

**ICRC submission on the Protection of Constitutional Democracy Against Terrorist and Related Activities
Amendment Bill in connection with responses received from the Parliamentary Portfolio Committee on
Police on 21 September 2022**

IHL Saving clause

- According to the response by the Honourable Members of the Portfolio Committee on Police, there is 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:
 - While the Government of South Africa must comply with its obligations under International Humanitarian Law (“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.
 - Indeed, 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:
 - Article 2.1.a addresses the financing of “an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex”. This Annex includes for instance the 1997 UN Bombings Convention which contains an IHL savings clause excluding from the scope of the instrument certain actions undertaken in armed conflict (article 19 §2).
 - Article 2.1.b of the 1999 Convention also establishes as an offence acts “intended to cause death or serious bodily injury to a civilian, or to *any other person not taking an active part in the hostilities in a situation of armed conflict*”. The phrase italicized indicates that the offence would not be applicable to the financing of acts directed towards armed forces and or fighters who inherently do participate in hostilities.
 - 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’. For instance, current s1(4) of POCDTARA as amended by the ICRC’s suggestion would still allow South Africa to prosecute actions consisting 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.
- According to the response by the Honourable Members of the Portfolio Committee on Police, there is also a suggestion that a proper interpretation of general principles of South African common law

would assume that humanitarian organisations are not committing terrorist-related offences, unless the State can prove otherwise.

- As the POCDTARA Amendment Bill currently stands, the State would be able to prove that an offence was committed even where the conduct in question was exclusively humanitarian in nature, and this is due to the broad definition of offences in the Bill. See more on humanitarian exemptions below.

Humanitarian exemption clause

- According to the response by the Honourable Members of the Portfolio Committee on Police, there is concern that an open-ended reference to humanitarian organisations would open the door to terrorist entities impersonating such organisations.
 - While such a response is understandable, it must be noted that an exemption clause does not seek an exemption from all common law offences, only offences contained in the Amendment Bill such as support to terrorist organisations.
 - In addition, a humanitarian exemption clause does not need to be viewed as a blank cheque – it can be formulated in such a way so as to limit exempt organisations to those qualifying as exclusively humanitarian under IHL. It can therefore have a narrow scope of application. It would be the task of the Judiciary and the Prosecutor to decide on a case-to-case basis which organisations qualify as “humanitarian organisations carrying out exclusively humanitarian activities in accordance with IHL”. In this regard, prosecutors maintain the upper hand in determining who would and who would not benefit from the humanitarian exemption clause. For example, an entity channeling money or transferring weapons to armed groups under the guise of humanitarian operations would not qualify as impartial humanitarian organization and would not benefit from the exemption. Similarly, an entity delivering humanitarian assistance only to some parts of the population based on their affiliation or religion rather than on their humanitarian needs would also not qualify for the exemption under POCDATARA. On the contrary, without the humanitarian exemption clause in place, prosecutors could end up prosecuting impartial organizations that, with State consent as foreseen by IHL, carry out exclusively humanitarian work.
 - The ICRC also underlines that the humanitarian exemption clause would not only apply in relation to the financing terrorism offence but also to other counter-terrorism crimes, notably the support to terrorism offence which is currently broad enough to cover humanitarian activities foreseen, authorized and protected under IHL.
- According to the response by the Honourable Members of the Portfolio Committee on Police, there is also concern that the ICRC already has sufficient immunities recognized under South African law.
 - While the ICRC’s Headquarter’s Agreement with the Government of South Africa does exempt the ICRC from having to testify in criminal proceedings of tribunals and domestic courts, it does not directly address the issue of immunity from terrorist-related offences.
 - In addition, the humanitarian exemption proposed by the ICRC would not only benefit the ICRC but also other humanitarian actors qualifying as impartial humanitarian organizations under IHL.