**Report of the Select Committee on Security and Justice on the Protection of Constitutional Democracy Against Terrorist and Related Activities Amendment Bill [B15 B – 2022] (National Assembly – section 75), dated 12 December 2022.**

The Select Committee on Security and Justice, having deliberated on and considered the subject of the Protection of Constitutional Democracy Against Terrorist and Related Activities Amendment Bill [B15 B – 2022] (National Assembly – section 75), referred to the Select Committee on Security and Justice on 29 November 2022, classified by the JTM as a section 75 Bill, reports that it has agreed to the Bill without proposed amendments.

**Background**

The Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Bill, 2022 (“the Bill”), was introduced in Parliament on 19 July 2022, as a bill to be considered in terms of section 75 of the Constitution, 1996 (i.e. a bill not affecting provinces). On 18 November 2022, the Portfolio Committee on Police reported the Bill with amendments [B15 B-2022]. The Report and the Bill was considered by the National Assembly on 29 November 2022. The Bill is now before the Select Committee on Security and Justice for consideration.

**In summary, the Bill aims to:**

(a) bring the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004, in line with developments in international law,

(b) give effect to certain Constitutional Court judgments and

(c) address certain challenges in conducting investigations and prosecutions.

The Bill also inserts provisions applicable to foreign terrorist fighters in the principal Act as required by the United Nations Counter-Terrorism Executive Directorate (UNCTED), to provide for

(a) more severe sentences for those convicted of financing of terrorism,

(b) freezing orders in relation to property and

(c) the extension of the Extradition Act 67 of 1962.

The Bill also seeks to clarify the public international law obligation to extradite or prosecute persons (non-residents or stateless persons) who commit serious international crimes (in respect of terrorism-related offences) where no other state has requested such extradition.

During a compliance visit by the United Nations Counter-Terrorism Executive Directorate (UNCTED) to South Africa in 2018, the need to make provision in respect of Foreign Terrorist Fighters in the principal Act was expressed by the UNCTED, including the disparity between the sentencing regime in terms of which a more severe penalty may be imposed in respect of money laundering as opposed to terrorist financing, and the lack of any reference to administrative sanctions for violating asset-freezing orders.

In addition to the UNCTED, the Bill addresses the findings made by the 2019 mutual evaluation conducted by the Financial Action Task Force (FATF) of its Anti-Money Laundering and Combating of the Financing of Terrorism (AML/CFT) system. South Africa rated poorly in the Mutual Evaluation Report (MER) published in October 2021. To address the technical compliance deficiencies, the Protection of Constitutional Democracy Against Terrorist and Related Activities Amendment Bill and the General Laws (Anti-Money Laundering and Combatting Terrorism Financing) Amendment Bill, 2022 (B18-2022) were submitted to Parliament for processing.

The POCDATARA Bill addresses two deficiencies and is a fundamental component to avoid being grey listed and it is critical to address technical compliance deficiencies (updating of legislation) and effectiveness of systems to address the risk of money-laundering. The deficiencies relate largely to Terrorist Financing (TF), sanctions related to terrorism and TF, freezing orders and the publication of notices by the UN Security Council.

**Summary of public participation process to date:**

On 28 November 2022, The Minister of Police addressed a letter to the Committee requesting that this Bill be dealt with as expeditiously as possible and for the NCOP to pass the Bill this year to prevent South Africa from being grey listed by the global anti-money laundering body, the Financial Action Task Force (FATF). The first briefing to the Committee by the Deputy Minister of Police was held on 30 November 2022.

The Committee advertised the call for written submissions, and requests for an oral hearing, from 30 November 2022 to Tuesday, 6 December 2022 on Parliament’s media platforms. The Parliamentary Monitoring Group posted the advert on their website as well.

To ensure that a reasonable opportunity was afforded to stakeholders, in addition to advertising the Bill for comment, the Committee requested the following participants, that made submissions during the NA process, to comment on the B-version of the POCDATARA Bill:

1. AfriForum – Did not provide a submission.

2. Banking Association of South Africa – BASA indicated they would not be submitting comment on the B-version of the Bill.

3. Freedom of Religion in South Africa (FOR-SA) - Submitted a written submission and requested a verbal presentation.

3. Dear SA – Submitted a written submission and requested a verbal presentation.

4. International Committee of the Red Cross (ICRC) – Submitted a written submission.

5. The Sussex Terrorism and Extremism Research Network (STERN) – Submitted a written submission and requested a verbal presentation.

The Committee received six written submissions from the public:

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

To further facilitate meaningful public participation, the Committee hosted public hearings on 7 and 8 December 2022. On 7 December, FORSA, the Cape Independence Party and STERN made presentations to the Committee. On 8 December 2022, Dear SA tendered an apology and requested that the Committee considers its written submission in the course of deliberations. On 8 December 2022, the Committee received the Department’s responses to the written submissions received from the ICRC, a member of the public and Dear SA and received an in depth briefing on the Bill itself from the Institute for Security Studies on 7 December 2022.

Please find the summary of the submissions attached as **Annexure A**.

**Committee consideration of the Protection of Constitutional Democracy Against Terrorist and Related Activities Amendment Bill [B15 B – 2022] (National Assembly – section 75).**

The Select Committee on Security and Justice received a briefing by the Ministry of Police on the Bill on 30 November 2022.

The Committee held a public hearing on Wednesday, 7 December 2022, with FORSA, the Cape Independence Party, and Dr A Schoeman from STERN. On Thursday 8 December 2022 the Civilian Secretariat for Police Service (the Department) responded to the written submissions received. DearSA submitted an apology as they were not able to verbally present on 8 December 2022. DearSA submitted a written submission to which the Department responded.

The Committee held deliberations on Friday, 9 December 2022. The Committee considered the Bill and the Committee Report on 12 December 2022.

**Consensus on the Bill**

No amendments were proposed for consideration.

The Chairperson put the Bill for consideration: The Bill, as tabled, was supported by the majority of members.

Objections: The Democratic Alliance objected to the Bill.

The Chairperson presented the Committee Report on Public Participation for adoption.

The report was supported by the majority of members.

Objections: The Democratic Alliance objected.

The Chairperson presented the Committee Report on the Bill for adoption. The report was supported by the majority of members.

Objections: The Democratic Alliance objected.

**Minority view**

The Democratic Alliance objected to the adoption of the Bill indicating that, in their view, the definition of terrorism does not in all cases cover the important elements of the crime of terrorism and that safeguards for humanitarian organisations be included in the Bill.

**Recommendation**

The Select Committee on Security and Justice, having considered the Protection of Constitutional Democracy Against Terrorist and Related Activities Amendment Bill [B15 B – 2022] (National Assembly – section 75), referred to it and classified by the JTM as a section 75 Bill, reports the Bill, without proposed amendments for the National Council of Province’s consideration.

**Report to be considered.**

**ANNEXURE A**

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

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

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

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

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

| **PROVISION IN QUESTION and COMMENTATOR** | **SUBMISSION/RECOMMENDATION** | **DEPARTMENT’S RESPONSE AND RECOMMENDATIONS** |
| --- | --- | --- |
| **FORSA**  **Clause 1: Definition of Terrorist Activity** | **Definition of “terrorist activity”** – Clause 1 proposes amending the definition contained in section 1 of the principal Act. However, of concern is the wide definition of “*terrorist activity*”. The current definition runs over two (2) pages in length. It contains various broad phrases that are open to abuse. This is of specific concern given that recent events have seen where the Department of Health labelled civil society organisations involved in enabling public comments on the Department’s proposed health regulations as “*instigating terrorism*” and/or “*sabotage*”.  It is problematic that “‘terrorist activity’… means any act— (a) committed in or outside the Republic, which (viii) creates a serious public emergency situation or a general insurrection in the Republic and (b) which is intended, or by its nature and context, can reasonably be regarded as being intended, in whole or in part, directly or indirectly, to— (iv) further the objectives of an entity engaged in terrorist activity.”  The above is **vague**, with no specified criteria for either a “**serious public emergency**” or a “**general insurrection**”. As such, it is open to abuse and it is possible that it may be interpreted, as done in the aforementioned example of the Department of Health, to refer to civil society organisations and/or advocacy groups that are involved in facilitating public awareness of, and participation in, the legislative process and/or other Governmental activities.  An unintended consequence of the Bill could therefore be to criminalise the voices of those opposing Government actions and/or curb civil society’s dialogue and actions in what is a participatory democracy. Given that the religious community is often at the forefront of criticising Government and/or facilitating public participation in elections, the legislative process and other civil society activities, this is particularly concerning to religious organisations and leaders.  The principal Act criminalises involvement with and/or funding organisations that are deemed to be involved with “terrorist activity”. In light of the above, this is equally concerning to the religious community.  The above definition, being open to abuse, could drastically limit the rights to: r**eligious freedom** which protects the right to hold opinions and beliefs and live these out publicly; **freedom of expression**, which protects all expression apart from propaganda for war, incitement of imminent violence, and the advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm; and **freedom of association**, which protects the right to freely associate with those one wishes to associate with.  Narrowing the definition of what is “terrorist activity” to avoid abuse by a future Government is vital. The right to religious freedom and freedom of association are, *inter alia*, protected in the various international covenants / treaties and declarations. It would thus be prudent for the Committee to be take cognisance of South Africa’s international law obligations, when drafting legislation that directly affects fundamental rights.  **FORSA argues:**  Limiting a right: section 7(3) of the Constitution states that a right contained in the Bill of Rights can be limited by section 36, or “*elsewhere in the Bill*” – i.e. by an internal limitation clause as is the case in section 16(2).  Interpreting a law: Importantly, in the current situation of drafting a proposed law, section 39(2) of the South African Constitution requires that any law must be interpreted in a way that promotes *“the spirit, purport and objects of the Bill of Rights*”.  In particular, For SA reiterates the right to Religious Freedom contained in section 15 of the Constitution, the Right to Freedom of Expression contained in section 16 of the Constitution and the Right to Freedom of Association contained in Section 18 of the Constitution.  **RECOMMENDATIONS:**  Clause 1 - Wide definition of terrorist activity:  *FOR SA* proposes that: The definition of “*terrorist activity*” be narrowed by excluding “*viii) creates a serious public emergency situation or a general insurrection in the Republic*”. The criteria to be met for a “serious public emergency situation” and “general insurrection” be expressly stipulated in the Bill.  *Alternatively, that:*The criteria to be met for a “serious public emergency situation” and “general insurrection” be expressly stipulated in the Bill. | * + The definition of “terrorist activity” rests on two legs: * A = Any activity that can cause harm * PLUS * B = Achievement of any of the intended objectives with that activity EQUALS * C = “Terrorist Activity” * The definition seeks to explain that there needs to be a link between the activity that can cause harm and the intention to achieve the objectives. If activities lack the necessary terrorist intent which is usually aimed at terrorizing the civil population or government, it cannot be considered as terrorism under the Act. If one element is missing, the crime is not established. The circumstances and evidence of each particular case, will have to be looked at, to arrive at a conclusion. Prosecution under POCDATARA is only possible with the written authority of the National Director of Public Prosecutions. The function of the NDPP in this instance is to determine that the State has a *prima facie* case with a reasonable prospect of obtaining a conviction. The NDPP's decision to authorise a prosecution is therefore an important safeguard as it has to take account of all factors that may influence the prospects of obtaining a conviction. * The examples mentioned by the Commentator that the actions of civil society organizations that facilitate public awareness into the legislative processes, will therefore not fall within the ambit of the definition of terrorist activity, because it lacks the intent to cause harm. * The comments regarding acts that creates serious public emergency situations or a general insurrection in the Republic are noted, but yet again these acts will have to be tested against the definition of “terrorist activity” before any prosecution can be instituted. * There is no intention to criminalize voices of those opposing Government processes. The Department concurs that Freedom of religion, expression and association are rights that are protected in terms of the Constitution of the Republic of South Africa, but are not without limitation in terms of section 36 of the Constitution. Any limitation of these rights must be justified and comply with all the requirements in section 36. * The Committee’s attention is also drawn to the fact that this particular part in the definition was not a subject matter in the Bill. It has been part of the definition since the adoption of the principal Act in 2004. The only amendment made to this part was the omission of a comma and insertion of the word “or” in line with technical legislative drafting. * The Commentator’s recommendation to narrow down the definition of “terrorist activity” is noted, but is not advisable. Substantive amendments to the definition that would seek to diminish the definition, and that are amendments other than those proposed in the Bill, will most likely compromise the legislative measures that are currently in place in the law to prevent and combat terrorism in the country. Further, if substantive amendments will be made to the definition at this stage in the legislative process, it will have a detrimental effect on other provisions in the Bill and may require substantial consequential amendments to other provisions in the principal Act, that is not advisable.   **RECOMMENDATION: The CSPS respectfully requests the Committee, not to amend the definition, outside the parameters of the current amendments proposed in the Bill. The definition in the principal Act has been in place since 2004 and only minor amendments are now proposed.** |
| **Dear SA**  **Clause 1 : Definition of Terrorist Activity** | DearSA harbours significant concerns regarding the contents of the Terrorist and Related Activities Amendment Bill. These concerns are in relation to the lack of concrete and clearly defined definitions of, among others, what constitutes terrorism, as well as terrorist acts and activities. The severe impact of loose interpretation from vaguely-defined and broad terms towards the constitutional rights of South African citizens is problematic.  The Constitution is the supreme law of the land, and no law or proposed amendment can be in conflict with it. The Bill in its current form has the potential to significantly infringe upon:  • Freedom of Expression  • Freedom of association  • Right to self-determination  Of particular concern regarding the right to self-determination is the proposed arbitrary removal of Sections 4 and 5 from Chapter 1 (Definitions). This section specifically refers to the right to self-determination as promoted and protected by the United Nations, to which South Africa is a member and bound signatory. There is no rational reason to remove this section if not to blatantly try to persecute anyone legally acting in accordance with the United Nations’ right to self-determination.  Furthermore, potentially any person, group, or organisation that criticises the government or expresses opposition to government policy or positions can be labelled as a terrorist under the Bill due to the clauses on “encouragement” and “indirect facilitation of terrorism”.  Hence the repercussions of this Bill for all NGOs, especially those who act as watchdogs and guardians of constitutional and democratic processes, are debilitating and destructive  Any additional amendments, primarily that which potentially conflicts with citizens’ constitutional rights and freedoms and criminalises them for exercising their hard-won democratic processes, must be written with unambiguous and plain definitions.  South Africa has existing comprehensive and effective legislation to prosecute criminal and terrorist activity. As presented by Dr A Schoeman (STERN), extremist and terrorist groups and individuals including Boeremag, PAGAD, Henry Okah, Thulsie twins and others, were successfully intercepted, apprehended and charged under terrorism using the existing, un-amended POCDATARA Act and other existing legislation.  1. We believe that the POCDATARA Bill and proposed amendments provide no additional benefit to curbing terrorist and terrorist activities, as the current Act has proven to be extremely effective.  2. We also believe that the current POCDATARA Act, used in conjunction with the recently adopted General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill [B 18B-2022], more than adequately meets the demands of the Financial Action Task Force. Left un-amended, the POCDATARA Act will not have a negative impact on the potential grey-listing of South Africa.  We strongly recommend that the POCDATARA Bill be sent back to the drawing board for reconsideration regarding its content, overall desirability and necessity. | * It is common cause that the principal Act does not meet the demands of FATF. The Bill addresses the recommendations of and guidance from oversight structures, especially from the 2018 report of the UN-Counter-Terrorism Executive Directorate and the 2021 mutual assessment report of the Eastern and Southern African Anti-Terrorism Group and the Financial Action Task Force. * Further, the principal Act has to be brought in line with developments in International Law as well as oversight by the courts.   **RECOMMENDATION: The Department recommends that the deletion of section 1(4) remains unchanged.** |
| **Cape Independence Party**  **Clause 1: Definition of Terrorist Activity** | In “Amendments B-15B” pg6 a)(iiiA), it states that terrorism is “*any act*”, which “*is calculated to overthrow the government…*”, and such terms as “overthrow” are left open to interpretation without any context of self-determination. This could result in the most basic democratic process of a political party in favour of self-determination electorally defeating/“overthrowing” the national ruling party being interpreted as an act of terrorism.  Furthermore, the above peaceful political acts taken in conjunction with pg7 b)i) which states terrorism is any act which “*threatens the unity or territorial integrity of the Republic*”, could also misconstrue self-determination as terrorism. And on pg7 b)ii) the net is cast so unreasonably wide so as to include the sharing of any ideas which “*may cause feelings of insecurity*”… in a *“person, government.. or institution.*”  The above is made even worse on pg7 c) where it confuses matters further by stating that terrorism is any activity as contemplated above “*which is committed… for the purpose of the advancement of a… political, religious, ideological or philosophical motive, objective, cause or undertaking.*”  The principles of international order were set out in a 2018 report (A/HRC/3763) to the General Assembly of the United Nations and the Human Rights Council. Section 14(h) categorically states that the principle of territorial integrity has external application and a state cannot use the principle of territorial integrity to deny or hollow out the right to self-determination.  It is as if the above amendments have been constructed either with malicious intent or without any conscious understanding of the right to self-determination, the right to free speech, political protest, and a basic principle of democracy which is to protect the right to a plurality of opinions and opposition voices which keep a government accountable.  The above is obviously not an unacceptable outcome or interpretation, but one that becomes possible with the inclusion of ambiguous and broad definitions, and by the removal of any reference to the right to self-determination. The absurdity of the proposed amendments to the POCDATARA Act is that, if enacted in its current form, many organisations and their supporters could now potentially be classified as terrorists.  Therefore, we kindly request the Select Committee on Security and Justice to reconsider the proposed amendments, to ensure that the right to self-determination remains in the Act, that any ambiguity is removed which may threaten South African democracy, free speech, the right to report and share information freely, protest the government, and oppose its policies. | * Section 235 of the Constitution recognizes the collective right of the South African people to self-determination. Communities have rights to pursue self-determination in line with the collective right. * Whilst the Bill of Rights protects basic human rights such as right to life, right to freedom and security of the person, it does not protect the right to self-determination. * It follows that the right to self-determination cannot be protected at the cost of human rights. * For an act to be regarded as a “terrorist activity” there has to be a link between the act that can cause harm and the intention to achieve the objectives. Any organisation that pursues the collective right to self-determination in a peaceful manner, would under no circumstances perpetrate any of the actions described in paragraph (a) of the definition and would therefore never be in the position where it could potentially be considered to be involved in terrorist activity. * It should be noted that the activities described in paragraph (a) of the definition would in itself be regarded as very serious criminal offences, and if pursued in the exercise of the right to self-determination, would not be a defence against those offences, despite section 1(4) of the principal Act. * Section 1(4) of the principal Act does not protect an organisation that pursues self-determination through the commission of the acts mentioned in the definition through means that threaten or harm civilian populations or non-military combatants, from a charge of terrorism. Such acts would not constitute a legitimate pursuit of self-determination, “in accordance with the principles of international law, especially international humanitarian law”.   **RECOMMENDATION: The CSPS respectfully requests the Committee, not to amend the definition, outside the parameters of the current amendments proposed in the Bill. The definition in the principal Act has been in place since 2004 and only minor amendments are now proposed.** |
| **Nelius Pretorius**  **Clause 1: Definition of Terrorist Activity** | This amendment bill is very broad and should be scrapped in its entirety.  The specific concerning parts mentioned start from page 11[[1]](#footnote-1):  q) by the substitution in subsection (1) for the definition of ''terrorist activity'' of the following definition:  ii) intimidate, or to induce or cause feelings of insecurity within, the public, or a segment of the public, with regard to its security, including its economic security, or to induce, cause or spread feelings of terror, fear or panic in a civilian population; [or]  (iii) unduly compel, intimidate, force, coerce, induce or cause a person, a government, the general public or a segment of the public, or a domestic or an international organisation or body or intergovernmental organisation or body, to do or to abstain or refrain from doing any act, or to adopt or abandon a particular standpoint, or to act in accordance with certain principles | * + The comments by the Commentator are noted, but do not take into account all of the elements of the crime that have to be proven for a successful prosecution.   **RECOMMENDATION: The CSPS respectfully requests the Committee, not to amend the definition, outside the parameters of the current amendments proposed in the Bill. The definition in the principal Act has been in place since 2004 and only minor amendments are now proposed.** |
| **ICRC**  **Clause 1: Deletion of Section 1(4) of the Act**  Notwithstanding any provision of this Act or any other law, any act committed during a struggle  waged by peoples, including any action during an armed struggle, in the exercise or furtherance of  their legitimate right to national liberation, self-determination and independence against  colonialism, or occupation or aggression or domination by alien or foreign forces, in accordance with  the principles of international law, especially international humanitarian law, including the purposes  and principles of the Charter of the United Nations and the Declaration on Principles of International  Law concerning Friendly Relations and Cooperation among States in accordance with the said  Charter, shall not, for any reason, including for purposes of prosecution or extradition, be considered  as a terrorist activity, as defined in subsection (1). | South Africa is not the only State whose counter-terrorism legislation presents such a clause (so called ’IHL Saving clause’). For example, the counter-terrorism legislation of Ethiopia, Chad, the UK, Ireland, New Zealand and Canada, present similar clauses. The IHL Saving clause is also recommended by the African Union Model Anti-Terrorism law4 and by other regional organizations such as the European Union. Furthermore, United Nations Security Council Resolution 2462 and 2482 (2019) demands States to ensure that their counter-terrorism measures comply with IHL.  The purpose of an IHL Saving clause is to separate the law applicable to the conduct that occurs in peacetime from the conduct that occurs during an armed conflict. If the conduct qualified as ‘terrorist’ occurs in peacetime, IHL would not apply, and the situation would remain governed by domestic law, including by the relevant counter-terrorism legislation, and by international human rights law. Conversely, if the conduct occurs within the context of an international or a non-international armed conflict, IHL is better suited to govern the situations.  Deleting South Africa’s IHL Saving clause (i.e., the current section 1 (4) of the POCDATRA), would mean there is no longer separation of the legal framework for conduct that occurs within an armed conflict, and the legal framework for the conduct that occurs in peacetime. This would be inconsistent with South Africa’s international obligations which has accepted IHL as the legal framework governing armed conflicts  In engagements with the Parliamentary Portfolio Committee on Police during their consideration of the Amendment Bill, it became clear that there was a concern that the deletion of s1(4) of the POCDTARA Act was a recommendation in the Mutual Evaluation Report of the Financial Action Task Force (“FATF”).  The ICRC response is as follows:   * Unlike IHL, the FATF Recommendations are non-binding. They do not carry the same value as international instruments such as relevant counter-terrorism conventions or IHL. As such, the Government of South Africa must favour provisions in its national legislation that comply with IHL. * The ICRC, in its capacity as guardian of IHL, would like to respectfully submit that the FATF approach towards IHL as well as its interpretation of the 1999 International Convention for the Suppression of the Financing of Terrorism are incorrect. The FATF argues that by excluding certain actions from the scope of POCDATARA, the IHL Savings clause unduly restricts the scope of the offence of financing terrorism. The ICRC respectfully disagrees with this observation. From the ICRC’s perspective, incorporating an IHL Saving Clause in counter-terrorism completely aligns with the requirements of the 1999 Convention. * Indeed, the 1999 Convention includes provisions expressly excluding certain acts from the scope of financing terrorism offences. Article 2 of this instrument contains two elements already limiting the scope of crimes based on IHL. As such, the IHL Saving clause in s1(4) of POCDATARA, together with the amendments previously suggested by the ICRC, is perfectly in line with the 1999 Convention and cannot be considered as restricting the scope of counter-terrorism crimes under international counter-terrorism conventions. * It is also important to highlight that incorporating an IHL Saving clause in counter-terrorism legislation does not prevent the State from prosecuting the offence of ‘financing of terrorism’ and ‘participation to a terrorist group’. For instance, current s1(4) of POCDTARA as amended by the ICRC’s suggestion would still allow South Africa to prosecute actionsconsisting of channeling funds to non-State armed groups for the purposes of committing acts of terrorism against the civilian population and/or civilian objects. Such acts would not be protected by the IHL Saving clause. | The deletion of s1(4) stems from the following:   1. Aligning the principal Act to developments in International law since its adoption eg. Geneva Conventions and Additional Protocol I and II (Relating to the Protection of Victims of International and Non-International Armed Conflicts). 2. The Financial Action Task Force (“FATF”) Mutual Evaluation Report, Oct. 2021   Although the FATF assessment team considered the view that the clause did not constitute a limitation on the ambit of the crime of terrorism as it derived from the Geneva Conventions, it concluded that the clause narrows down the scope of the terrorist financing offence in section 4 in its comparison to the requirements of Articles 2 and 6 of the United Nations Convention on Suppressing the Financing Terrorism that was adopted in 1999. In particular, Article 6 of this Convention requires countries to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of the Convention (terrorist financing offences) are under no circumstances justifiable on political, philosophical, ideological, racial, ethnic, religious or other similar considerations.  The FATF considered this as a major factor in their assessment of the recommendation on the criminalization of terrorist financing.  It also played a role in the assessment of the country’s ability to provide international co-operation in extradition matters relating to terrorist financing offences.  **RECOMMENDATION: The Depart-ment recommends that the deletion of section 1(4) remains unchanged.** |
| **Cape Independence Party**  **Clause 1: Deletion of Section 1(4) of the Act** | In particular, we object to the removal of Chapter 1. Subsection 4, which defines and protects the constitutional right to self-determination from being incorrectly interpreted as terrorism.  We note that the Red Cross, DearSA, as well as Afriforum, amongst others, have also raised serious concerns surrounding the dangers of the removal of this subsection.  This section was intentionally included in the original Act, under “*Definitions and Interpretation*”, for the exact purpose of making it clear to all, the public and the courts, that self-determination is NOT to be defined or interpreted as terrorism. There can be no logical reason to remove this entire section. Its removal creates confusion within the intent of the law, and thereby suggests that acts of self-determination could be confused as acts of terrorism.  Since its very inception in the Act, Chapter 1. Subsection 4 has helped to define the law surrounding terrorism and to help ensure that acts of self-determination are not misinterpreted as terrorism. It therefore provided clarity and the correct interpretation to the law.  Nothing is gained by its removal. Its removal is arbitrary and dangerous as it could lead to the persecution of acts protected in the constitution, such as self-determination.  In complete opposition to the above, the removal of Subsection. 4 does nothing to strengthen the definition of terrorism - as the Bill was intended to do - instead it weakens the definition, provides less clarity, and creates confusion in the interpretation of the law.  If there is a specific part of the subsection that the Committee is concerned with then that specific part should be addressed. But removal of the entire subsection protecting the right to self-determination goes against the intended interpretation of the law and may result in conflict with Section 235 of the South African constitution, as well as international law.  **Recommendation that arose from Cape Independence Party during the Public Hearings**:  The FATF recommendations states: “*Generally, the criminalization of TF in South Africa is broadly consistent (****84****) with most of the TF Convention. The POCDATARA, however, does exclude from the definition of terrorist activity certain acts committed during an armed struggle. (****85****) This exemption therefore narrows the scope of the TF Convention.*” (FATF Recommendations: reference #84 and #85)    First of all the FATF congratulates South Africa in its recommendations on pg 165, reference #84, stating that South Africa is “*broadly consistent with most of the TF Convention*”.  Then when one looks at the POCTDATARA S.1(4) referred to in the FATF Recommendations, reference #85, the phrase they state is of concern to them is: “***however,*** (The POCDATARA) ***does exclude from the definition of terrorist activity*** *certain* ***acts committed during an armed struggle****. This exemption therefore narrows the scope of the TF Convention.*”  Let us now look at the entire POCDATARA S.1(4), referred to in the FATF Recommendations as, reference #85:  *“(4) Notwithstanding any provision of this Act or any other law,* ***any act*** *committed during a struggle waged by peoples,* ***including any action during an armed struggle****, in the exercise or furtherance of their legitimate right to national liberation,* ***self-determination*** *and independence against colonialism, or occupation or aggression or domination by alien or foreign forces,* ***in accordance with the principles of international law****,* ***especially international humanitarian law****, including the purposes and principles of the* ***Charter of the United Nations*** *and the* ***Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States*** *in accordance with the said Charter,* ***shall not****, for any reason, including for purposes of prosecution or extradition,* ***be considered as a terrorist activity****, as defined in subsection (1).”*  It is the aspect of violence that is the fundamental issue. And according to the FATF’s very own recommendations, they too chose to specifically highlight and identify this one specific phrase of an “*armed struggle*” within S.1(4) that was of concern to them.  If then, one was to remove the phrase, “***including any action during an armed struggle***”, this would immediately remove any possibility for acts of violence from being condoned under S1(4), and therefore open up the definition to easily prosecute anyone engaging in any acts of violence.  This would also clearly limit any acts of self-determination to remain purely within the legitimate realm of the peaceful and democratic, political process.  However, the inverse is true if one removes the entire clause S.1(4), then the broad terminology such as “is calculated to overthrow the government” (Amendments: a) iiiA) could then interpret peaceful, political, democratic acts of self-determination that seek to defeat/“overthrow” a government, by winning elections, as terrorism.  Just as acts of violence are unacceptable, this would not be an acceptable outcome either, nor would it be consistent with the laws listed above that protect the right to self-determination.  Therefore, we believe that the proposed amendment does a very good job of satisfying the concerns of the FATF, thereby showing South Africa’s good faith and willingness to compromise and comply. It also preserves the original Acts intention to ensure that self-determination is clearly defined and not mistakenly interpreted as terrorism, and at the same time, does not unnecessarily threaten or undermine this long-standing constitutional right. | * The wording “including any action during an armed struggle”, means that these acts are excluded from the definition of terrorist activity and shall not be considered as a terrorist activity. * The deletion of s1(4) was a recommendation in the Mutual Evaluation Report of the FATF. * Although the FATF assessment team considered the view that the clause did not constitute a limitation on the ambit of the crime of terrorism as it derived from the Geneva Conventions, it concluded that the clause narrows down the scope of the terrorist financing offence in section 4 in its comparison to the requirements of Articles 2 and 6 of the United Nations Convention on Suppressing the Financing that was adopted in 1999. In particular, Article 6 of this Convention requires countries to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of the Convention (terrorist financing offences) are under no circumstances justifiable on political, philosophical, ideological, racial, ethnic, religious or other similar considerations. * The FATF considered this as a major factor in their assessment of the recommendation on the criminaliza-tion of terrorist financing. * It also played a role in the assessment of the country’s ability to provide international co-operation in extradition matters relating to terrorist financing offences. A limited narrowing of the exemption, as proposed by the commentator, would therefore not address the underlying concern that was pointed out in the mutual evaluation report.   **RECOMMENDATION: The Depart-ment recommends that the deletion of section 1(4) remains unchanged.** |
| **ICRC** : Parliament to consider including a clause in the Amendment Bill to provide for exemption from criminal sanctions of impartial humanitarian assistance provided by organizations that operate with State consent, reference is made to:  **Section 3(2) of the Act:**  (2) Any person who- (a) provides or offers to provide any weapon to any other person for use by or for the benefit of an entity; (b) solicits support for or gives support to an entity; (c) provides, receives or participates in training or instruction, or recruits an entity to receive training or instruction; (d) recruits any entity; (e) collects or makes a document; or (f) possesses a thing, connected with the engagement in a terrorist activity, and who knows or ought reasonably to have known or suspected that such weapons, soliciting, training, recruitment, document or thing is so connected, is guilty of an offence connected with terrorist activities. | The ICRC is also concerned by the absence of a clause within POCDATRA to exempt from criminalization exclusively humanitarian action carried out by humanitarian and impartial organizations. The current wording of the Bill may unintentionally criminalize the provision of humanitarian assistance. For instance, section 3 (2) of POCDATRA could potentially criminalize provision of medical assistance to wounded people in areas controlled by a Non-State Armed Group.  The potential criminalization of exclusively humanitarian activities does not accord with the letter and spirit of IHL. Article 3 Common to the Geneva Conventions provide that impartial organizations may offer their services for the benefit of the victims of armed conflict. Impartiality requires that the humanitarian services are offered without any adverse distinction based on criteria such race, nationality, religion or ethnicity. In order to avoid the potential criminalization of humanitarian aid, it is important to provide for a ‘humanitarian exemption clause’ in counter-terrorism legislation. Such clauses have been included in the counterterrorism legislation in various jurisdictions such as Ethiopia, Chad, Philippines, Switzerland, the United Kingdom, New Zealand and Australia. Like the IHL Saving clause, the humanitarian exemption clause is also recommended by the African Union Model Law on Counter-terrorism10 and by other organizations such as the European Union. Furthermore, United Nations Security Council resolution 2462 (2019) urges States “when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.  The ICRC appeals to Parliament to consider including a clause in the Amendment Bill to provide  for exemption from criminal sanctions of impartial humanitarian assistance provided by organizations that operate with State consent. As currently worded, section 3(2) of POCDATRA could criminalize the work of exclusively humanitarian and impartial organizations such as the ICRC. Such a clause would entrench in law a targeted approach in dealing with the threat of terrorism in the Non-Profit Sector as recommended under the Financial Action Task Force1 (FATF) regulations. | The inclusion of a humanitarian exemption clause is not supported due to the following:  The Terror Financing provisions in the Bill are derived from the Convention for the Suppression of the Financing of Terrorism (TF).  The crime only applies to financing terrorist entities and activities.  The ICRC renders humanitarian assistance to victims of armed conflicts, and these cannot remotely fall within the ambit of the TF.  Open ended reference to humanitarian organisations would open the door to terrorist entities impersonating such organisations.  Immunities recognized for the ICRC in terms of international law, exempt if from having to testify in criminal proceedings of tribunals and domestic courts.  Treatment of victims would constitute proof that they were in fact victims of war crime sought to be prosecuted.  Giving evidence of such, the ICRC would either not be allowed into conflict zones or being itself targeted.  Immunity exists, due to the interests of alleviating human suffering that outweigh the giving of evidence.  This is entirely different from exempting the ICRC from the provisions of a criminal offence.  There is therefore no necessity for an exemption as per the ICRC submission.  The National Director for Public Prosecutions must authorize all TF prosecutions and it is therefore sufficiently safeguarded against any potential abuse.  **RECOMMENDATION: The Department recommends that an Exemption clause not be included in the Bill.** |
| **STERN**  **Deletion of Clause 3 in original version of the Bill** | In the original amendment Bill, a clause was proposed dealing with the “Prohibition of publication with unlawful terrorism related content” which created an offence related to the publishing, distribution, or circulation of content “intended to directly or indirectly encourage or otherwise induce the commission, preparation or instigation of any offence under this Act”. This clause was removed from the Bill in the Portfolio Committee’s deliberations, which we believe is a mistake and will undermine South African’s security. The removal of this important clause likely stems from concerns that this will overly prohibit freedom of expression and lead to abuses by the state. However, public comments making these claims fail to understand the boundaries and specificity of the law when it comes to the proposed criminalisation of terrorist content  Stern refers to Section 16 of the Constitution in relation to Freedom of Speech and argues the Constitution clearly states that propaganda for war and the incitement of violence do not qualify as protected speech. Considering the security threat that this type of material poses to the country and South Africans, the incitement of violence and terrorist-related acts should rightfully be criminalised. Many countries have criminalised these acts for this reason.  Further, the legislation places clear and appropriate limits on the use of these powers by limiting it to the promotion of offences criminalised under the Act and tying it to the extensively defined definition of terrorist activity. Most importantly, the current definition of terrorist activity includes the following caveat:    (3) For the purposes of paragraph (o)(vi) and (vii) of the definition of **“terrorist activity”,** any act which is committed in pursuance of any advocacy, protest, dissent or industrial action and which does not intend the harm contemplated in paragraph (o)(i) to (v) of that definition, shall not be regarded as a terrorist activity within the meaning of that definition.  This means that the definition is limited to the perpetration of terrorist acts criminalised under international law (the Convention Offences) and the proposed clause prohibiting the publication of terrorism content takes this into account. This places an appropriate limit on the application of the law and will prevent abuses of the legislation to suppress legitimate free speech and dissent. Any speech which does not advocate for or incite Convention offences will consequently not fall within the remit of this legislation. Concerns that the inclusion of this clause will restrict civil society groups and legitimate free speech fail to understand the boundaries of this legislation and the built-in restrictions to protect legitimate dissent.  The Select Committee is asked that this clause prohibiting the publication of unlawful terrorist content should be returned to the Bill. This is an important tool for deterring the publication of such material which has been used to radicalise young South Africans to violent extremist causes and incite them to commit terrorist acts in South Africa. An intervention at this point will disrupt the chain leading from the radicalisation of an individual to the perpetration of terrorist acts. This is an important intervention which has the potential to prevent the loss of life and keep ordinary South Africans safe.. | * + The clause related to the prohibition of any publications with terrorist related content in the original amendment Bill, sought to create an offence related to the publishing, distribution or circulation of content to encourage or induce the commission of any offence under the principal Act.   + During the public participation process when the Bill served before the Portfolio Committee on Police (PCoP), the Department carefully considered all submissions that cautioned about the constitutionality of the clause and possible infringement on the right of freedom of expression and agreed to propose to the PCoP the deletion of the clause. It is our considered opinion that prosecutions of publications with terrorist related content, can be prosecuted under section 14 of the principal Act.   + Examples of problematic provisions in the clause: * 3A(2)(d): “A person commits an offence if he or she, in respect of a publication with unlawful terrorism related content—   …  *(d) provides a service to others that enables them to obtain, read, listen to, or look at such a publication, or to acquire it by means of a gift, sale or loan.”*   * + Provision is onerous, especially for electronic communications service providers – the offence lies in **“enables them to obtain, read, listen to, or look at such a publication”** whereas such a provider may only provide the access mechanism but has no control over what content is accessed through its service. If the provider for example, enables broad internet access, and the user then chose to search and access prohibited material, the provider will be on the wrong side of   the law, and the provision is therefore too wide.   * 3A(5)(b): ““A person charged with committing an offence under this section and section 3(2)*(e)* may raise as a defence—   …  (b) the person's action or possession was for the purposes of—  (i) carrying out work as a journalist; or  (ii) academic research.".   * + The provision on carrying out work as a “journalist” was identified as problematic. There is no specific definition of “journalist” in South African law. Mainstream journalists are not registered anywhere and are opposed to registration. The only safety net is that of the Persombudsman. For example, any person in possession of a cellphone device and a blog, can publish unlawful terrorism related content and is considered a journalist. It is therefore uncertain whom should be considered as a journalist for purposes of the defence. The defence of journalism was also debated by the previous Portfolio Committee on Police, in case of the Critical Infrastructure Protection Act, and the defence was not inserted.   + The aforementioned examples of complexities in the clause, as well as possible constitutional challenges and possible infringement of the right of freedom of expression, led to the proposal to the PCoP to delete the clause, that was accepted by the PCoP, and we respectfully make the same proposal to the Select Committee, not to reinstate the clause, because the offence can be successfully prosecuted under section 14 of the principal Act.   **RECOMMENDATION: The Depart-ment recommends that the deletion of clause 3A remains unchanged.** |
| **FORSA**  **Subsection 3 of the definition of terrorist activity** | The addition of a phase such as “is calculated to overthrow the government”, will fall within the sections mentioned in subsection 3. If you have “advocacy” that is deemed by the State as being “to overthrow the government”, subsection 3 offers no protection. | * + The proposed insertion related to overthrowing of a government must be read in conjunction with paragraph (a)(viii) of the definition: “creates a serious public emergency situation or a general insurrection in the Republic”. The title of the Act is Protection of Constitutional Democracy against Terrorist and Related Activities Act. Clearly in a constitutional democracy, overthrowing the government or the constitutional order by unconstitutional means such as crippling the country or by means of violence, should be a crime. ISIS in Syria has established its own government by means of violence.   + It is correct that subsection (iiiA) will fall within the ambit of subsection 3. Whether the “advocacy” will be deemed as a harmful action to overthrow the government, is a question on whether the advocacy is violent in nature and aimed at endangering the life or bodily integrity of persons. In addition to this, the advocacy must be intended to threaten the unity and territorial integrity of the Republic and intimidate the public in a manner that they feel unsafe. The State must prove this. If not proven, the “advocacy” enjoys protection under subsection 3.   **RECOMMENDATION: The CSPS respectfully requests the Committee, not to amend the definition., outside the parameters of the current amendments proposed in the Bill. The definition in the principal Act has been in place since 2004 and only minor amendments are now proposed.** |

1. Page 7 of B version of the Bill. [↑](#footnote-ref-1)