistance in any of the conflicts to which Protocol I applies. One such factor would be whether the liberation movement would also comply to the principles in Protocol I. Article 18(2) of Additional Protocol II requires that “relief actions for the civilian population which are on an exclusively humanitarian and impartial nature and which are conducted without adverse distinction” be undertaken, subject to the consent of the High Contracting Party concerned, in case “the civilian population is suffering from undue hardship owing to a lack of the supplies essential for its survival such as foodstuffs and medical supplies”. Additional Protocol II thus only explicitly requires the consent of the State when it comes to relief actions. However, in practice, humanitarian organizations  will need the agreement or acquiescence of the non-State actors Party to the conflict as well, to ensure that activities can be carried out in a safe manner.  By providing a standing exclusion for humanitarian organisations would negate this “consent” requirement.  The ICRC is a reputable humanitarian organization and internationally recognized. There had, however, been instances where humanitarian aid associations inadvertently aided terrorism as well as cases where such aid was provided knowingly.  Arguments against sectoral humanitarian exemptions from counter-terrorism laws have been articulated along the following lines:  See HUMANITARIAN EXEMPTIONS FROM COUNTER-TERRORISM MEASURES:  A BRIEF INTRODUCTION Page 141  Dustin A. Lewis  Harvard Law School  In Terrorism, Counter-Terrorism and International  Humanitarian Law  Proceedings of the Bruges Colloquium  20-21 October 2016  • some governments and experts are concerned that sectoral humanitarian exemptions could be abused by unscrupulous players to support acts of terrorism;  • calls for such exemptions might be inferred to imply that, where applicable, existing protections for principled humanitarian action in International Humanitarian Law, in domestic law or in UN privileges and immunities, are insufficient;   * if limited to counter-   terrorism measures, sectoral humanitarian exemptions may not be broadly effective, considering other restrictive measures, (such as those laid down as part of anti-bribery, anti-corruption, or anti-money laundering framework); and  • calls for exemptions raise the possibility of creating a perception that humanitarian  organisations endorse counter-terrorism approaches, which, in turn, might implicate those players’ (perceived) neutrality and independence.  Lewis concludes on page 150:  If the analysis above is correct, then much seems to be at stake in the debate concerning sectoral humanitarian exemptions from counter-terrorism measures. Against that broader backdrop, several trends and trajectories – and the intersections between them – might merit close monitoring.  For instance, more domestic counter-terrorism legal cases might adjudicate, if indirectly, what  constitutes ‘legitimate’ humanitarian action, including in relation to armed conflicts involving  designated terrorists conducted outside – sometimes, far outside – the State where the legal  proceedings are instituted. There may be more demand for, and scrutiny of, principled humanitarian action, perhaps especially in areas where designated terrorists control access to civilian populations in need. Cash programming in humanitarian response seems likely to increase, despite ‘fungibility’ concerns from a counter-terrorism perspective. New and expanded due  diligence and other anti-diversion (or pro-beneficiary) measures seem likely to be imposed  – whether internally, externally, or both – on humanitarian organisations. More broadly, the web of overlapping, converging, and diverging legal obligations, other requirements and policies incumbent on principled humanitarian stakeholders seems likely to become even more intricate. Finally, if sectoral humanitarian exemptions are pursued further, there might be new, or renewed, attempts to certify humanitarian players in order to establish what does and does not constitute ‘legitimate’ humanitarian action.  Surely, the National Prosecuting Authority, which must give written approval before any person may be prosecuted in South Africa in respect of a terrorist offence in South Africa would be cognizant of the role and position of the ICRC in providing legitimate humanitarian assistance. |