

STERN Submission to the Select Committee on Security and Justice 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 is based on work by Dr Albertus Schoeman and Dr Matthew Garrod.

Dr Albertus Schoeman has worked on projects with organizations including the Brookings Institute, INTERPOL, UNODC and the World Bank. His research focuses on the democratic governance, human security 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 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.

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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 during the height of the conflict.

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 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 in the conviction of the "Thulsie Twins", two brothers allegedly radicalised online who

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

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/>

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. Prohibition of publication with unlawful terrorism related content

3.1. A major concern around the expansion of terrorism-related law often lies with concerns that this will lead to restrictions on freedom of expression. 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. At the same time, international trends show organised terrorist groups using information and communications technologies such as the Internet as a means to spread their message and radicalise followers.

3.2. The Internet and social media have become an area of particular concern in terms of radicalisation. Those harbouring extremist views are easily able to seek out extremist groups or extremist material. In this online context, individuals are socialised into extremist thinking through a process of 'grooming' that shapes the thinking of the target, ultimately seeking to direct their behaviour. In this way, extremist beliefs are reinforced and deepened through accessing online material aimed at radicalising individuals to support and commit acts of violent extremism. See [Schoeman 2017](#).³

3.3. This is illustrated in the case of the recently sentenced Thulsie twins. In this case, it is alleged that the pair were radicalised through their online interactions with extremists who groomed the young men into supporting violent extremist beliefs and encouraged the pair to carry out violent acts in South Africa. In this case, material

³ 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>

promoting terrorist acts and ideology was found in their possession and likely contributed to their radicalisation. Similarly, in 2016 a pair of teenage girls were intercepted on their way to join Islamic State in Syria who were similarly groomed online to support the terrorist group. The distribution of this type of online material aimed at radicalising and promoting terrorist activity poses a serious threat to South Africa's safety as illustrated by these cases.

3.4. In the original amendment Bill, a clause was proposed dealing with the "Prohibition of publication with unlawful terrorism related content" which created an offence related to the publishing, distribution, or circulation of content "intended to directly or indirectly encourage or otherwise induce the commission, preparation or instigation of any offence under this Act". This clause was removed from the Bill in the Portfolio Committee's deliberations, which we believe is a mistake and will undermine South African's security.

3.5. The removal of this important clause likely stems from concerns that this will overly prohibit freedom of expression and lead to abuses by the state. However, public comments making these claims fail to understand the boundaries and specificity of the law when it comes to the proposed criminalisation of terrorist content. The Constitution is clear in the limits of free speech and Article 16 of the South African Constitution on Freedom of expression states:

1. Everyone has the right to freedom of expression, which includes
 - a. freedom of the press and other media;
 - b. freedom to receive or impart information or ideas;
 - c. freedom of artistic creativity; and
 - d. academic freedom and freedom of scientific research.
2. The right in subsection (1) does not extend to
 - a. propaganda for war;
 - b. incitement of imminent violence; or
 - c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

3.6. As can be seen here, the Constitution clearly states that propaganda for war and the incitement of violence do not qualify as protected speech. Considering the security threat that this type of material poses to the country and South Africans, the incitement of violence and terrorist-related acts should rightfully be criminalised. Many countries have criminalised these acts for this reason.

3.7. Further, the legislation places clear and appropriate limits on the use of these powers by limiting it to the promotion of offences criminalised under the Act and tying it to the extensively defined definition of terrorist activity. Most importantly, the current definition of terrorist activity includes the following caveat:

(3) For the purposes of paragraph (o)(vi) and (vii) of the definition of "**terrorist activity**", any act which is committed in pursuance of any advocacy, protest, dissent or industrial action and which does not intend the harm contemplated in paragraph (o)(i) to (v) of that definition, shall not be regarded as a terrorist activity within the meaning of that definition.

3.8. This means that the definition is limited to the perpetration of terrorist acts criminalised under international law (the Convention Offences) and the proposed clause prohibiting the publication of terrorism content takes this into account. This places an appropriate limit on the application of the law and will prevent abuses of the legislation to suppress legitimate free speech and dissent. Any speech which does not advocate for or incite Convention offences will consequently not fall within the remit of this legislation. Concerns that the inclusion of this clause will restrict civil society groups and legitimate free speech fail to understand the boundaries of this legislation and the built-in restrictions to protect legitimate dissent.

3.9. The Select Committee is asked that this clause prohibiting the publication of unlawful terrorist content should be returned to the Bill. This is an important tool for deterring the publication of such material which has been used to radicalise young South Africans to violent extremist causes and incite them to commit terrorist acts in South Africa. An intervention at this point will disrupt the chain leading from the radicalisation of an individual to the perpetration of terrorist acts. This is an important intervention which has the potential to prevent the loss of life and keep ordinary South Africans safe.

4. Conclusion

We welcome the opportunity to comment on the Bill and are grateful for the work of the Committee. Many of the proposed amendments are long due. We therefore welcome the amendments and their intention to address contemporary terrorism challenges such as foreign terrorist fighters and the distribution of online terrorism-related content. We are supportive of proposed amendments and humbly request that the proposed clause prohibiting the publication of unlawful terrorist content be returned to the Bill as this is an important tool for preventing the radicalisation of South Africans.

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.

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