CHAPTER 13

OPTIONS ON REFORM

A. INTRODUCTION

13.1 It was noted in Chapter 1 that the Minister of Safety and Security requested the Commission to conduct an investigation into security legislation. The Commission said in the discussion paper that it is indebted to the Police Service who conducted the initial research and drafted a Bill on which this report and the proposed Bill are based. The reader will therefore find references in this report to "the original Bill", "the original clause" or the "original proposal" meaning the Bill as submitted by the Police Service to the Commission and its project committee. (The words which are struck out in the Bill (contained in Annexure "B") are those amendments which the project committee and working committee considered should be made. The Bill was published in this format to reflect the original and the amended wording.) The original Bill was distributed by the SA Police Services to some Government Departments for their comments before it was submitted to the project committee (that version, however, did not contain clause 16 on detention for purposes of interrogation and special offences which was added by the SAPS after a spate of bombings in the last quarter of 1999).

13.2 The discussion paper explained that the existing offence of terrorism which is contained in section 54(1) of the Internal Security Act, 1982, relates only to terrorism in respect of the South African Government or population, although the threat of terrorism worldwide is often directed at foreign officials, guests, embassies and the interests of foreign states. It was therefore considered that the existing offence of terrorism under South African law was inadequate.

13.3 It was explained in the discussion paper that it can be argued that any act of terrorism can in any event be prosecuted in terms of the existing law as such an act would constitute an offence, whether under statute or common law but that the worldwide trend is to create specific legislation based on international instruments relating to terrorism. Two reasons for this were noted, namely firstly to broaden the normal jurisdiction of the courts to deal with all forms of terrorism, especially those committed outside the normal jurisdiction of courts, and secondly to prescribe the most severe sentences.

13.4 It was stated that it is imperative that South Africa sign, ratify or accede to the respective instruments relating to terrorism as soon as possible. It was said that for this purpose two options are available: one is for the Departments involved to amend present

legislation pertaining to nuclear energy, civil aviation, etc. on the basis of the relevant international instruments, and the other is to draft an omnibus Act addressing the issue of terrorism on a broader basis.

13.5 It was explained in the discussion paper that the second option was provisionally preferred, and a draft Anti-Terrorism Bill to that effect was included in the discussion paper for general information and comment (see Annexure B). The State Law Advisers: International Law have noted in preliminary consultations that complex issues are raised by this investigation. They noted that this is exacerbated by the fact that so many line function Departments are involved, and that the investigation is a timely reminder that if South Africa is to fulfil its international obligations to combat terrorism as well as address the ever-increasing terrorism threat within our borders all Departments must do their bit. They noted that the Bill was drafted in order to address all relevant terrorism issues in one piece of legislation. They stated that in principle they supported this approach as it can expedite the pressing issue of the ratification of the outstanding conventions, a consideration which must be taken very seriously. They raised, however, the concern whether this is operationally feasible and legally comprehensive, pointing out that this is something which must be determined by all the line function Departments. Comment was therefore in particular invited from all line function Departments on this aspect.

13.6 The draft Bill as drafted originally by the South African Police Service dealt with the following aspects:

- Definitions (clause 1);
- offences relating to terrorist acts (clause 2);
- the providing of material support in respect of terrorist acts (clause 3);
- membership of terrorist organisations (clause 4);
- sabotage (clause 5);
- hijacking of aircraft (clause 6);
- endangering the Safety of Maritime Navigation (clause 7);
- terrorist bombings (clause 8);
- taking of hostages (clause 9);
- sentences in case of murder or kidnapping of internationally protected persons (clause 10);
- protection of internationally protected persons (clause 11);
- protection of property occupied by foreign governments (clause 12);
- offences relating to fixed platforms (clause 13);
- nuclear terrorism (clause 14);
- jurisdiction of the Courts of the Republic in respect of offences under the Bill (clause 15);
- custody of persons suspected of committing terrorist acts (clause 16);
- identification of special offences by Directors of Public Prosecutions (clause 17);

- powers of court in respect of offences under the Act (clause 18);
- pleas at trial of offences under this Act (clause 19);
- bail in respect of offences under this Act (clause 20);
- duty to report information on terrorist acts (clause 21);
- powers to stop and search vehicles and persons (clause 22);
- authority of the Director of Public Prosecutions (clause 23);
- amendment and repeal of laws (clause 24); and
- interpreting the Bill (clause 25).

13.7 Amnesty International recently stated that on 29 November 2001, in an unprecedented move, the heads of three leading inter-governmental human rights bodies[1] **jointly cautioned governments that measures to eradicate terrorism must not lead to excessive curbs on human rights and fundamental freedoms. AI noted that in a joint statement, these three said that while they recognize that the threat of terrorism requires specific measures, they call on all governments to refrain from any excessive steps which would violate fundamental freedoms and undermine legitimate dissent, and in pursuing the objective of eradicating terrorism, it is essential that States strictly adhere to their international obligations to uphold human rights and fundamental freedoms. Amnesty international pointed out that following the attacks in the United States of America on 11 September 2001, many states have taken steps to protect their populations from similar criminal acts, and these measures include new security legislation and new law enforcement measures.**[2] **Amnesty International pointed out that it has monitored the use of security legislation and security measures in all regions of the world for 40 years. Amnesty International said it recognizes the duty of states under international human rights law to protect their populations from violent criminal acts, however, such measures should be implemented within a framework of protection for all human rights. They remarked that the challenge to states, therefore, is not to promote security at the expense of human rights, but rather to ensure that all people enjoy respect for the full range of rights, and that the protection of human rights has been falsely described as being in opposition to effective action against "terrorism". Amnesty International noted that some people have argued that the threat of "terrorism" can justify limiting or suspending human rights, and that even the prohibition of torture, one of the most basic human rights principles and a rule of international law which binds every state and every individual, has been called into question. Amnesty International consider**

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1 Mary Robinson, the United Nations High Commissioner for Human Rights, Walter Schwimmer, Secretary-General of the Council of Europe, and Ambassador Gérard Stoudmann, Director of the Organization for Security and Cooperation in Europe's (OSCE) Office for Democratic Institutions and Human Rights.

2 “Rights at risk: Amnesty International's concerns regarding security legislation and law enforcement measures” press release, 29 November 2001.

that states can work together to address the threats that were brought into sharp focus by the events of 11 September 2001, but only by upholding agreed and shared basic standards of human rights in their law enforcement and judicial procedures. They stated that concerns in Europe regarding the extradition of suspects to the USA, because of the possibility that the death penalty would be imposed, showed that failure to abide by international standards can inhibit international cooperation in law enforcement, that many of the measures currently being introduced are ostensibly to deal with emergency situations, and that some explicitly or implicitly involve derogating from (limiting or suspending) human rights guarantees. Amnesty International also note that on 10 December, a number of UN Independent Experts publicized their concerns as follows:

> **We express our deep concern over the adoption or contemplation of anti-terrorist and national security legislation and other measures that may infringe upon the enjoyment for all of human rights and fundamental freedoms. We deplore human rights violations and measures that have particularly targeted groups such as human rights defenders, migrants, asylum-seekers and refugees, religious and ethnic minorities, political activists and the media. Concerned authorities have already been requested to take appropriate actions to guarantee the respect for human rights and fundamental freedoms in a number of individual cases drawn to the attention of relevant independent experts. We shall continue to monitor the situation closely.**

B. THE NEED FOR AN ANTI-TERRORISM BILL

(a) Comment on discussion paper 92

13.8 It was noted above that the publication for general information and comment of the discussion paper on terrorism led to a heated debate in the newspapers locally as well as in the foreign press.[1] **Martin Schönteich remarks that the South African anti-terrorism policy — unlike the populist pronouncements of some of its policy makers — has taken the approach that terrorism should be combated without sacrificing citizens' civil liberties and the rule of law.[2] He notes that the value of this approach — and the dangers of ignoring it in favour of a Draconian one — is spelt out by Paul Wilkinson:**[3]

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1 See Chapter 1 par 1.5.

2 Of the Institute for Security Studies *Fear in the City, Urban Terrorism* Published in Monograph No 63 2001 Chapter 4 see http://www.iss.org.za/Pubs/Monographs/No63/Chap4.html.

3 Director: Centre for the Study of Terrorism and Political Violence University of St Adrews, United Kingdom. See also "Current and Future trends in Domestic and International Terrorism: Implications for Democratic Government and the International Community" in

The primary objective of a counter-terrorist strategy must be the protection and maintenance of liberal democracy and the rule of law . . . To believe that it is worth snuffing out all individual rights and sacrificing liberal values for the sake of 'order' is to fall into the error of the terrorists themselves, the folly of believing that the end justifies the means.

It must be a cardinal value of liberal democracies in dealing with problems of civil violence and terrorism, however serious these may be, never to be tempted into using the methods of tyrants and totalitarians. . . . It is a dangerous illusion to believe one can 'protect' liberal democracy by suspending liberal rights and forms of government. Contemporary history abounds in examples of 'emergency' or 'military' rule carrying countries from democracy to dictatorship with irrevocable ease."

13.9 Martin Schönteich says that numerous pieces of legislation designed to combat terrorism, uphold internal security, and strengthen the hands of the security forces against terror groups, are on the South African statute books:

Many of the laws are not being used fully by the security forces because of operational weaknesses in the criminal justice system and the state's intelligence agencies. Policy makers need to direct their efforts at these weaknesses, before advocating Draconian measures — as contained in some of the clauses of the draft Anti-Terrorism Bill — which could have the effect of curtailing the rights and liberties entrenched in the country's constitution.

Tough and sweeping legislation is likely to fail in its aims if it is not properly implemented and used by the personnel of the criminal justice system. Terrorism can be effectively combated. What is needed is a well-run and adequately resourced criminal justice system staffed by trained and motivated personnel.

Recent developments promise to improve the state's ability to apprehend and convict those guilty of urban terrorism. At the beginning of 2001, legislation was promulgated which formally established the Directorate of Special Operations (DSO). Comprised of multi-disciplinary teams of investigators, prosecutors and intelligence operatives, the DSO's structure, and prosecution-driven and intelligence-led approach, places the organisation in a strong position to effectively combat those guilty of acts of urban terror. An increase in budgeted expenditure of 41% between 2001/02 and 2002/03 to over R200 million per year should provide the DSO with the necessary resources to fulfil its mandate.

There is a need to streamline the many disparate pieces of legislation designed to combat terrorism and to bring them in line with South Africa's international obligations. It would, however, be a mistake to introduce legislation that seeks to combat terrorism by diluting the rights of all South Africans. The country's history is full of examples of tough temporary legislative measures becoming permanent fixtures on the statute books.

13.10 Some respondents such as the Department of Environmental Affairs and Tourism responded that they have no comment to made on the discussion paper. The Magistrate's Office Pretoria North also comments that the discussion paper is comprehensive and no further comment is regarded necessary. The Department of

Labour notes that it has no inputs to the paper.

13.11 Numbers of respondents pointed out that since there are more than 20 statutes presently on the statute book, there is no need to enact the proposed Bill.[4] **Others also stated that the threat of international terrorism is not an issue in this country and it is therefore not necessary to have legislation dealing with this aspect in South Africa.**[5]

13.12 Professor Michael Cowling of the University of Natal argues that the enactment of detention without trial provisions could amount to a violation of South Africa's obligation under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to which South Africa is a party.[6] **The convention obliges each state party to keep under systematic review interrogation rules, instructions, methods and practices, as well as arrangements for the custody and treatment of persons subject to any form of arrest or detention in order to prevent any cases of torture. He points out that this means that the government is under a duty not only to actively prevent torture by punishing those who perform acts of torture but also to prevent it indirectly by eliminating conditions in which torture is likely to take place.**

13.13 Esther Steyn remarks that for purposes of the arguments advanced it will be accepted that a consolidated security Act would be useful, provided that it conforms to constitutional norms.[7] **She says that she therefore accepted that on a substantive level the crime of terrorism should be re-defined to include transnational acts and that on a procedural level the jurisdiction of the courts should be broadened in order for them to be able to impose more severe sentence that befit the crime. She argues that this is what was reasonably anticipated by the legislation in the light of the Commission's reasons for the proposed Bill yet the provisions of the Bill reveal that what the project committee did was to create a procedural lobster pot. She argues**

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4 Such as Dr Imtiaz Sooliman on behalf of the Gift of the Givers Foundation

5 The remark by Prof Mike Hugh of the University of Pretoria's Institute for Strategic Studies in its ISSUP Bulletin 6/2000 is worth noting where he says: *The fact that two South African citizens (since released) were among those taken hostage by the Abu Sayyaf Group, an Islamic separatist group operating in the Southern Philippines, has also shown that South Africa is currently neither immune from domestic terror, nor from international terror*.

6 "The return of detention without trial? Some thoughts and comments on the draft Anti-Terrorism Bill and the Law Commission report" *South African Journal of Criminal Justice* 13 (3) 2000 344 - 359 at p 350.

7 "The draft Anti-Terrorism Bill of 2000: the lobster pot of the South African criminal justice system?" 2001 *SACJ* Vol 14 179 - 194 at at 179 -180 and 194.

that the definition of terrorism is defined in such broad terms that almost any serious violent offence will fall within its ambit and a system is created by virtue of clause 16 , whereby persons will be put in the lobster pot with ease but will find it much harder to get out of the pot or be able to avoid such detention in the first place. She says that the Bill is in fact unique in its severity, and on a procedural level it not only provides for a broadened substantive crime and an increase in the punitive measures of the courts, it also allows the state to use drastic pre-trial detention procedures. She considers that even if its is accepted that a consolidation of different offences was needed, she submits that the Bill as presently drafted , is excessive in its scope and will short fall of constitutional norms. She explains that the adoption of the South African Constitution laid a secure foundation for all the people of South Africa to transcend the divisions and strife of the past, which had generated transgressions of human rights and humanitarian principles and left a legacy of guilt and revenge. She considers that in contrast, the enactment of this Bill in its current form would be a regressive step that would undeniably lead to a forfeiture of hard won rights. She expresses the view that rights, such as the right to life, to liberty and freedom of worship and assembly, as well as other fundamental rights should not be compromised, because they do not depend on the outcome of elections. She notes that liberty, most importantly should not be something that derives from the grace of law enforcement officers, but from the Constitution as a right.

13.14 Mr JEH Wild[8] notes that having researched organised crime for approximately 20 years, both as an academic and as a practising advocate, he would like to offer the suggestion that the existing legislation and systems, properly applied and functioning, are satisfactory and more than adequate to deal with organised crime and public violence. He considers that what is required to address the present crisis is a correct analysis of the available intelligence and data concerning the nature and extent of the phenomena which the intended legislation seeks to address and which has apparently become such great concern to the present government. He suggests that upon a correct analysis of the available data it will be possible, with all the available resources including the existing legislation and suitable personnel, to bring the present situation to an end. He considers that the present problem is occasioned by a failure to analyse the available data correctly and act upon it efficiently. He remarks that it may be that there is an unwillingness to act, given the maintenance of past structures and personnel whose loyalty and commitment to democracy are extremely doubtful. He notes that it would not only be ironic but tragic if the present government were seduced by certain advisers and structures into resurrecting

8 Who is an advocate from Durban.

legislation of apartheid when there is no real necessity to do so in the context of those very past elements and their allies who can be clearly identified as responsible for the existing state of affairs.

13.15 Advocates Fick and Luyt of the Office of the Director of Public Prosecutions Transvaal note that the discussion paper has been perused and that their office is in agreement that a consolidation of Security Legislation to bring it in line with international trends is necessary to effectively curb terrorism and bring about certainty in the prosecution of related offences.

13.16 Amnesty International (AI) points out in its comment on the discussion paper that the Bill is quite wide ranging in its scope and intentions and that they take no position on the matter of rendering into positive law South Africa's obligations under international conventions relating to terrorism. They explain that they confine their comments largely to a number of proposed clauses which will likely have substantial impact on the human rights of South Africa's citizens, in particular the section in the Bill which would allow detention without charge or trial of suspects or witnesses for the purpose of interrogation. They say they are aware that public debate has already occurred on the proposed legislation, including in the media and at a recent seminar hosted by the South African Human Rights Commission on 6 November 2000 in Cape Town.[9] Amnesty International remark that they understand from comments made in the national parliament, from reports in the media[10], as well as from AI's own

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9 South African Human Rights Commission seminar, "Human Rights, Crime and Urban Terror", 6 November 2000.

10 "Zealots, criminals or amateurs - who are Cape Town's bombers? Government insists Muslims are to blame" by Chris McGreal in Cape Town *Guardian* Saturday October 21, 2000
"What is happening in Cape Town depends on who you believe.
Some say a bomb blast this week - the 21st in two years - was the work of highly trained religious terrorists bent on turning South Africa's "mother city" into Algeria as a means of overthrowing the government. Others portray it as a lame attempt by a bunch of deluded incompetents capable of rigging no more than the most rudimentary explosion, exaggerated by the authorities to justify sweeping anti-terrorism legislation. . . . The police and government are confident that the bombs are the work of a once popular Muslim vigilante group turned terrorist outfit, People Against Gangsterism and Drugs (Pagad). Last week, more charges were added to those already faced by Pagad's leader, Abdus-Salaam Ebrahim, for murder and terrorism. More than 50 other Pagad members are either being tried or awaiting trial on similar charges. "I want to state clearly that we know a lot about the people involved in urban terror," South Africa's safety and security minister, Steve Tshwete, told parliament. "We know who the leaders are, we know who provides resources, and we know who carries out the acts of urban terror. I am absolutely convinced it is Pagad." The Western Cape's security minister, Hennie Bester, went further. He said the bombers were trying to overthrow the government. "They want to overthrow the state," he said. "There is some evidence they tried to produce larger fertiliser bombs. The intent for something much bigger is there but they haven't been able to execute it. My sense is we have the more technically proficient in prison." Last month, President Thabo Mbeki and Mr Tshwete warned that Pagad could turn Cape Town into Algeria. The comparison was clearly so ludicrous and so offensive

discussions in Pretoria on 20 October 2000 with officials from the Ministry of Justice and the Office of the National Director of Public Prosecutions (NDPP), that the domestic impetus for this legislation has arisen primarily out of longstanding

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to the city's Muslim community that it was quickly dropped. But the portrayal of Pagad as an organisation with secret bomb-making cells is being used to justify sweeping anti-terrorism legislation that some say is as draconian as laws from the PW Botha years. Among the provisions of the draft legislation is a clause that categorises any threat to the functioning of the state as terrorism, a term so broad as to potentially include strikes. The police will be able to carry out random street searches, and hold anyone with "knowledge" of "urban terrorism" for up to 14 days without charge. But the definition of urban terrorism is so unclear that any reporter who spoke to Pagad could be accused of it.

"Technically civil service strikes could be interpreted as terrorist activity under the bill," said Irvin Kinnes at the University of Cape Town's centre for conflict resolution. "According to the draft legislation the police can also stop and search for any articles that may be used in a terrorist act. It means a police officer can detain anybody that his information says has knowledge of terrorist activity. We are questioning this because we've had such a long road to democracy in this country. It's the easiest way for the police to silence opposition."

Even Mr Bester had doubts about the new legislation. "I have serious reservations about it. I frankly believe you only go to that when you can't achieve what you want with good intelligence, good effective policing and a fairly good criminal justice system. And we don't have that at the moment," he said. In any case, Mr Bester admitted that the police were using apartheid-era security laws still on the statute books to lock up suspects. "We have taken the key people off the streets. We used minor charges to get 30 or 40 people at the core, to keep them in prison. The latest bombs are much more amateurish. We've been pretty effective," he said.

There are few who doubt that Pagad was responsible for an earlier spate of about 150 small pipe-bomb attacks that killed drug dealers and gangsters operating in the Cape Flats townships. But is it behind the explosions that have plagued the city of Cape Town over the past two years? The doubters question why a Muslim fundamentalist group supposedly bent on overthrowing the state would bomb pizzerias and nightclubs. As a terrorist force it has not been particularly effective - three deaths from 21 bombs have not had a big impact on a city that views murder and robbery pretty much as part of life. And while the government has secured dozens of convictions against Pagad members, not one is related to the blasts. Above all, if Pagad is attempting to bolster support for its cause through the bombings, it could not have pursued a worse strategy. The vigilantes once commanded overwhelming support within the Muslim community, and on the Cape Flats as a whole. Two years ago, opinion polls gave Pagad the backing of more than two-thirds of the area's population. But the support, which had the government scrambling to respond, collapsed as a result of the bombs. And if the organisation is pursuing a cause, where are its demands and claims of responsibility? To the sceptics, some of the bombings and their targets point to organised crime, probably extortion rackets. Doubters have latched on to the testimony of a police informer, Deon Mostert, who alleges that senior police officers with links to organised crime are involved in the bombings. Others note that South Africa's private security industry is making considerable amounts of money from the fears stoked by the bombings. The doubts extend to the business community, which is offering a 2m rand reward (ff180,000) for the capture of the bombers.

"By making your opponent more important than he really is you justify your own incapacity," said the businessman behind the scheme, Michael Rubin. "I'm not accusing Tshwete and Mbeki of that but talk to the local security guys and they'll tell you they are dealing with a highly organised, technically advanced group. It's not true. "The security industry, and that includes the police, are not people that give me a great deal of confidence. They are getting nowhere." The most significant impact has been on Pagad itself. The most senior leader still free, Cassiem Parker, last week told what may well prove to be the organisation's final public rally that it is prepared to go underground if necessary. "We don't know if we are going to meet again in this format to feel the togetherness we feel today. They can split us, but meet we will. We have a common cause, whether they like it or not," he said. Then he led the audience in chants of "one gangster, one bullet". “

government concern over the pattern of violence in the Greater Cape Town area. They note that in particular the government appears concerned that there continues to be difficulty in achieving convictions in the courts of those responsible for the string of bomb explosions in the past two or more years, notwithstanding the number of joint police and military security operations in the area and the increased involvement of the NDPP's office in directing the investigations. AI considers that members of the public must clearly also be extremely concerned as well, in view of the deaths and injuries which have resulted from these bomb blasts.

13.17 AI notes that the Minister of Safety and Security, Steve Tswete, is reported to have stated in the national parliament during 2000 his belief that those responsible for this "urban terror" are members of PAGAD (People against Gangsterism and Drugs), or militant elements among this anti-crime vigilante organization. Alleged statements by some PAGAD members and the organization's affiliations with the local Muslim community appear to have led to the view amongst some national and provincial authorities that the "acts of urban terror" are ideologically motivated and anti-state. AI points out that the authorities have also publicly linked the organization to the targeted killings of officials involved in investigating or hearing cases against their members, as well as to the intimidation of potential prosecution witnesses. AI notes that civil society organizations, statutory bodies with oversight functions, journalists and others have, however, expressed concern that there may be a multiplicity of actors involved in this violence, including organized crime or even renegade members of the security and intelligence services, and that primarily what underlies the investigation failures is corruption, inefficiencies, limitations in resources or other shortcomings in law enforcement agencies. AI remarks that as the South African Human Rights Commissioner, Jody Kollapen, noted at the Cape Town seminar, if the problem is a lack of capacity, this needs to be dealt with head-on, to ensure that the actual perpetrators are more likely to be arrested and brought to justice, rather than by passing new laws, particularly where they involve serious inroads into fundamental human rights.[11]

13.18 Amnesty International states that while it does not condone under any circumstances deliberate and arbitrary killings or threats of violence by armed opposition groups, or killings or threats of violence acquiesced in by elements of the state, the organization is concerned that certain provisions in the proposed Bill

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[11] Chris McGreal, "Zealots, criminals or amateurs - who are Cape Town's bombers", The Guardian (UK), 21 October 2000; Howard Barrell, "Clean up the cops first", Mail & Guardian, September 29 to October 5, 2000; Marianne Merten, "Back to detention without trial ?", Ted Leggett, "Tshwete is barking up the wrong tree", idem, 15-21 September 2000.

violate international and regional human rights treaties to which South Africa is a party and may lead to human rights violations.

13.19 Mr Saber Ahmed Jazbhay asks in his comment whether we are about to witness a reversion to the apartheid era with its plethora of security legislation whose sole purpose was to neutralize opposition on the part of the majority to the policies of the then de facto as well as de jure National Party government? He points out that South Africans who have struggled to put an end to that era were, no doubt, extremely relieved when the constitutional era was ushered in on 29 April 1994 with the final Constitution forming the bedrock of the vision that underpins the society that is desirable and achievable.[12] **He states that a justiciable Bill of Rights entrenched therein constitutes a shield as well as a sword to defend them against the very sort of human rights violations which characterized the apartheid era. He considers that in this context the Anti-Terrorism Bill raises concerns on the part of those South Africans, many of whom asking as to given the fact that there are at least 22 laws already in existence which deal with, inter alia, terrorism and related matters that, whether there is a need for an omnibus terrorism legislation in the could of the ATB.**[13] **He believes that the Bill will do more harm than good, in its present form and should be put in cold storage. He considers that it is manifestly an anti-Islamically orientated measure**[14] **and the fact that the drafters had originally intended to exclude lawyers as well as to hold a detained person incommunicado for longer than the period of 14**

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12 Dr Imtiaz Sooliman who commented on behalf of the Gift of the Givers Foundation says that the Bill appears to be in conflict with the Constitution which in the words of the late Chief Justice Ismail Mahomed *is the soul of the nation*.

13 Mr Faadil Khan is of the view that since there are more than 20 statutes presently on the statute book, they should rather be used than creating a new terrorism law. Mr Vahed Mahomed also comments that he believes that it is the government's duty to protect its citizens, that the current laws are sufficient to combat urban terrorism, that the Bill infringes the rights of its citizens and a *copy and paste* version of laws of other jurisdictions is an insult to our Constitution. Mr RS Gass also comments that South Africa should surely not be subjected to the previous draconian repressive laws against which so many people have fought for so many years and that legislation should not be introduced which suppresses lawful dissent.

14 Mr Nishaat A Siddiqi points out that some politicians are convinced that Pagad are to blame for the bombings. He considers if Pagad were truly intent on overthrowing the government they would focus on more significant targets instead of wasting their time on obscure restaurants. His views are that attacking a government target these days is not so difficult a task as one vagrant recently demonstrated when entering the presidential home successfully. He notes that up to now Pagad has denied all connection with the bombings, a strange decision if they were the perpetrators. He considers that it would make sense to accept responsibility so as to raise the profile of their organisation rather than to condemn the bombings outright, and that any number of groups or organisations out to discredit Muslims would be hard pressed to find a better tactic than the one making headlines. He considers Also that forensic experts would by now have been able to determine who is behind these heinous crimes.

days without the safeguards now built in, shows the hidden agenda behind the drafters, the SA Police Services no less, in submitting the Bill to the Commission. He notes that notwithstanding its ostensible purpose, namely to combat terrorism in the international as well as domestic front, in its current draft form it is a crude piece of legislation reminiscent of the dreaded *Internal Security Act* and Terrorism Bills of apartheid era,[15] and the fact that certain of it provisions are borrowed from these, and other pieces of odious laws, require more than mere lip service against violations of human rights. He says that when legislation confers the power to detain without trial, it authorizes invasion of the individual's most fundamental liberty — the liberty of personal freedom. He considers that there are no compelling reasons to derogate from the constitutional guarantees which the Bill in subtle ways attempts to do. Mr Jazbhay remarks that the cumulative effect of this draft law is the annihilation of the right to personal liberty and given our history, he submits that we can do without it. He points out that though welcome, the safeguards surrounding the renewal or extension of periods of detention are of little assistance taken conjunctively with the 'no bail' provision in section 16 of the Bill.

13.20 Mr Jazbhay comments further that section 39(2) of the Constitution provides a guide to statutory interpretation under our nascent constitutional order in stating:

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15 Mr Essa Zaheer remarks that as a lay citizen of South Africa he considers that the passing of the Bill would be taking a step backwards into the apartheid era, it seems to attack what all South Africans have recently been given, namely the gift of democracy, in essence, it violates the civil and human rights and to accept this would be an atrocity. Dr SAS Haffejee responds in a similar way stating that the proposed legislation seems to be a gross violation of individual rights, that the return to detention without trial is reminiscent of the bad old days of apartheid, to simply belong to any organisation cannot make one automatically guilty of an offence that may be committed by others and that this reminds one of the banning of the ANC and the PAC in the dark days of apartheid. He suggests that the SAPS use all other legal means to bring the perpetrators to justice. Mr Ismail M Moolla responds similarly that if we look at past history during the BJ Voster regime, we are all fully aware what the freedom fighters had experienced with the invasion of individual's most fundamental liberty namely the right to personal freedom. He states also that with the Bill we are going back to those wretched days by once more becoming a police state, the Bill will take us back to the days of apartheid and it will simply mean that those who have sacrificed their lives for the freedom of all South Africans will eventually be made a mockery. He considers that by introducing the Bill disorder and chaos will be created to the extend of the juntas we had seen before the new democratic order was established. He suggests that it would be more effective if the Ministers concerned were to call a conference consisting of various organisations who feel affected and most aggrieved by the Bill. He considers that the government has the necessary legislation to deal with any problems, therefore there is no need for the Bill. Mr A Dangor is also of the view that the Bill demonstrates opposition of Muslims. These sentiments are also expressed by Mr Nishaat A Siddiqi who says that it would be a tragedy especially to the memories of so many ordinary South Africans who have endured repressive laws under apartheid to find similar laws camouflaged in new and impressive terminology reintroduced. He poses the question where are the civil liberties promised to every South African in the Constitution, and whether in a democracy one can hold a suspect for 14 days in detention without trial. He considers it is the tools of an oppressive regime out to silence any opposition. He considers that we do not need new legislation to curtail freedoms but bold legislation and action to eliminate the terrorists who roam our streets daily.

"When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights". He points out that this means that all statutes must be interpreted through a prism of the Bill of Rights, and that all law-making authority must be exercised in accordance with the Constitution. He notes that the Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. He explains that the points expressed must be seen against the backdrop of our history and the fact that constitutional protection of human rights is new in this country and that we need to be mindful of the sort of violations that were perpetrated with impunity by the legislature and the executive. Mr Jazbay considers that such emphasis is necessary particularly in this period when South African society is still grappling with the process of purging itself "of those laws and practices from our past which do not fit with the values which underpin the Constitution- if only to remind both authority and citizen that the rules of the game have changed". He remarks that as such, the process of interpreting the Constitution must recognise the context in which we find ourselves presently, from whence we emerged and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. He notes that the purport and objects of the Constitution finds expression in clause 1 which lays out the fundamental values which the Constitution is designed to achieve and that the Constitution requires us to read and interpret legislation, where possible, in ways which give effect to its fundamental values. He says that consistently with this, when the constitutionality of legislation is in issue, one is under a duty to examine the object and purport of the ATB and to read its provisions, as far as is possible, in conformity with the Constitution.

13.21 Mr Jazbhay states that to reiterate, it should be kept in mind that apart from the 22 existing laws, the South African common law, has the capacity to combat terrorism especially in cases where it is difficult to prove specific intent which these laws require, and with the immense powers afforded to the Investigating Directorate: Investigation of Organised Crime and Public Safety, together with the resources at its disposal anti-terrorism can be implemented. He says that interestingly, although the *Criminal Code* of Canada does not provide for a specific offence of terrorism, certain of its provisions are particularly relevant to the type of offences committed by terrorists, and there is an important lesson we can derive from this, especially when we debate a need for an omnibus terrorism Bill. He suggests that it can be argued, therefore, that any act of terrorism can be prosecuted in terms of existing law,

notwithstanding the worldwide trend to create specific legislation based on international instruments relating to terrorism. He points out that a cursory examination of the ATB shows, for instance that it has borrowed extensively from the provisions of other jurisdictions.[16]

13.22 Mr Jazbhay states that his comment is by no means his final word on the ATB, a piece of legislation which will do more harm than good, in its present form and should be put in cold storage. He considers that it throws out wide-ranging tentacles which constitute a crushing blow to the constitutionally entrenched values fought for and entrenched in the Bill of Rights, and the fact that certain of its provisions are borrowed from these, and other pieces of odious laws, require from us more than mere lip service against violations of human rights.[17]

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16 Mr Jazbhay points to section 22 of the United Kingdom's *Prevention of Terrorism (Temporary Provisions)Act,* 1989; *the Northern Ireland (Emergency Provisions) Act,* 1986 (regarding bail applications); the USA's *Antiterrorist and Effective Death Penalty Act of 1996* (clause 3 of the ATB); Germany's *Kontaktsperregesetz*, 1977, in regulating contact between detainees and their lawyers; France's *Anti-Terrorist Law* of 9/09/1986 regarding the definition of terrorism and the power of the police to handle and investigate terrorist crimes; and the Russian Federation whose Criminal Code defines "terrorism" as 'causing the explosion or committing arson or other acts entailing risk or loss of human life, substantial damage to property or other consequences dangerous to society, if these acts are committed for purposes of disrupting public safety, terrorizing the population . . .';

17 The respondents H, I, M, G, R, N, L, S, F and E Vanker, S, N, F, G and K Nichols, I, Z, E and W Majiet and R Seepye comment that they lodge their opposition against the Bill as they consider that the reason for the Bill was not to curb urban terrorism and with about 23 statutes already available to the SA Police Service to curb urban terrorism why do we need an international terrorism Bill thrown on us by foreign powers to tell us how to run our country. They say they are against any form of terrorism by any person or organisation and believe that the law must take its course but that if the police services were seen to be more effective then the laws we presently have are adequate. The Athlone/Crawford Ratepayers & Residents Association also note their opposition against the Bill saying that the Bill will further impoverish and oppress its citizens and that one should think of future generations, we have come to far to go back to what the apartheid government did to its citizens. Mr Abdul Ragmaan Moos, Mr Riaz Mahomed, Dr Faizel Sarwar and Mr Mahomed Sarwar also hold the view that there are enough statutes available, that the existing laws should be amended to conform to international instruments and that the proposed legislation is not required. Messrs Mufti AS Desai and MIH Khan also note that it is ironical that the government they voted into power now legitimises the very same policies which it fought to obliterate as oppressive and inhuman when it was not in power. They consider that the Bill is a violation of the fundamental rights of citizens as are embodied in the Constitution and imposes unacceptable restrictions on the rights of a person to subscribe to and practice upon the basic teachings of a religion which does not have among its tenets the perpetration of indiscriminate acts of violence. He says that the initiation of such legislation is undoubtedly insidious and shrouded with suspicion in the context of the public statements of one of our ministers that they have the names of the perpetrators of the bombings but *need concrete evidence fit for judicial scrutiny*. He notes that without intending to present any mitigating factors towards the cause of any organisation, it is highly questionable that these *known perpetrators* are left unchallenged because of a *lack of concrete evidence* while an entire religious sector is construed as terrorists purely on a whim and unsubstantiated suspicion, again without *concrete evidence*. He considers that this is anomalous and has a very treacherously familiar tone to it one of the infamous *third force* of the apartheid era.

13.23 Mr Jazbhay states that during the apartheid era, those opposition political parties[18] in parliament did very little apart from paying lip service opposing the labyrinthine set of laws which unleashed five decades of misery and human right violations in South Africa and that scared off by *swart gevaar* type of tactics they became eunuchs muted into submission. He comments that someone once said that the worse type of oppression is when good men do nothing and that those inclined to rush headlong into supporting any type of anti-terrorist type legislation need to ask themselves whether historical precedents have anything to teach them. Mr Jazbhay considers that during the cold war era, the apartheid government willingly became a pawn of the US led alliance against communism with active support being given by the US and the United Kingdom to prop up the apartheid regime. He remarks that the powers that were benignly looked on as Parliament passed a plethora of anti-human right laws which were repressive and violent in their implementation. He remarks that it seems as if we have turned full circle and we are being dictated to again by the powers that be which are dominating the United Nations now that the spectre of communism as epitomised by the then Soviet Union is no longer a factor in the quest for a new world order. He notes that it is in this context that the *Anti-Terrorism Bill* is located. He comments that when legislation confers the power to detain without trial, it authorizes invasion of the individual's most fundamental liberty- the liberty of personal freedom, and that there are no compelling reasons to derogate from the constitutional guarantees which the Bill in subtle ways attempts to do. He notes that if there is a serious terrorism problem, the Constitution provides for the declaration of regional states of emergency and this , in addition to the powers under the *National Prosecuting Authority Act*, ought to be employed by the government in its fight against crime and the threat to security in South Africa. 13.24The Criminal Law and Procedure and Legal Aid committee of the Law Society of the Cape of Good Hope notes that at the request of the Law Society it met to discuss and comment on discussion paper 92, and that the committee also considered a comment prepared by Mr SA Jazbhay. The Committee remarks that it supports the views expressed in Mr Jazbhay's memorandum. The Committee says that it offers an additional comment, namely that during the apartheid era the legislator provided for anti-terrorism legislation which came under constant attack and which was later repealed. The Committee states that it feels that new legislation on anti-terrorism will probably go the same way. The Committee notes that it is of the view that visible policing and effective prosecution in terms of the law whether common or statute is sufficient to combat terrorism.

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[18] Helen Suzman is an exception to this. She is catalogued as the lone voice of conscience that pricked the side of the pachydermic type Nationalist Party government.

13.25 The Commission received petitions totalling hundreds of pages from people opposing the proposed Bill. One such comment was received from members of the Orient Old Boys Club who said that they wish to record in the strongest terms their categoric opposition to the draconian measures proposed in the Bill. They note that the Bill is decidedly oppressive in nature, iniquitous and completely out of synchronisation with the democratic liberal tradition, and that it makes a mockery of the constitutional milieu that South Africa is arguably basking in and smacks of the oppressive, paranoid and dictatorial recent past. Another comment received was from an organisation named Muslims Against Global Oppression (MAGO). They explain that they are a movement that has an Islamic commitment to enjoin what is good and forbid what is evil and that they will expose any form of oppression and exploitation. MAGO states that the indecent haste on the part of the government to steam-roller through Parliament the proposed Bill ostensibly to curb urban terror is a painful reminder of the draconian security laws of the apartheid era which culminated in the worst form of state sponsored oppression and violence against its own citizens. They note that they have not forgotten the thousands of people that were incarcerated unjustly, the deaths in detention and those who went missing without trace. MAGO remarks that the preamble of the Bill contains eleven clauses dealing with the need to introduce the Bill and that significantly, no fewer than ten of these deal with international terrorism and only one addresses local terrorism. They consider that this Bill makes nonsense of the state's efforts to convince the nation at large that the proposed legislation is necessary to combat local urban terrorism. They point out that it is clear that the proposed legislation forms part of the global agenda of the new world order policed by the greatest terrorist State, the United State of America. MAGO notes a number of areas of concern regarding the Bill such as —

- **that any person merely suspected of being involved with terrorism may be detained for interrogation for up to 14 days;**
- **detainees are not entitled to apply for bail;**
- **detainees will be traumatised which is tantamount to torture both physically and mentally;**
- **the subject matter of the Bill is so generally defined that its very vagueness could lead to abuse of power in the interpretation and application of the legislation;**
- **the legitimate grievances of the oppressed masses against corruption, crime and economic exploitation will be the stifled;**
- **the power of police officers to authorise the stopping and searching of vehicles and persons will encourage the further abuse of an already established power given to the police;**
- **members and supporters of an organisation deemed to be a *terrorist organisation* would be criminalised by mere association with**

such an organisation, lawful activities such as fundraising, logistical and material support of such an organisation would be a crime and Muslim would be restricted in choosing which organisations should receive their charities;

< the Bill does not make provision for political detainees.

13.26 MAGO considers that the irony of the State's determined effort to bulldoze the Bill through Parliament is that it merely serves to highlight the inefficiency and ineptitude of the Police Service to deal with the serious crimes which are rampant in the whole of South Africa. MAGO states that it questions the justification of reverting to past draconian laws to deal with urban terror as there are already 22 laws on the statute book dealing with crime and which they consider more than adequate to deal with any crises situation. MAGO note that they demand the scrapping of the Bill; condemn in the strongest terms the irresponsible conduct of Ministers Tswete and Maduna in blaming Pagad for the recent spate of bombings in the Western Cape without due process of law having taken place; hold the State accountable and responsible should any innocent party suffer adversely as a result of the implementation of the Bill; and view the introduction of the Bill as an attempt on the part of the State to thwart any organisation that poses a viable threat to the security of the new world order.

13.27 The United Ulema Council of South Africa (UUCSA)[1] note that their submission will not deal extensively with the unconstitutionality of the proposed Terrorism Bill, as there will be without doubt many submissions from various credible organisations that will do justice to the extent of the unconstitutionality of the Bill. They explain that the focal point of their submission is to investigate, given the history of the Antiterrorism Bill from its international evolution, whether such a Bill is necessary and if so what precisely will the Bill achieve if it is passed as law.

13.28 UUCSA notes that the nub of their submission is this: one man's terrorist is another's man's freedom fighter, and although the present Government is democratically elected, that

[1] The UUCSA explains that it is the largest representative organisation of the Muslim community in South Africa and that it consists of leaders of each of the various categories of Muslim communities within South Africa. They say that UUWA's mission statement is to unify, co-ordinate and represent all Muslims of South Africa on a National and International basis, and amongst others its objectives are to protect, preserve and promote Islamic law and to procure religious freedom. The composition of UWSA is an umbrella body comprising of all theological formations in South Africa. Its founding members are the Muslim Judicial Council; Jamiatul Ulama - Transvaal; Jamiatul Ulama - Kwazulu Natal; Sunni Ulama Council; and Sunni Jamiatul Ulama. In its constituency, UWSA has approximately 455 Mosques and 408 educational institutes in South Africa. UUCSA through its affiliates control the overwhelming majority of religious institutes and Mosques in South Africa. It is representative of and enjoys the confidence of the greater Muslim populace of the country.

process of being democratically elected did not come about easily. They point out that the streets of Sharpeville flowed with the blood of youth whom to this day tribute is paid to, the blood of martyrs being the blood of South Africa's freedom fighters — yet these very freedom fighters were labelled, classified and declared enemies and terrorists of the South African State. They point out that the African National Congress was declared a terrorist organisation, just as the Pan African Congress and host of other organisations. They state that the consequence of this was that if a person was found to be a member of such an organisation of what they will refer to as freedom fighters, and if such a person was convicted of the "offence" in terms of the Internal Security Act (a piece of legislation which is comparable to the present *Anti-Terrorism Bill*), such a person would be imprisoned. They refer to *S v Xoswa & Others*[2] **where the accused were imprisoned for two years for being members of the ANC in terms of sections 31(a)(i) of Act 44 of 1950, which forbade a person inter alia to become a member of an unlawful organisation. They note that the South African law reports are exhaustively compiled of the various incidences of freedom fighters being arrested and detained for several years, and that one example which comes immediately to mind is the regrettable and unfortunate imprisonment of our ex President Dr Nelson Mandela for a period of 27 years. They consider that Walter Sisulu, Chris Hani, Ahmed Kathrara and the rest of the so-called "terrorists" should not be forgotten.**

13.29 UUCSA remark that on 24 January 1995, the President of the US by executive order placed a prohibition on transactions with "terrorists" who threatened to disrupt the Middle East Peace Process.[3] **They note that this order declares certain organisations to be terrorists, just as the previous South African Government declared the ANC and PAC as terrorist organisations. They ask whether South Africa is prepared to align itself with such a view and is South Africa willing to align itself with the harsh, violent and brutal slaying by an Israeli sniper who cold-bloodedly kills**

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2 1965 (1) SA 267 (C).

3 The following organisations were listed in the USA (at the time the respondent commented) as designated by the then Secretary of State Madeleine Albright on October 8, 1999: (see http://usinfo.state.gov/topical/pol/terror/fto1999.htm) Abu Nidal Organization (ANO); Abu Sayyaf Group (ASG); Armed Islamic Group (GIA); Aum Shinriykyo; Basque Fatherland and Liberty (ETA); Gama'a al-Islamiyya (Islamic Group, IG); HAMAS (Islamic Resistance Movement); Harakat ul-Mujahidin (HUM); Hizballah (Party of God); Japanese Red Army (JRA); al-Jihad; Kach; Kahane Chai; Kurdistan Workers' Party (PKK); Liberation Tigers of Tamil Elam (LTTE); Mujahedin-e Khalq Organization (MEK, MKO, NCR, and many others); National Liberation Army (ELN); Palestine Islamic Jihad-Shaqaqi Faction (PIJ); Palestine Liberation Front-Abu Abbas Faction (PLF); Popular Front for the Liberation of Palestine (PFLP); Popular Front for the Liberation of Palestine-General Command (PFLP-GC); al-Qa'ida; Revolutionary Armed Forces of Colombia (FARC); Revolutionary Organization 17 November (17 November); Revolutionary People's Liberation Army/Front (DHKP/C); Revolutionary People's Struggle (ELA); Shining Path (Sendero Luminoso, SL); Tupac Amaru Revolutionary Movement (MRTA).

a 12 year old Palestinian boy in his father's arms whilst both father son are unarmed and at a prayer congregation in a Mosque in Jerusalem? They point out that the entire world cried out aloud at the incident which occurred on Friday the 1st of September 2000 in Palestine. The Middle Eastern Peace Process is a debate about land, and the right to self-determination much the same way as our own history teaches us. UUCSA explain that many of these liberation movements are declared terrorist organisations because they seek to protect and preserve their right to self determination in a land which they say they have a claim to. UUCSA asks to what extent does South Africa align itself to the United Nations list of terrorist organisations?[4] **They remark that it is clear that 80% of the organisations listed therein are Muslim organisations, and that there is global paranoia about Muslim fundamentalism in the West, particularly in America. UUCSA says that an article which appeared in the *Impact International Magazine* in February 1999 issue clearly illustrates the extent of such paranoia**[5] **as well as an article which appears in the *Impact International Magazine* in August 2000 entitled "Fighting Terrorism on Hearsay - Secret Evidence Threatens Everyone's Rights". They note that 20 Muslims remain in jails on the basis of a 1996 Antiterrorism Bill authorising the use of secret evidence in deportation proceedings, and neither defendants nor their lawyers have the right to see such evidence. They ask what kind of justice is this and note that it appears to bring back haunting memories of the former *Internal Security Act*.**

13.30 They also note that in an article written by a New York journalist Judith Miller it is reported that the parents of an Israeli American teenager killed in a 1996 "terrorist attack" in Jerusalem filed a $600 million lawsuit in Chicago against several Islamic charities, non-profit groups and individuals contending that they raised money in the United States of American for Hamas, the militant Palestinian group, and the allegation by Miller is that these organisations 'ostensibly have religious and charitable purposes,' but finance terrorism. They say that American lawyers Nathan Lewin and Thomas B Carr, two of the lawyers for the plaintiff in the $600 million lawsuit said that they hoped to prove "that anyone sending money to a group like Hamas could be legally accountable for all its activities, and that that's what we believe Congress intended in enacting the Antiterrorism Act of 1990 and 1992", Carr said. They ask isn't that what the present *Anti-Terrorism Bill* will achieve, whether or not it is the intended objective, in particular isn't that what Section 1 and in particular the definition of funds and clause 3 are designed to achieve.

13.31 UUCSA says it wants to clarify one point and that is that they strenuously

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4 They enclosed a copy of the Terrorist Organisation Profiles of the United Nations.

5 They enclosed a copy of the article entitled Profiling Islam as Terrorism.

oppose violence against civilians, and indiscriminate bombings where women and children are murdered. They say they do believe, however, that if adequate policing of a highly specialised team of officials is put into place, this would lead to arrests and convictions of the perpetrators in these crimes. The consider that the existing provisions of the bail laws and particularly the Criminal Procedure Act contain sufficient safeguards in order to protect the State to further its investigations and not release the accused if their release would be a continued threat to the State.

13.32 UUCSA remarks that in the past history of South Africa many people were killed in bomb blasts on both sides of the fence, in what would be defined as terrorist activities in terms of the Bill, yet the ultimate objective and aim of the Truth and Reconciliation Commission was to grant political amnesty to the perpetrators of crimes that fit the glove of the present Anti-Terrorism Bill. The UUCSA considers that this was done only because the Government recognises that certain crimes which committed in the course of a political objective stand on a different footing to common law crimes such as murder, robbery etc and the only question is on which side of the fence does the Government want to align itself? They point out that an effect of clauses 1 and 3 of the *Anti-Terrorism Bill* will be to haunt our future with a case known as *S v Arenstein*[6] where Arenstein was sentenced to 4 years' imprisonment for, *inter alia*, financially assisting the South African Communist Party in 1967 and that our law reports are plagued with such decisions. They note that the incident of the 12 year old Palestinian boy who was shot to death in cold blood by the Israeli sniper is an incident that will no doubt elicit a response from one or other liberation movement in Palestine. They ask whether the organisation that fights for that cause is truly a terrorist organisation in South African eyes, despite the American list of "terrorist organisation profiles" which declares virtually every Palestinian liberation movement a terrorist organisation. The UUCSA says that they do not intend to deal at any length with the unconstitutionality of the *Anti-Terrorism Bill* although there are some glaring unconstitutional provisions which violate the South African Bill of Rights. They note that a fundamental feature of the Constitution is the right to silence and the protection against self incrimination. UUCSA considers that the Bill, in addition, offends the provisions of section 12(1)(a) to (e) and sections 35(1)(a) to (c) of Act 108 of the Constitution.

13.33 UUCSA states that in the final analysis, if a *Terrorism Act is* to be passed, caution should be used in very carefully defining precisely what terrorism is and what the standpoint of South African authorities is on terrorism, and whether, in fact, the

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6 1967 (3) SA 371 AD.

South African authorities will adopt the American position regarding the Palestinian issue for instance. They suggest that the emphasis should be to target individuals and not organisations. They pose the question how is one to distinguish between a situation where a person provides funding to an organisation which is viewed as being a terrorist organisation although its intention is the provision of legitimate charitable assistance and which may be the fundamental object of the organisation concerned. UUCSA suggests that the past should not be repeated, and as the Bill presently stands this will be its ultimate effect. They consider that there are no guarantees that police officials or persons in Government opposed to Islam may use the provisions in the manner used by the apartheid Government in order to undermine the struggle. UUCSA says it is therefore and for all the aforementioned reasons opposed to the Bill in its present form.

13.34 The Media Review Network (the Network) explains that there are more than 1 million Muslims living in South Africa and that in the past, and on an on-going basis, the mainstream media has defined who Muslims are and what they represent for the general South African public.[7] **The Network states that their views and opinions, policy positions and strategic interests have always either been ignored or deliberately distorted. The Network points out that, through a loose informal grouping of individuals, it considered it imperative in the rapidly changing socio-political landscape of the new South Africa, to ensure that the dynamism of Islam not to be lost in the maze of perverse innuendos and that the need to have Muslim opinions and insights heard on a daily basis as a matter of routine, rather than as an**

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[7] The Media Review Network explains its aims and objectives as follows:

- To monitor, analyse, dissect and evaluate distortions fabrications and double standards in the mass media;
- to research the impact on Islam caused by such misrepresentations and publish its findings on an on-going basis;
- to arouse curiosity, inquiry, research and interest in Islam;
- to counter the onslaught on Islam, it''s norms and values;
- to identify and nullify certain stereotypes e.g.: “terrorists”, “fundamentalists”, “radicals”, “fanatics”, etc;
- to express alternate perspectives and policy positions on local and international issues;
- to be proactive in respect to projecting and promoting Islam;
- to establish rapport with journalists, editors and key opinion-formers;
- to source appropriately qualified and articulate spokes-persons to represent Muslims on radio and TV; and to widen the network of informed Muslims to address the print media;
- to hold seminars and workshops on information gathering and dissemination;
- to promote the training of committed Muslims in the specialised fields of communication/journalism;
- to establish an effective network of co-operation with Muslims engaged in the publication of Islamic magazines, periodicals, newspapers and with those engaged in community Islamic radio stations.

exception. The Network notes that its aspiration is to dispel the myths and stereotypes about Islam and Muslims and to foster bridges of understanding and that Muslim perspectives on issues impacting on South Africans is a prerequisite to a better understanding and appreciation of Islam. The Network explains that they believe that freedom of speech is a fundamental human right but it is also a responsibility which must be discharged with a sense of justice and a commitment to the truth.

13.35 The Network notes as a prelude to its comment that the Bill intending to deal with terrorism that has its motivation in dealing with internal incidents of terrorism, although the motivation for the Bill is largely based on international precedents, requires a deeper analysis, of the general ideas implicit in its interpretation. The Network comments that the Rule of Law stands for the view that decisions should be made by the application of known principles of all laws and that, in general, such decisions must be predictable, and as such all citizens must know what the law is. The Network notes that South Africa has just traversed a period where some of its legislation and in particular the security legislation could be regarded as the worst examples of statutory violation of the rights and liberties of the overwhelming majority of its subjects and inroads were made in an arbitrary fashion at the whim and fancy of certain individuals whose intentions are now being articulated, by these individuals who attacked the integrity, dignity and liberties of individuals that chose to oppose the Draconian measures that were in place at the time. The Network remarks that the cruelty that has been portrayed is cruelty reminiscent of the Middle Ages and the arbitrary and uncontrolled powers applicable at the time over-stepped every norm of the legal idea. The Network comments that in any civilized society, arbitrary powers, sanctioned injustices and brutal application of the law, by the upholders of law and order cannot be countenanced even in the guise of security actions or under the pretext of total onslaught.

13.36 The Network notes that South Africa is a constitutional state, and has a Constitution which articulates the idea that government should obtain its powers from a written constitution and that its powers should be limited to those set out by the constitution and that in South Africa we now have such a Constitution. The Network points out that the dichotomy of any government in a constitutional state is identified as follows: *the government that is established must have sufficient power to govern, but that power has to be structured and controlled in such a way as to prevent it being used oppressively*. The Network states that a constitution limits the power of the government in the following ways:

- **It imposes structural and procedural limitations on power;**
- **Through the operation of the bill of rights, substantive limitations are imposed.**
- **A government may not use its power in such a way as to violate any of a list of individual rights. Inherent in this is the right of individuals in terms of our constitution to: Just administrative action; access to courts; he rights of arrested, detained and accused persons.**

13.37 The Network notes the comment by the Commission *"the substantive and the procedural aspects of the protection of freedom are different, serve different purposes and have to be satisfied conjunctively. The substantive aspect ensures that a deprivation of liberty cannot take place without satisfactory or adequate reasons for doing so. In the first place it may not occur arbitrarily, there must, in other words be a rational connection between the deprivation and some objectively determinable purpose. If such a rational connection does not exist ... the protection of freedom … is now being denied."* The Media Review Network considers that the procedure envisaged in affording police officers discretion to stop and search any vehicle or person as those envisaged in clause 21, clearly flies in the face of the noble intentions articulated herein; that the police officials simply have too much power at their disposal; and that the administration of justice according to law means administration according to standards, more or less fixed, which individuals may ascertain in advance of controversy and by which all are reasonably assured of receiving like treatment. The Media Review Network comments that the law enforcement agencies have been inherited and retained from the apartheid era, and as such they are not capable in dealing with issues such as the ones on hand and there are no systems of checks and balances in place.

13.38 The Media Review Network remarks that no matter how noble the intention of the drafters of the proposed anti-terrorism legislation, the effect of such legislation will damage and or destroy the essential elements and basic features of our Constitution. The Network states that the power afforded to individuals in the proposed legislation, includes the power to violate the constitutional principles and suggests that those charged with upholding the Constitution should not be seeking authority directly or indirectly to circumvent the Constitution. The Network remarks that at present, there are sufficient remedies in the common law crimes that can deal with the criminal activity that has to be prohibited; the constitutional values enshrined in our Constitution underlie the unique system of government in South Africa; and the anticipated legislation can perhaps be interpreted in such a manner where diversity, religious and ethnic tolerance now becomes questionable, on the part of the

government. The Network states that it can also be argued that the anti-terrorism laws may well be used to detain and silence political opponents, as well as purportedly subversive actions whose activities may have nothing to do with terrorism. The Network suggests that the solution does not lie in the implementation of Draconian legislation, but in proper policing, prosecution and the punishment of crimes already recognised in terms of our common law.

13.39 The Media Review Network points out that the United States government has implemented a law that is structured in a similar fashion to the Anti-Terrorism Bill. The Network notes that the implications of such legislation and the arbitrary fashion in the imposition of its provisions, profiles Islam as a terrorist religion and adherents of the Islamic faith as fundamentalists/terrorists and that the United States government has gone ahead with implementing a law, which targets Muslim passengers at airports. The Network says that the overwhelming majority of people that have been singled out for security checks by the new profiling system and have been subjected to crude and humiliating searches at the United States airports have been Muslims or people of Arab origin and Muslim women in *hijab* and Muslim men with beards. The Network states that the recent comments made by the Minister of Safety and Security and other high profile politicians are reminiscent of the comments that were made in the United States by prominent politicians prior to the implementation of the anti-terrorist legislation. The Network points out that Islamic organisations have invariably come under severe criticism for lawful civil action and condemned as unlawful without proper investigation or proof in most of the instances, and, unfortunately, this pattern seems to be repeating itself in South Africa. The Network considers that the proposed legislation will in all probability be utilised to silence opponents of the government no matter how vociferous and justified the opposition may be. The Network notes that the implications of the legislation in the United States have included the following:

- **Fundraising has now been criminalized, for groups that have been deemed to be terrorists.**
- **Banks are forced to freeze funds of these organizations.**
- **Lawyers are not generally available to defend persons being prosecuted under the terrorist legislation.**
- **The fairness of trials under this legislation is now questionable.**
- **The wording of the legislation is so wide that it allows for selective enforcement.**

13.40 The Media Review Network considers that the above will easily find its way into their lives if the law is to be passed, the impact that such actions will have for the different communities presently being accused by the Minister for Safety and Security will be profound and communities that are vociferous in calling the government to

perform its duties will be targeted. The Network says that the present document has the full backing of the United States and that it is not inconceivable that those persons who will be tasked with the responsibility of implementing the law will receive their education and training in the USA. The Network notes that until very recently, civil rights activists and human rights proponents were subjected to similar forms of repression and the present leaders and representatives in Parliament were assaulted, falsely accused of crimes, subjected to slander campaigns, and were brutally treated; demonstrations were suppressed by tear gas, rubber bullets, live ammunition and police dogs in order to terrorise people who had demanded equality. The Network notes that it was the sacrifices of our present leaders who stood against unjust laws that brought about changes and many of the leaders presently in Parliament are no strangers to difficulties themselves having spent time in prison as a result of the repressive legislation. The Network considers that surely those who have tasted the bitter end of such repressive legislation can never allow history to repeat itself no matter what the price may be.

13.41 The Media Review Network comments that it is the "omnibus" approach addressing the entire spectrum of terrorism from the highjacking of an aircraft or nuclear terrorism to mere domestic political offences that leads to such drastic statutory provisions. The Network says that these provisions are unjustifiable in any democratic country when applied to relatively minor political offences and yet become palatable and justifiable when seen against the backdrop of nuclear terrorism or the possession of radioactive devices. The Network comments that under the guise of deterring international terrorism, mere ordinary political protests and activities are clamped down yet again in a repressive and undemocratic manner by the use of draconian measures, which prior to 1994, were universally condemned for their repressiveness. The Network states that while the state may justify the introduction of drastic measures to deter international terrorism, in harmony with the Organisation of African Unity and the United Nations, on the ground that South Africa is now part of the international community, this in no way justifies the use of such repressive methods to deter political protests in a democratic country. The Network comments that the two objects of combatting international terrorism and deterring domestic political unrest and terrorism cannot justifiably be grouped together and suggests that they must be divorced and present legislation be relied on, coupled with more effective enforcement to deter domestic political offences. The Network considers that present legislation is adequate to counter domestic 'terrorist" activities- such as the *Internal Security Act* 74 of 1982, and in particular Section *54(1),* and a whole host of similar legislation, is beyond argument. The Network says that

comparisons drawn with jurisdictions such as Northern Ireland or Israel are not only unhelpful but positively misleading and suggests that the *omnibus* approach thus be rejected.

13.42 The Network comments that while the security of the state may under certain circumstances, be an overriding interest, the measures adopted in the Draft Bill effectively erode the basic liberties of the individual. The Network remarks that every citizen has the right not to be deprived of his freedom arbitrarily, and he has, according to Sachs J in *De Lange V Smuts NO* 1998 3 SA 785 (CC) a right to bodily and psychological integrity. The Network says that it is shocking that under the guise of countering "terrorist" activities, gross invasions of individual rights are now being justified, that even the right of silence is now under threat and that these drastic powers cannot be justified on the ground that they are reasonable and necessary in the interests of the community or the state.

13.43 The Media Review Network comments that the South African Constitution represents a decisive break from the past but the Draft *Anti-Terrorism Bill* destroys that achievement, and that experience shows that power can, and inevitably, will be abused. The Network remarks that the Constitution lays the foundation for a democratic and an open society, that every citizen enjoys the equal protection of the law and that human dignity, equality, and the advancement of human rights together with non-racialism and non -sexism are the values enshrined in the Constitution (they note Judge Chaskalson's *Delmery the Third Braam Fischer Lecture*). The Network considers that these limitations on these rights, contained in the *Anti-Terrorism Bill* are manifestly neither reasonable nor justifiable as they go further then is required for the protection of the interests of the state. The Network comments that the Draft Bill fails to achieve a proper balance between the protection of the fundamental rights of the individual against the general interests of the community and the state and says it strongly urges that it be rejected, and that the implementation and application of the *Anti-terrorist Bill* be abandoned.

13.44 The Sunni Ulama Council of the Cape (the Council) comments that Muslims in South Africa, more so in the Western Cape, are gravely perturbed by the climate of fear and suspicion against Muslims and Islam in particular that has been generated by remarks, which are of extreme concern to Muslims, made by Ministers Steve Tshwete and Penuell Maduna, linking the spate of bombings in the Western cape, a senseless and heinous act, to *Muslim fundamentalism*. The Council states that the meaning of the word *fundamentalism* according to the dictionary is *a person who upholds a strict or literal interpretation of traditional religious beliefs*. The Council considers that by the aforesaid definition, the

honourable Ministers have painted every Muslim who upholds the principles of Islam as being *fundamentalists*, which the Council remarks is indeed a very grave error. The Council notes that what concerns them is that with the rhetoric of the Ministers and their unfounded claims not a single person has been arrested for these senseless acts and that the current wave of violence is used to justify the imposition of the ATB. The Council remarks that the negative implications of the Bill for civil society as a whole and Muslims in particular, based on the experience of communities in other parts of the world, where similar draconian legislation exists, has lead to intense consultation within the Muslim community. The Sunni Ulama Council states it calls on the government to retract the Bill for the following reasons:

< In its Preamble, whilst reaffirming its condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, it makes specific reference to, inter alia, *considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them*. Given official utterances by the likes of the Minister Tshwete *et al* against certain organisations like Pagad and Qibla, a reasonable man will reach the inescapable conclusion that it has an Anti Islamic connotation. Islam has been equated with *terrorism*, falsely we must add, not only by the so-called superpowers but also by the world's media, given the hype associated with Hollywood inspired movies. Furthermore, the official response by the said Ministers attributing the criminal acts on unknown persons, in the absence of hard evidence, which lead to the senseless loss of live and maiming of people in some of the bombings in the Western Cape to *Islamic Fundamentalists* is a typical case in point. It is therefore arguable that the ATB targets and discriminates against Muslims and that accordingly it or parts of it could be challenged to be unconstitutional and invalid.

< The definition of the words *terrorist acts* is too wide and is bound to become unstuck should it become subject to constitutional challenge. It must be understood that with the proliferation of organised crime in this country, sophisticated crime syndicates could use the anti-Islamic hysteria publically expressed to whip up support against terrorism to implicate all bona fide organisations who are fighting organised crime and drug syndicates, especially in the Western Cape region. It will be recalled that a Mr Deon Mostert revealed the existence of third force activity in the Western Cape region whose intention was and we submit still is, to destabilise the Western Cape region and pin the blame on somebody else as our Ministers have tended to do without backing it up with proof.

< It will violate the constitutional right to be presumed innocent if people may be charged with membership of any organisation deemed to have links with groups designated as *terrorists*.

< Legislation is so vaguely and broadly defined that in practice it could infringe on the basic constitutional rights to freedom of expression and association.

< It would criminalise fundraising for lawful activities associated with *unpopular* causes.

< The ATB seeks to entrench the principle of guilt by association.

< The legislation should subtly redefine terrorism by simply establishing a nexus between material support and so-called *terrorist activities*.

< Certain clauses in the ATB are reminiscent of the apartheid are which the majority of people in this country including the Muslims, fought so vehemently against, and who were extremely relieved when the new constitutional ear was ushered in on the 29/4/1994 with the final Constitution forming the bedrock of the vision that underpins the society that is desirable and achievable.

< It would be a crime for Muslims to support relief, charitable or religious activities or groups labelled as *terrorists* by people who are themselves guilty of perpetrating acts of terrorism. It would constrain the choices of Muslims in determining or deciding a worthy cause for their charities.

< It may bar personalities associated with a so-called *terrorist organisation* from

attending or addressing public gatherings. This would effectively control who cannot or cannot speak in our mosques and it will also inhibit what could be said from our pulpits.

< The integrity of Islamic institutions of higher learning may also be compromised since they are viewed as the seedbed for Muslim *Fundamentalism*.

< It will unilaterally brand organisations, states or countries that seek to be free and independent of Western and Imperialistic control, especially id such a stance is postulated upon an Islamic overview.

13.45 The Sunni Ulama Councul reiterates that Islamic teachings and practices are strongly opposed to any indiscriminate acts of violence and that the South African Constitution has adequately covered the very sort of human rights violations which characterised the apartheid era. The Council states that a justiciable Bill of rights entrenched in the Constitution acts as a shield and a sword to defend South Africa's people against any human rights violations and that the acts of violence orchestrated in the Western Cape compels the Muslim community to question the motives of these faceless perpetrators. The Council poses the question whether somebody is deliberately manipulating this piece of legislation directed more at Muslims who happen to be classified as the overwhelming majority of so-called *terrorists* and *fundamentalist* organisations by the very people who sow fear and terror in all corners of the world. The Sunni Ulama Council considers that the cumulative effect of the Bill is the annihilation of the right to personal liberty and given South Africa's history the Council submits it is something that the country can do without.

13.46 Ms JA Schneeberger of the office of the Chief State Law Adviser (International law) of the Department of Foreign Affairs notes that the Department of Foreign Affairs, and particularly the office to which she is attached, has a specific and ongoing interest in the elaboration of an *Anti-Terrorism Act*. She explains that their interest arises from the fact that the international community has been particularly active in elaborating measures to combat international terrorism and has elaborated 12 international conventions on this. She remarks that as has already been pointed out in the Discussion Paper, South Africa is only party to 5 of these Conventions and needs, on a priority basis, to ratify the other 7. She says that many Member States, and in particular the G8 have an active lobby group requesting States to report on the implementation of these Conventions and it is imperative that South Africa indicates progress on its own initiatives to implement these conventions. She notes that the South African Law Commission's Project, and the future *Anti-Terrorism Act* are crucial components of this. In addition, she notes, they also believe that it is imperative for South Africa's security interests that it be part of the international legal framework to combat terrorism. She explains that to date the major stumbling block in ratifying the terrorism conventions is the fact that they are all based on a "prosecute or extradite" framework with extensive jurisdiction provisions which do not fit neatly into the existing legislative basis. They believe that the proposed *Anti-Terrorism Bill* can be the ideal vehicle to enhance the

legislative basis in order to enable South Africa to ratify these Conventions. Their comments on the *Bill* are therefore made from the point of departure as to whether or not the provisions comply with South Africa's international obligations, thereby enabling South Africa to ratify these Conventions.

13.47 Ms Schneeberger remarks that the debate in the UN Ad Hoc Committee on a Comprehensive Convention on Terrorism[1] **is interesting because it is also reflected in the approach that has been taken in the SALC's project. She explains that the decision to elaborate a comprehensive convention is a historic one as a logical corollary for such a convention will be some sort of definition for terrorism. She notes that the need for such a definition was raised in the SALC Discussion Paper. However this is likely to be a very difficult task. She considers that the cliché "one man's terrorist is another man's freedom fighter" is only a cliché because it is true, and the political interests and dynamics were clearly reflected in the debate in the Sixth Committee on this item. Ms Schneeberger remarks that the main issue at stake therefore is the scope of a Comprehensive Convention, that some States argue that, as the name implies, the Convention should be truly comprehensive in nature but that they differ on how this should be done. She notes that some argue that the definition of the crime should focus not on the type of crime (murder, kidnapping etc) but rather on the motive for the crime (violence with the intention to compel the State to do or abstain from doing something), and that the definition of the crime should be broad enough to encompass State terrorism. Others argue that the Convention should merely fill in the gaps left by existing Conventions and should therefore focus on crime specific issues (such as murder, extensive destruction of property etc) without focusing on the intention. She states that the States preferring the more restrictive, crime specific approach, were also concerned that a comprehensive approach would either lead to confusing conflicts between the crime specific conventions on terrorism and the comprehensive convention, or that the comprehensive convention would make the crime-specific conventions redundant.**

13.48 Ms Schneeberger explains that in the Commission's proposed Bill there is thus a comprehensive definition for a terrorist act, which focuses on the intention of the perpetrator and could theoretically cover all the other acts such as hijacking, hostage

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[1] Which was first discussed by the United Nations, and in particular the Sixth (Legal) Committee and its Ad Hoc Committee on Measures to Eliminate International Terrorism, in the ongoing project on Measures to Eliminate International Terrorism: Ad Hoc Committee from 25 September – 6 October 2000. She notes that the core issues for the elaboration of a comprehensive convention were identified and discussed, and that due to the sensitivity and complexity of the matter however, progress is slow and further sessions were to be held in 2001 to continue this process (the first during February 2001).

taking, terrorist bombings etc provided that the requisite intention is present and, the *Anti-Terrorism Bill* also includes specific acts, which focuses on the nature of the act rather than a specific intention. She comments that in view of the fact that the title of the Bill is the "*Anti-Terrorism Bill*" what this implies is that even if there is no "terrorist intention" (i.e. to compel a government to do or abstain from doing any act) specific acts are identified as being of such a serious nature that they will still fall within the realm of terrorism. A person hijacking an aeroplane to the Bahamas with no terrorist intention but merely with the intention to enjoy a free holiday could therefore be classified as a terrorist for having committed a crime under the *Anti-Terrorism Bill*. Similarly a mugging of an internationally protected person with only criminal intent would also be included in the *Anti-Terrorism Bill*.

13.49 Ms Schneeberger remarks that they have no strong views on the viability of this approach from a domestic law point of view, it is not within the field of their expertise. She suggests, however, that in view of the fact that the Bill can cover common (although serious) crimes as well, the drafters may wish to consider using a more neutral title such as the "Security Act". She remarks that from an international law point of view they do favour the current approach in the Bill — that his is the approach that has been utilised by the international community, and while it is perhaps legally not very neat, it is workable. She notes that the approach currently followed in the Bill will enable South Africa to ratify the existing crime specific terrorism conventions. She states that it also clearly incorporates the crimes from these conventions and is therefore a clear indication of South Africa's willingness to co-operate with the international community on the basis of the comprehensive legal framework which has been elaborated at an international level.

13.50 The Human Rights Committee of South Africa (the HRC) remarks that there is no question about the importance of combating terrorism towards its elimination.[2]

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[2] The Human Rights Committee of South Africa explains that it is an independent national non-governmental organisation (NGO) established from a number of banned human rights organisations in September 1988. "We believe in protecting and promoting fundamental rights and in sustaining and developing democracy. We seek to contribute to a South Africa where its entire people effectively enjoy the benefits enshrined in the Constitution and the Bill of Rights.
The HRC owes its history to a number of South African NGOs that had fought for the fundamental rights for all South Africans for many years. Its formation was in response to the banning in February 1988 of a number of anti-Apartheid organisations, in particular the Detainees' Parents Support Committee (DPSC) that was established in 1981. Amongst other activities, the DPSC had undertaken to monitor and publicise human rights violations in South Africa. The HRC aimed to fill the information vacuum resulting from its banning.
Our objective is to bring the Constitution to our people. The HRC has adopted an integrated and holistic approach whereby its monitoring, research, reporting, public awareness and advocacy work aims to:

The HRC states that terrorism constitutes a serious violation of fundamental rights, in particular rights to physical safety, life, freedom and security, and impedes socio-economic development through destabilisation of states. The HRC notes that South Africa, a nation that seeks to move from a deeply divided society characterised by strife, conflict, untold suffering and injustice to a future founded on the recognition of human rights, democracy and peaceful co-existence and opportunities for all by way of the Constitution, cannot afford to ignore the growing incidence of terrorism. The Human Rights Committee points out that it is especially concerned about the continuing urban violence and bombings in the Western Cape and the effect it has on building a human rights culture.

13.51 The Human Rights Committee notes that there are advantages in approaching terrorism from an international perspective, since international conventions and United Nations resolutions focus on *international* terrorism.[3] **The HRC also point out**

< ensure that people's rights are respected, promoted and protected;

< ensure that legislation and government policies conform to the Constitution;
< assist people within state institutions to respect, promote, protect and fulfil constitutionally entrenched rights;
< empower people to know their rights and assert them; and,
< monitor trends in the SADC region that could impact on South Africa.

At the outset the stated objectives of the HRC were to monitor and disseminate information about the observance or violation of fundamental rights by the Apartheid government. Special emphasis was placed on repression, defined by the HRC as actions perpetrated by the proponents and supporters of Apartheid for the purpose of maintaining and defending the system of Apartheid. The HRC concentrated its efforts on monitoring and exposing such violations with the express purpose of bringing them to the attention of a wide audience, in particular to those in a position to influence the demise of Apartheid.

Subsequent to South Africa's first non-racial democratic elections in April 1994 and the acceptance of the Government of National Unity, the HRC continues to see its role as a watchdog body concerned with the protection of civil society from the abuse of government power. The HRC moves to identify gaps in human rights reporting and to provide a regular comprehensive national human rights barometer. The HRC has broadened its activities to include lobbying for effective human rights legislation."

[3] The HRC points out —

< Article three of the *International Convention for the Suppression of the Financing of Terrorism*: "[t]his Convention shall not apply where the offence is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has a basis under … this Convention to exercise jurisdiction…"
< *The Convention of the Organisation of African Unity on the Prevention and Combating of Terrorism* which does not provide a clear nationality exception, but its focus is nevertheless international.
< *Resolution 1269 (1999)* adopted by the Security Council (19 October 1999) which emphasises the "necessity to intensify the fight against terrorism at the national level and to strengthen … effective international cooperation in this field." The *Resolution* is a condemnation of *international* terrorism and a call for international cooperation to address international terrorism on a domestic level.

that these conventions and resolutions focus on the fair treatment of the alleged perpetrator: Under Article 17 of the *International Convention for the Suppression of the Financing of Terrorism* any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention must be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law. Under Article 7(3) any person regarding whom measures are being taken shall be entitled to communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person's rights or, if that person is a stateless person, the State in the territory of which that person habitually resides; be visited by a representative of that State; be informed of that person's rights under subparagraphs (a) and (b). Under article 7(3) any person against whom the national measures to ensure that person's presence for the purpose of prosecution are being taken shall be entitled to communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person's rights or, if that person is a stateless person, the State in the territory of which that person habitually resides; be visited by a representative of that State; be assisted by a lawyer of his or her choice; and be informed of his or her rights.

13.52 The Institute for Democracy in South Africa (IDASA) explains that while it is understood that the drafting of the *Anti-Terrorism Bill* is still in its preliminary stages, certain aspects of the Draft Bill threaten to erode the attempts which have been made post-1994 to entrench a human rights culture in South Africa. IDASA says that when tackling crime and especially terrorism, the state has immense power, and the manner in which it utilises such power is an issue of public interest. IDASA notes that it thus makes its submission to draw attention to the aspects of the Draft Bill which are problematic in light of the Constitutional framework of our nascent democracy. They are of the opinion that an infringement of any of these principles undermines democracy and minimises the accountability of government. The four aspects of the Draft Bill that they would submit are problematic and which will be the focus of the submission are — clause 16 dealing with "the custody of persons suspected of committing terrorist acts"; the definition of "terrorist act"; the definition of "terrorist organisation", and linked to the problems surrounding s16, the constitutional right of the arrested person to remain silent and the duty to take cognisance of such right (which is not dealt with in the Draft Bill).

13.53 IDASA comments that there has been much debate on whether South Africa ought to follow the examples of other jurisdictions and create specific legislation to deal with the

threat of terrorism. IDASA notes that those who argue against the omnibus Act are of the view that a new Act would be socially wasteful and there are several (22 in all) pieces of legislation in terms of which a person may be charged, should he be accused of a terrorist act. IDASA points out that the argument continues, that resources should instead be expended on effective *implementation* of the existing legislation and that legislation *per se* will not be a solution to the problem of terrorism.[4]

13.54 IDASA explains that alternatively, the Commission has taken the view that specific legislation on terrorism is essential for the following reasons:

- **The existing offence of terrorism contained in s 54 (1) of the *Internal Security Act* of 1982 only relates to terrorism in respect of the South African Government or population. Given the threat of international terrorism specifically when directed at foreign officials and the interests of foreign states, it is clear that the offence of terrorism as it exists in South African law is inadequate.**
- **The international trend is to enact specific legislation dealing with terrorism and to thereby ensure that the most severe sentences are meted out.**
- **South Africa also needs to ratify the respective international instruments relating to terrorism as soon as possible.**

13.55 IDASA points out that its position is that effective implementation will always be the test for the efficacy of any legislation, that the anti-terrorism legislation is no different and whether there were to be an omnibus Act or several pieces of legislation, they will be of little or no value, if not implemented properly. IDASA remarks that it may well be that the omnibus Act will give the State renewed impetus to deal with terrorism, the Act being an important starting point. IDASA states that it may also be easier to enact the specific legislation as opposed to amending the 22 pieces of legislation which impact on terrorism, that the Act, whatever form it takes, needs to deal with the threat of terrorism locally and internationally and needs to do so within the framework of the Constitution. IDASA notes that laws must also be implemented against the backdrop of thorough police investigation for which there can be no replacement, and that a large part of the efficacy of the Draft Bill indeed rests on the assumption that police are trained not only in their jobs but also in the ability to carry out of their duties in a constitutional democracy. IDASA considers that this

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[4] IDASA notes that its concerns are, at this stage limited to the above aspects of the Draft Bill. IDASA welcomes the manner in which this Draft Bill has been introduced for public comment. They say the SA Law Commission is to be commended for placing all the information surrounding the formulation of the Draft Bill (including the preliminary draft efforts) at the disposal of the public. The process has been open and transparent. They say they look forward to the final draft Bill which is to be presented to the Minister of Safety and Security and trust that it will indicate that consideration has been given to the concerns raised by them.

assumption is a dangerous one and one which could potentially limit the efficacy of the legislation. IDASA notes that while this potential problem will be raised further on in the submission, it is beyond the scope of its submission to test all the ways in which untrained police, in conjunction with limited resources can decrease the efficacy of this or any of the 22 pieces of legislation.

13.56 The Legal Resources Centre (LRC) in Cape Town comments that the question of whether the legislation was desirable in the South African context seemed rhetoric at first. It made sense that only a terrorist would be opposed to this legislation. The LRC says that the *Anti-Terrorism Bill* sets out to do two very important things to combat terrorism, namely, to give effect to relevant international principles, and to ensure the security of the republic and the safety of the public against threats and acts of terrorism. The LRC notes that it has been argued further that there is a need for a single legislation, as this seems to be an international trend to have a legislation creating specific offences of terrorism rather than relying on common law. The LRC remarks that in a Constitutional democracy it is possible to legislate without adding our Bill of Rights to the list of casualties of the incidents of urban terror in Cape Town. The LRC points out that values and the freedoms enshrined in the Constitution are there to guide us even when legislating in times of perceived crisis, and as a sector of civil society they look at this legislation and weigh up the competing interests in an attempt to balance fundamental freedoms. The LRC says that the draft Bill and discussion document presents a number of problems, and that their response is aimed at addressing some of those problems. The legislation comes at a time when the whole of South Africa and Cape Town in particular tries to make sense of the recent spate of urban terror. A call for the limitation of fundamental rights for the purpose of fighting terrorism continues to perpetuate the perceived links between the Constitution and crime. The LRC aks what the purpose of this self-defeating legislation could be? The LRC points out that a unifying legislation aimed at combating terrorism is hailed as global trend, and that the domestic situation has been described as disparate because our anti-terrorism legislation is spread across 22 different laws. The LRC considers that the provisions of the draft legislation make the existing position ideal, that we have not been presented with any compelling reasons why retaining the offences in the legislation that deals with those matters is undesirable or inadequate. The LRC suggests that instead there be a draft provision that (mis)labels a number of offences by providing for them in the *Anti-terrorism Bill.* The LRC notes that in the attempts to unify scattered pieces of legislation one needs to guard against the mislabeling that might be created in the process. The LRC suggests that common assault on a diplomat over any brawl could be mislabeled as a

terrorist act because it is part of an anti-terrorism legislation, and that the offender could be prosecuted in terms of this legislation. The LRC states that clause 16 is a good example of this bad idea, where it states: "Whenever it appears to the Judge of the high court on the ground of information submitted under oath by a Director of Public Prosecutions that there is a reason to believe that any person possesses or is withholding from a law enforcement officer *any information regarding any offence under this Act*". The LRC considers that this means that a witness to an assault on a diplomat could be detained for 14 days because s/he has information regarding an offence under the Act.

13.57 The LRC says that if the motivation for a single piece of legislation is anything to go by they still need to be convinced why our common law or statutes such as *Civil Aviation Offences Act*, in which some of the provisions dealing with hijacking of an aircraft have been taken from, are inadequate. The LRC suggests that they need to be made to understand why it is important to provide for common law offences in anti-terrorism legislation. The LRC says that there is no doubt that we need to incorporate the provisions of most or all of the international instruments that South Africa has ratified, at a domestic level, noting that some domestic legislation have been able to incorporate main provisions of international conventions. The LRC remarks that the *Civil Aviation Offences Act* incorporates the Tokyo Convention, 1963, Convention on offences and certain other acts committed on Board Aircraft, the Hague Convention, 1970, for the suppression of unlawful seizure of aircrafts, the Montreal Convention, 1971, for the suppression of unlawful against the safety of civil aviation. The LRC states that it has been argued that the existing legislation curtails our ability to act against someone who may be guilty of a terrorist act against a foreign target. The LRC considers that if the intention of the legislature is to provide for international terrorism it falls short in that respect, the international conventions have been provided for in the relevant legislation, and there is no single clause in the draft bill that introduces new measures aimed at combating international terrorism. The LRC points out that we are consoled by the interpretation clause that provides for the definition of a terrorist act to be in accordance with the principles of international law, and in particular international humanitarian law.

13.58 The LRC suggests that South Africa is a country struggling to come to terms with information uncovered during the TRC hearings regarding the acts of police brutality, some of which took place in detention, that there is a need to restore public confidence in our police services and giving them more power is a hardly a first step towards achieving that. The LRC states that there is no denying of the devastating

effects of the recent spate of bombings. The LRC points out that South Africa cannot renegotiate its fundamental freedoms in a state of fear. The LRC notes that the project committee noted that to the extent that bombs are ticking they are certainly ticking more in Northern Ireland and Israel than they are in South Africa, maybe those countries do need those drastic measures. The LRC suggests that what is very difficult to foresee is what is the next freedom that we might have to renegotiate and that in the process we may loose the right to retain our global claim of being owners and custodians of one of the world's most progressive Constitutions.

13.59 The LRC says that the need for institutions like the ICD continues to exist, police brutality can be monitored but police incompetence is hard to monitor, and the consequences of both are the same. The LRC considers that at this instance South Africans are asked to hand over our freedoms to compensate for lack of financial and trained human resources, that it is a heavy price and its people need to be convinced why this legislation is the only viable alternative to what they have got. The LRC remarks that South Africans need to be convinced why the drastic measures as provided for in clause 16 are justified and to be willing to discover why conventional policing methods are inadequate, and whether this is in the public interest.

13.60 The South African Human Rights Commission (SAHRC) comments that it approaches the fulfilment of its mandate from a "rights based perspective" in order to achieve the progressive realisation of human rights within South Africa. The SAHRC says that in the context of legislation monitoring, this approach entails a critical analysis of proposed measures, such as the draft *Anti-Terrorism Bill* ("the Bill"), in order to advise government and civil society on the likely impact that a proposed new law, amendment or the implementation of an existing statute will have on the realisation of human rights in South Africa. The SAHRC notes that in the performance of its functions, it is primarily guided by the Bill of Rights, as contained in the Constitution, existing rights as developed through our common law and other statutes and international human rights instruments. The SAHRC remarks that present levels of crime and violence in South Africa profoundly concern the SAHRC and that our nascent democracy has for the past few years been grappling with the challenge of combating and overcoming the scourge of serious crime. The SAHRC states that crime in whatever form prevents decent and law-abiding citizens from enjoying and exercising the rights guaranteed in the Constitution, and that recent events in Cape Town compellingly illustrate how crime threatens our democracy and the values of freedom and human dignity that underpin it. The SAHRC points out that it is simply impossible for human rights to flourish under conditions that resemble a

siege and it is wholly unacceptable that nameless and faceless criminals can hold a nation to ransom.

13.61 The SAHRC comments that society demands, and legitimately so, that those responsible for these deeds of terror be arrested and prosecuted. The SAHRC notes that it is necessary that the resources of the State and in particular the law enforcement agencies be fully harnessed to deal with this challenge. In this regard the intelligence and investigative capacities need to be seen to be responding in an effective, expeditious and decisive fashion. The SAHRC points out that in a media release on 18 September 2000, it commented that an important debate has commenced on the desirability or otherwise of introducing anti-terrorism legislation, and even the declaration of a state of emergency in appropriate circumstances. The SAHRC states that at the media release, the SAHRC emphasised that state action, and in particular that of the law enforcement agencies, takes place within the parameters of the Constitution and the law and that the debate on the proposed anti terror legislation happens in a rational and dispassionate environment.

13.62 The SAHRC notes that while the primary responsibility for dealing with crime rests with the state, it is their view that all decent and law abiding South Africans have a duty to assist where possible in this process, they could assist the police in their investigations, make relevant information available and join in a collective effort to overcome what no doubt is a real and formidable threat to our society. The SAHRC points out that we cannot, however, condone citizens or communities taking the law into their own hands. The SAHRC says that we take strength from the fact that the majority of South Africans are indeed committed to a society free of crime and terror. It is this resolve that has seen South Africa overcome the demon of apartheid and oppression and it is this resolve that will see us overcome the demons of crime and urban terror. The SAHRC points out that their comments at this stage are directed at broad issues of principle around the introduction of the Bill rather than a detailed analysis of its provisions, although their work will not stop there. The SAHRC explains that they have embarked on various initiatives around the introduction of the Bill in order to bring pertinent issues to the fore and to facilitate discussion of these by the broader South African public.

13.63 The SAHRC explains that it convened a seminar on the issues of crime, urban terror and human rights which took place in Cape Town on 6 November 2000. The SAHRC notes that the seminar brought together members of Government, the Judiciary, civil society and community organisations to discuss the Bill and other

critical issues relating to crime, urban terror and the realisation of human rights in South Africa, and amongst others, the following topics were discussed at the seminar:

- **The recognition, promotion and realisation of the rights of the victims of crime;**
- **The impact recent event in Cape Town has had on the community;**
- **The ability of the Constitution to effectively deal with crime as it prevails in South Africa as well as more serious challenges to the authority of the State;**
- **The government's motivation for anti-terrorism legislation evaluated from a rights based perspective;**
- **The challenges facing the judiciary in adjudicating on cases involving crime and urban terror within the framework of the Constitution and the Bill of Rights; and**
- **The challenges crime and urban terror present for human rights activists.**

13.64 Secondly, the SAHRC points out, it was developing a research paper entitled *Crime and Human Rights* which considers existing legal provisions relating to the investigation, prosecution and adjudication of criminal cases, and it evaluates the ability of the criminal justice system to effectively implement these measures. The SAHRC points out that based on their findings, they pose the question whether South Africa needs more laws to deal with present levels of crime and the spate of bombings in and around Cape Town or whether the problems can be dealt with by the effective implementation of existing laws. The SAHRC says that it will closely monitor the further passage of the Bill and will comment on its provisions in detail at a later stage should the need arise. The SAHRC notes that a last preliminary point must be made, having taken note of the reasons for anti-terrorism legislation put forward in the discussion paper. The SAHRC notes that these are two-fold; firstly according to the Commission there is an international trend to create specific legislation based on international instruments relating to terrorism, and while this may be so, they are not convinced that South Africa should follow this world-wide trend without further compelling reasons, and secondly, however, the Commission points out that to enable South Africa to give effect to its obligations in terms of international it is necessary to draft an omnibus Act addressing the issue of terrorism on a broader basis. The SAHRC notes that they support the recommendation of the Commission in this regard as it will provide clarity, certainty and facilitate access to the law, and in this regard they join the Commission in calling on the government to ratify or accede

to the respective international instruments relating to terrorism as soon as possible.[5]

13.65 Professor Abdulkader I Tayob who is a professor of religious studies, comments that he supports the government's attempt to eradicate the scourge of terror and crime on the streets of South Africa. He notes that he hopes that his comments will assist in the formulation of adequate strategies in this regard. Professor Tayob states that he wishes to raise some concerns about the proposed Bill to curb acts of terror in South Africa, and to align South African legislation in line with international trends. He believes that South Africa's approach in developing new legislation, rather than taking the alternative route of revising existing legislation, is flawed and dangerous for a number of reasons set out below. At the outset, he indicates that he is not an expert in international law or anti-crime legislation, however, as a specialist in the study of modern trends in Islam, he believes that this type of legislation has direct implication for the development of certain trends within the religious community. Moreover, he says, it contributes to the false perception of the international arena since the fall of communism and the end of the cold war.

13.66 Professor Tayob points out that the proposed Bill assumes that international terror is carried out in the name of social, political, religious and other causes, and that such goals are held by key organisations that purportedly support or carry out such acts. He notes the hesitancy with which organisations are dealt with, and also note that there is no intention to ban or proscribe organisations as such, although the proposed Bill works from the assumption that terror is driven by organised activity led by clearly identified ideological goals. In his opinion, the proposed Bill does not address the difficult question of how such organisations will be identified. He says such a situation leaves the question of terror organisations to popular perceptions, and the vagaries of media allegations, and in the absence of clear guidelines as to how such organisations will be identified, the proposed Bill unwittingly grants some legal recognition to wild allegations and speculation. He suggests that this is not

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[5] The SAHRC points out that it has not commented on each provision of the Bill, although they share many of the concerns raised by the South African Law Commission and explains that their failure to comment on all clauses should not be construed as indicating their support for specific clauses. They note that they shall continue to monitor the progress of the Bill and may submit further comments at a later stage, if necessary. The SAHRC notes that their seminar on Crime and Human Rights will provide a further useful opportunity to engage with the issues at hand and will facilitate discussion of the critical issues the Bill raises. They state that they shall keep the Commission advised of developments in this regard. They also congratulate the South African Law Commission on the work it has done to date, stating that the depth of research and analysis that accompanies the report is commendable and has established a solid foundation for further debate of the issues at hand. The SAHRC says it shares many of the concerns of the Law Commission and invite the Commission to call on their services should the Commission require their further assistance.

acceptable, as the issue of terrorist organisations is fraught with emotions, which often have serious social consequences. Professor Tayob points out that in Kenya and the United States, for example, Islamic religious and welfare organisations were tainted with the brush of supporting terror, and that Kenya, in fact, passed a law against a number of such organisations, demanding that they re-register.

13.67 Professor Tayob notes that the Bill proposes to bring South African legislation in line with international attempts to combat terror acts, and that this is commendable, although there are no safeguards whereby South African security organisations will not, wittingly or unwittingly, be used by governments to use anti-terror legislation to oppose legitimate opposition (or in some cases where legitimate opposition is severely curtailed). He explains that many countries in the Middle East including Algeria, Tunisia, Egypt, Israel and Turkey use the bogey of Islamic fundamentalism to suppress dissent. He notes that the proposed Bill sets up South Africa as a potential partner in the suppression of legitimate opposition, but there are no safeguard clauses where such co-operation may be checked against defensible criteria. He says that the Bill seems to be making the same mistake as was made during the Cold War, when legitimate opposition to dictatorial regimes was suppressed in the name of fighting communism, and that there is no consideration of this danger in the proposed Bill and documents on this matter.

13.68 Professor Tayob points out that the discussion paper provides a good survey of the range of terror acts in South Africa, and points out that more than 50% of such acts have taken place in the Western Cape. He states that given this information, however, it seems unclear why such acts are considered to be part of an international network from one or few organisations. He considers that the cause of such acts of terror must first be laid at internal problems, and the proposed legislation seems too hasty to lay the blame at international connections. Professor Tayob is of the view that the cure, in brief, may not suit the problem. He notes that there is a general tendency again to see Islamic political activity as foreign-inspired, and that this tendency is not too different from thinking in the days of apartheid that laid the blame for insurrection against the Apartheid State at the door of Russia, and the problems in South Africa, as they are in Algeria, Egypt, Israel and Turkey, closer to home.

13.69 Professor Tayob points out that according to the proposed Bill, acts of omission may also be construed to be supportive of terror organisations or acts, and any person who fails to report on acts of terror may be guilty. He notes that the Bill makes no provision for the lack of safety against individuals who are thus implicated,

and also opens the door for rogue law enforcement officers to "terrorise" individuals who may be suspected of withholding information. He is of the view that the right to silence for reasons of personal safety, not to speak of self-incrimination, has been thrown out of the window. Professor Tayob states that even though the legislation does not overtly state this, the issue of "Islamic" terror must be addressed. He points out that it is undeniably that certain groups, in the name of religion, use violence to espouse and achieve their goals. He says he would go one step further, and does not think it is sufficient to state that they misuse religion to achieve their political goals. He considers that one would rather have to admit that their approach reflects a reading of religious teachings of war and defence based on their perception of their own social and political conditions. Professor Tayob explains that this particular approach means that their reading and interpretation of religious views and obligations has potentially greater appeal than if it had mainly been a matter of misusing religion as such. He notes that if one agrees with this, then the promulgation of a law against certain organisations may be construed as a law against a particular religious reading. Professor Tayob explains that supporters of Islamic political ideology include a whole range of tendencies, including those who are both prone to use violence and those who reject violence in principle. He remarks that the Bill in its wide sweep and scope may correctly, however, be construed as a law against Islamic political ideology in its entirety. He considers that this is a matter, he believes, that must be left to the religious tendencies in the Muslim community, and that any Bill that encroaches upon this activity interferes in it, and lends support to those who choose violence. Professor Tayob believes that the Bill must drop certain aspects, particularly as it pertains to an international network of terror, to avoid the pitfall of being regarded as an anti-Islamic Bill, moreover, it cannot be accepted that all acts of omission be criminalised.

13.70 Professor Tayob remarks that there is at best dubious evidence that the resurgence of religious militancy, Muslim or otherwise, is inter-connected globally. He notes that claims about the network of international Islamic terror are supported by sectors within a number of countries (US, Israel, France and sadly South Africa) with their own dubious agendas, and given more time he would be able to document the manner in which the supposed threat of the Islamic terror in South Africa has been fanned and promulgated. He believes that the legislation endorses this perception of an international *network* of Islamic terror, without having the *evidence* to name such an organisation. He remarks that on the contrary, the tendencies to interpret Islam politically are driven by a more diffuse process, through the global movement of ideas and people. He points out that any organised network, if there is

such a thing and it has not yet been proved, thrives on this global flow, but does not drive it. Professor Tayob considers that the proposed Bill stands the risk of criminalising any flow of people and ideas that may appear to be supporting or condoning acts of terror. The comment by Mr F Jeewa echos those made by Prof Tayob in stating that he is shocked and appalled by the Bill which is a very serious infringement of human rights; is vaguely defined; and would do nothing but make life difficult for honest God-fearing citizens who want this country to learn from the mistakes from the past and progress favourably into the bright future painted for us by people such as Mahatma Ghandi and Nelson Mandela.

13.71 The sentiments expressed by these respondents are also shared by respondents such as Mr Ismail Soosiwala, Mr Asad Soosiwala, Mr Arsad Soosiwala, Mrs Sabira Soosiwala, Mrs Rehana Dinat, Mrs Razia Essack, Mr A Dinat, Mr R Essack, Ms N Essack, Ms Z Amod, Mr M Amod, Mr H Amod, Ms A Dinat and Mr W Essack.[6] **Ms Mushahida Adhikari comments that the proposed *Anti-Terrorism Bill* seems very clearly to be aimed almost exclusively at controlling the activities of PAGAD as witnessed by the Minister of Safety and Security and the DPP's comments in the media recently and that PAGAD has been identified as a mainly Muslim or Muslim driven organisation. She notes that her concern is that the enactment of a bill aimed so clearly at a particular identifiable segment of the population could be used as a tool in the hands of persons who would see certain political and or ideological opponents neutralised, and additionally, that the blame for the urban terror campaign in the Western Cape has been placed almost solely at the door of PAGAD and ordinary Muslims who may not even be involved or sympathetic to the aims of**

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[6] Who comment that as law abiding and tax paying citizens it disturbs them that the Minister of Safety and Security can pin blame on a group of people without concrete evidence nor without following the proper legal channels. They remark that this is following the lead of many so-called democracies who firstly points the blame at certain religious groups or people without even getting the evidence and going to court. They note that their father and friend was recently murdered in a car highjacking and was shot in broad daylight in front of hundreds of people including school children. They note that the law abiding citizens are being held hostage by the criminals in the country. They consider that the proposed legislation should be an anti crime law and not target innocent Muslims who are fighting for the just causes of their brethren in Palestine, Iraq, Sudan, Chechniya, Afhanistan, Mindanao etc. They note that the law if passed will alienate a large and powerful people who are mostly law abiding people and that it is the Muslim community who fought in the struggle globally as well as in South Africa. They agree that the people or organisations who carry out the senseless acts of bombings, murders etc should be severely punished as Islam does not condone these acts. They however consider that the government knows who is behind these acts and should not target the Muslims or blame Islam. They say that in the light of the Bill being a violation of human rights and freedom of belief and religion, they record their objection to the Bill and plead that the government release its citizens from the clutches of crime and reinstate the death penalty but not to impose the bill which is a form of terrorism itself.

PAGAD are already being victimised by business persons and the security forces. She remarks that to her such incidents indicate a growing anti-Muslim sentiment and she fears that the *Anti-Terrorism Bill* will further add to this. She notes that as any resident of the Western Cape will be able to tell this not something to be taken lightly, as the Muslims form a fairly large proportion of the population in the region. She considers that a sustained campaign of victimisation could in fact have the effect of driving more moderate Muslims closer to the fringe elements in PAGAD, as well as violating the freedom of association clauses in the Constitution.[7] **She points out that the parts of the proposed Bill which most concern her are the "bad company" clauses which seem to indicate that one could be branded a terrorist merely by being acquainted with identified terrorists. She states that if one then applies this to the PAGAD situation one could conceivably end up with a situation where a sizeable portion of the Muslim and Coloured communities in the Western Cape would be**

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[7] Mr Khalick Limalia also notes that it is sad that Ministers Tshwete and Maduna single out Pagad as the group that is involved in the bombings and that he fails to understand that after the 20th bomb has exploded in the Western Cape no one has been arrested but that these ministers can go publicly and state that Pagad is involved. He suggests that if Pagad is involved, the law should take its course but the SAPS must first investigate the matter. He considers that it has a detrimental effect on the innocent Muslims in South Africa as they all will be looked at as if they were terrorists. His views are also held by Mr N Motala who comments that apart from being an unconstitutional limitation of the prescribed 48 hour detention period and the right to freedom from detention the bill is reviewed under circumstances which are entirely conducive to religious intolerance. He explains that the wave of terror which has swept the Western Cape is an undeniable fact but the unjustified and unsubstantiated comments of the Ministers of Justice and Safety and Security about the involvement of Pagad in the spate of bombings goes beyond merely irresponsibility. He notes that it encourages blatant religious intolerance as Pagad is portrayed as an *Islamic Fundamentalist* organisation upholding the *fanatic* ideals of all Muslims, and that creating misconceptions before such an influential piece of legislation is to be considered can only be detrimental to the measured processes which ordinarily accompany such Bills. He notes that constant reiteration of terms such as *Muslim extremists and Islamic fundamentalists* creates negative connotations not only of a group such as Pagad but indeed of the whole Muslim community of South Africa. He suggests that the Bill directed mainly at Pagad will serve not only to quell terrorist acts but will open up avenues for general discrimination against Muslims countrywide with every Islamically clad person being deemed a terrorist. He considers that the timing of the last bombings which occurred in a predominantly Muslim area provides great impetus for the fast-tracking of the proposed legislation which renders the usual consideration processes ineffectual. He urges that the Commission create greater awareness of the constitutional dangers which surround the passing of such legislation as the greater public is kept in the dark over much what is happening in terms of religious intolerance and this must be brought to light. Mr Tshepo Matsimela's comments also echo the sentiments expressed by these respondents. He also questions the fact that Pagad is singled out as the prime suspects. He notes that in such serious issues there are usually more than one suspect on the SAPS list and asks where ae the other possibilities. He notes that usually terrorists makes it known that they are involved in certain acts/crimes and therefore expect certain demands of theirs to be met . He points out that Pagad are denying any links to the terror and asks what do they have to gain from such terror acts and whether they would risk being caught by continuing to detonate bombs in the Cape. He also points out that whoever is responsible for the bombings are doing it so professionally that no ons seems to be able to catch them and poses the question whether Pagad has reached such a level of skill even when 35 of their key members have been arrested.

criminalised. She explains that these communities is so closely knit that one could have PAGAD members, gangsters and ordinary citizens all in one family group. She notes that this is a very frightening scenario and that it also seems to be a very convenient way to deal with the Urban Terror and Gang problem in the Western Cape without having to use the normal law enforcement channels.

13.72 Ms Adhikari states that another area of great concern is the proposed re-introduction of detention without trial and denial of access to legal representation. She notes that besides the obvious historical connotations, she finds it hard to see how such provisions could be in accordance with South Africa's hard won Constitutional rights nor does she feel that such provisions could possibly fall within the bounds of the limitations clause. She considers that this again seems to be a convenient way for the security forces to deal with a problem which the traditional methods of law enforcement have proven incapable of handling. She says that this, however, also seems to be a way of diverting attention from the possible reasons for law enforcement's failure to deal with these issues. She comments that to add further weight to the fears she has expressed, she would like to draw the Commission's attention to the statements made in the press recently by the DPP, when he was asked what evidence he had to back up his claims that PAGAD are behind the urban terror campaign and he replied that normal observation was his proof. She adds that when MP Patricia De Lille pointed out that there could be a certain amount of complicity between the gangs, PAGAD and the police, Ms De Lille was loudly denounced and her allegations dismissed without any attempt at an explanation as why law enforcement found this such a preposterous idea. In conclusion she would urge the Commission when making its recommendations to look very carefully at the human rights context within which this Bill will operate and to make sure that this Bill does not become a tool in the hands of certain forces to neutralise their opposition, as was the case under the apartheid era's terrorism laws.

13.73 Another respondent joining the ranks of the last-mentioned respondents is Rashid Mohammed. He comments that as he understands it, the Bill is intended to curb the recent terrorist attacks in the Western Cape and he supports this one hundred percent as anyone be it a black or white person, Muslim or Christian who has the audacity to take innocent lives, must be punished and sentenced accordingly. He points out, however, that he has a problem with the underlying statements of the Bill which subtly seem to be concealed in the background. He poses the question if the law is to curb terrorism locally why must there also be clauses preventing humanitarian aid and any other form of support to liberation groups overseas who are

deemed by America as supposed *terrorist groups*. He criticises the fact that the word *terrorist* is not defined in the Bill and that the definition of *terrorist act* as being too wide. He poses on the issue of criminalising support to so-called terrorist organisations the question (raised by other respondents as well) that why should being a good Samaritan to innocent widows and orphans overseas make someone a terrorist. Mr Mohammed considers that the Bill is a very subtle and intelligent approach to sideline and victimise a certain group or people in the country by detention without trial, secret evidence, search of person, organisations and personal property. He notes that the country has just emerged from an era with laws such as the proposed Bill and asks whether our progress has been forward or backwards, and whether this is the South Africa millions have been martyred for.[8] **He notes that South Africa has inter alia the right to freedom of association. Mr Mohammed notes also that there are the 23 laws presently on the statute book and asks whether it is a question of the police not being effective in carrying out their duties or whether it is perhaps a lack of resources preventing them to perform their duties effectively and efficiently. He considers that the proposed Bill infringes the rights of South Africans, and if this appalling and uncalled for Bill were passed it will deny their rights of freedom of association and expression.**

13.74 Mr Hashim Bobat also notes that the Bill is said to deal with urban terrorism whereas it deals in fact with international terrorism.[9] **He notes that he is concerned**

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[8] A respondent who commented under the name Muhammad notes similarly that he believes the Bill takes the country backwards instead of forwards, the reason being detention for no reason other than interrogation, without the opportunity to post bail creating a draconian law which is against any concept of democracy, and it also prevents freedom of choice when funding organisations that could be blacklisted removing the constitutional right of association. Another respondent who likewise responds is Mr Iqbal Sheik who says that the Bill will take South Africa back to the apartheid era and that it would be more reasonable to implement the death penalty than the proposed Bill. He considers that there are sufficient laws in South Africa and that we do not need the proposed Bill. The Pretoria Muslim Congregation also notes that their submission is a reminder to the present government that the demise of apartheid has not necessarily led to a demise of injustice and oppression as is evidenced in the Bill and that as Muslims, they are duty-bound to oppose it. They note that should the constitutional rights be limited in the way the Bill does, it would auger a return to the draconian laws of the apartheid state which the Muslims and others have tirelessly fought against.

[9] A comment containing the same content as was received from Mr Bobat was received from Mrs B Motala and Mss Z Motala and S Motala. Mr Rhiaz and Mr Riedwaan Hassiem point out in separate submissions that all Muslims are targeted by the Bill and that they will be unable to support the people in Bosnia, Chechnya, Palestine, Kashmir, Afghanistan etc who are fighting for their freedom, to raise funds for them for medicine, clothing, food and basic humanitarian rights, or to hold protest marches and rallies whereby they can openly speak out against their oppression. They suggest that the State and Pagad should unite by creating synergy with a greater output, as Pagad and the State are fighting the same cause (the eradication of criminal elements and creating peace in South Africa), the state should implement measures forcing the Police to do their job and the third force should be eliminated. They consider that we do not need American, French or Russian laws but that all

that the Bill uses an all-embracing concept of *terrorism* and that no provision is made for any freedom strugglers, liberation movements or the concept of a just war. He considers that this will effectively cut off any support for the liberation movements all around the world and also humanitarian aid for those who are victims of oppression. He poses the question of how the former liberation movements in this country will be viewed under this Bill.[10] **He notes with alarm that the Bill is modelled on the 1996 *Anti-terrorism Act* of the USA and that it is common that the USA has been pressurising all countries all over the world to pass similar legislation that will effectively cut off all moral, material, and financial support for any group abroad that is deemed terrorists by them. Mr Thamsana Mnqadi comments that the Bill is against the Constitution, that South Africans have struggled for these human rights and that he simply does not have parents as a result of the struggle. He considers that the Bill is another form of apartheid in disguise as the Bill is directed against a certain minority of people and that it is barbaric and cruel.**

13.75 Ms Mary de Haas of the *Natal Monitor* notes that the Bill deals with matters pertaining to South Africa's need to fulfill international obligations to combat terrorism — as well as address what is described as an "ever-increasing threat within our borders". She suggests that until there is far greater debate and clarity about this supposedly ever-increasingly threat within South Africa, that only what is necessary to fulfill international obligations be dealt with by way of legislation. Ms De Haas

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who oppose terrorism should join forces in South Africa to achieve the same objective.

10 Mr Jon Smith raises the question whether South Africa is taking a dive back to the times of Hendrik French Verwoerd as the spirit of the proposed Bill is an embodiment of his spirit. He considers that South Africa has presently 23 laws to combat terrorism and asks why is there a need to bring into existence another one. He comments that he considers the solution is that the police is not equipped to carry out their duty and are using the Bill as a scapegoat to target Pagad. Mr Smith believes that no one actually knows who the perpetrators behind the bombings are. He notes that the uncalled for outbursts by persons such as Minister Tshwete highlights the fickleness of the public and how generalisations and cheap propaganda play a role in the lives of masses. He also points out the fact that the media use the word Muslim fundamentalism irresponsibly. He notes that at the start of the series of bomb blasts the minister called for a Bill to combat urban terrorism in the Western Cape but now it has spread to international-based so-called *terrorist groups*. Mr Smith considers that we cannot solve the problems in South Africa but wish to concern ourselves with international terrorism, and that it does not add up. He is of the view that it is startling that the word terrorist is not defined in the Bill and considers that a terrorist is someone who pledges any form of support (be it financially, medically, verbally, etc) to a group deemed as a terrorist organisation by the government. He poses the question whether it would constitute an offence of terrorist if someone were to collect funds for the widows and orphans in Chechnya, Kosovo or any of the other war stricken countries. He further poses the question how could it constitute a terrorist act if someone scratches the car belonging to a diplomat. Mr Smith considers that South Africa should not turn to a country such as Algeria for inspiration as they are governed by militant rulers. He suggests that South Africa is going to commit a grave injustice and erode the constitutional rights of its citizens, particularly the Muslim citizens who feel they are the prime target of the Bill were the Bill passed.

considers that the crux of her problem is that there is no proper analysis of the nature of terrorism in South Africa, and no attention to the context in which it is taking place. She states that bombings in the Western Cape, for example should be seen in the context of what is happening in South Africa in general and, especially what amounts to terrorism of a different manifestation in KwaZulu-Natal, where wanton killings of, amongst others, elderly people and children, it could be argued, fall into this category. She considers that should such an analysis be done, it would be shown that the greatest threat to internal stability of this country comes from the security arm of the State, especially the police, to whom this proposed legislation wants to give increased powers. She points out that the discussion paper refers to the wearing of hoods/masks in public places[11] and that in recent illegal raids on homes of rural residents by members of the SANDF in the Creighton area, soldiers were accompanied by people wearing balaclavas. She also notes that the *Intimidation Act* of 1982 and the *Arms and Ammunition Act* of 1969 are constantly transgressed with impunity in KZN.

13.76 Ms Mary De Haas is of the view that an holistic analysis of terrorism would give proper attention to the failure of existing organs of state to address it. She considers that such an analysis should include attention to the structure of policing and intelligence agencies, and include an audit of the backgrounds of those tasked with combatting violence, including that which is defined as terrorism. Ms De Haas is of the view that it would show that, structurally, the South African police, for example, remains largely the same as it was under *apartheid*, with most key positions being occupied by members of the former security police and their homeland police allies. She points, however, out that it should be noted that she is not saying that there are no good, professional members of all races as there are, but that she is talking about the structure of the SAPS. She suggests that there should be a moratorium on any further legislation concerning violence and terrorism in South Africa until there has been far greater debate, and especially, analysis of the existing *status quo*. She states that there is in particular a need to examine why the police and the well-resourced Scorpions cannot deal with the situation. She is of the view that what is totally overlooked is that South Africa has not changed structurally, in terms of the composition of its bureaucracies — and there is reason to believe that certain members of those bureaucracies may be resentful of the change in government and, putting it mildly, unenthusiastic about making democracy work. She remarks that the only beneficiaries of the violence — whether in the Western Cape or KZN — are those

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[11] In terms of the Northern Ireland (Emergency Provisions) Act of 1996 the wearing of hoods or masks in public places constituted an offence.

who wish to undermine nonracial democracy.

13.68 Mr Zehir Omar comments that clause 20 of the Bill manifest Parliament's mindfulness of the recent amendments to our *Criminal Procedure Act* of 1977 relating to Schedule 6 offences and that the consequences of *terrorist acts* invariably fall within the category of offences listed in Schedule 6. He says the South African Constitutional Court's acknowledgment of the sudden increase in crime in our country was a persuasive factor confirming the constitutionality of denying rights enshrined in section 35 of the Constitution to persons arrested for having contravened any one of the offences identified in Schedule 6. Mr Omar remarks that we already have tools in place to address "terrorist activities" identified by the "International community". He considers that the success of Bill of Rights in the UK, Canada and USA was a significant factor yielding our surrender to the Bill of Rights enacted in the South African Constitution. He is of the view that the enactment of the proposed Bill will obstruct the germination of the nascent seeds of democracy still growing in our country, and that the obstruction may serve as a precedent to any future government to enact legislation that will completely obfuscate the provisions of section 35 of the Constitution. Mr Omar notes that we must remain mindful of the destruction of post-colonial democracies in Africa. Mr Omar points out that there are factors peculiar to our democracy:

- **The ANC has close to seventy five percent support of the citizenry, opposition parties aligned do not surpass the support by the populace for the ANC and a *majoritarian* dictatorship is therefore a prominent reality absent from other democracies. (He says Madiba's reconciliation of Black and White and Zulu and Non-Zulu also remains tenuous.)**
- **South Africa's third world economy prevents it from giving practical effect to Parliament's obligations contained in, inter alia, sections 26, 27 and 29 of the Constitution, ie government's obligation to provide housing, health care and education.**
- **South Africa does not have the financial resources possessed by other democracies to ensure that the sweeping powers of arrest, detention and interrogation referred to in the Bill are not abused.**

(b) <u>Evaluation</u>

13.79 It is instructive that numerous respondents argue that existing legislation should be used or amended in stead of adopting a comprehensive piece of legislation. It was noted above that on 28 September 2001 the Security Council of the United Nations adopted the wide-ranging, comprehensive resolution 1373 with steps and strategies to combat

international terrorism, that by this resolution the Council also established a Committee to monitor the resolution's implementation and called on all States to report on actions they had taken to that end no later than 90 days from that day. The Council decided that all States should prevent and suppress the financing of terrorism, as well as criminalize the wilful provision or collection of funds for such acts. The Security Council also adopted Resolution 1390 the aim of which is to ascertain which measures have been taken by UN member States and it also makes provision for a sanctions committee.[1] **It is therefore clear that**

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[1] Acting under Chapter VII of the Charter of the United Nations,

. . . 2. *Decides* that all States shall take the following measures with respect to Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them, as referred to in the list created pursuant to resolutions 1267 (1999) and 1333 (2000) to be updated regularly by the Committee established pursuant to resolution 1267 (1999) hereinafter referred to as "the Committee";

< Freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly, for such persons' benefit, by their nationals or by any persons within their territory;

< Prevent the entry into or the transit through their territories of these individuals, provided that nothing in this paragraph shall oblige any State to deny entry into or require the departure from its territories of its own nationals and this paragraph shall not apply where entry or transit is necessary for the fulfilment of a judicial process or the Committee determines on a case by case basis only that entry or transit is justified;

(c) Prevent the direct or indirect supply, sale and transfer, to these individuals, groups, undertakings and entities from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related materiel of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned and technical advice, assistance, or training related to military activities;

3. *Decides* that the measures referred to in paragraphs 1 and 2 above will be reviewed in 12 months and that at the end of this period the Council will either allow these measures to continue or decide to improve them, in keeping with the principles and purposes of this resolution;

4. *Recalls* the obligation placed upon all Member States to implement in full resolution 1373 (2001), including with regard to any member of the Taliban and the Al-Qaida organization, and any individuals, groups, undertakings and entities associated with the Taliban and the Al-Qaida organization, who have participated in the financing, planning, facilitating and preparation or perpetration of terrorist acts or in supporting terrorist acts;

5. *Requests* the Committee to undertake the following tasks and to report on its work to the Council with its observations and recommendations; . . .

6. *Requests* all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement the measures referred to in paragraph 2 above;

7. *Urges* all States, relevant United Nations bodies, and, as appropriate, other organizations and interested parties to cooperate fully with the Committee and with the Monitoring Group referred to in paragraph 9 below;

8. *Urges* all States to take immediate steps to enforce and strengthen through legislative enactments or administrative measures, where appropriate, the measures imposed under domestic laws or regulations against their nationals and other individuals or entities operating on their territory, to prevent and punish violations of the measures referred to in paragraph 2

there are definite measures to be taken by South Africa to comply with its international obligations, and that the UN will be taking steps to coerce States into compliance should they choose not to comply. The Commission also considers that the events of 11 September 2001 put terrorist activities in completely a different light than it was hitherto regarded. Effective legislation for combatting terrorism is one of the available tools governments can use in fighting terrorism. There are shortcomings in South African legislation and they should be remedied. There are respondents who argue that the police are abusing their powers, that they will continue this process under the terms of the proposed legislation and that the proposed legislation should not be proceed. It was pointed out above that the Law Commission of India took into account that their police have contravened the law in the past and the Law Commission considered that this is no reason why they should desist in proposing legislative amendments. The Commission agrees with the point of view that we must bring our South African legislation for combating terrorism in line with the international conventions dealing with terrorism, that our law should provide for extra-territorial jurisdiction in line with the international conventions, that the present terrorism offence is too narrow and that financing of terrorism must be addressed. The Commission therefore considers that there is a need for legislation dealing with terrorism by way of a so-called omnibus Act and that an *Anti-Terrorism Bill* must be drafted. The Commission has noted the perceptions that the Bill targets Islam and wishes to make it clear that this is not the intention. Legislation should be adopted which contains the necessary safeguards and which complies with the South African Constitution. The Commission wishes to emphasise that detention for interrogation cannot be supported, it being in conflict with the fair trail rights and the right to security of the person. The Commission is of the view that legislation should be adopted which contains the necessary safeguards and which complies with the South African Constitution.[2]

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of this resolution, and to inform the Committee of the adoption of such measures, and *invites* States to report the results of all related investigations or enforcement actions to the Committee unless to do so would compromise the investigation or enforcement actions; ...

[2] The remarks by Prof Paul Wilkinson (Head, School of History and International Relations, University of St. Andrew's, Scotland) are noteworthy where he gave the answer in 1995 to the question what are the prospects of European states achieving radical improvements in their measures to combat terrorism up to 2010 and beyond: (“Terrorism: Motivations and Causes”in *Commentary No. 53* A Canadian Security Intelligence Service Publication January 1995)

> In view of the fact that attacks by terrorist groups have become increasingly lethal over recent years, it is wise to plan for a continuing trend towards massive car and truck bombings in crowded city areas, and "spectacular" terrorist attacks, for example on civil aviation, airport facilities or military or diplomatic facilities, designed to capture maximum attention from the mass media, to cause maximum shock and outrage and to effect some terrorist demands.
> Conclusion

Faced with this scenario of future terrorism, what are the prospects of European states achieving radical improvements in their measures to combat terrorism up to 2010 and beyond? The true litmus test will be the Western states' consistency and courage in maintaining a firm and effective policy against terrorism in all its forms. They must abhor the idea that terrorism can be tolerated as long as it is only affecting someone else's democratic rights and rule of law. They must adopt the clear principle that one democracy's terrorist is another democracy's terrorist. The general principles which have the best track record in reducing terrorism are as follows:

- no surrender to the terrorists, and an absolute determination to defeat terrorism within the framework of the rule of law and the democratic process;
- no deals and no concessions, even in the face of the most severe intimidation and blackmail;
- an intensified effort to bring terrorists to justice by prosecution and conviction before courts of law;
- tough measures to penalize the state sponsors who give terrorist movements safe haven, explosives, cash and moral and diplomatic support;
- a determination never to allow terrorist intimidation to block or derail international diplomatic efforts to resolve major political conflicts in strife-torn regions, such as the Middle East. In many such areas terrorism has become a major threat to peace and stability, and its suppression therefore is in the common interests of international society.

To conclude on an optimistic note, one major aspect of advanced technology gives the democratic governments a potentially winning card in their battle against terrorist organizations. Whereas developments in terrorist weaponry and the vulnerability of modern complex societies help the terrorists, the development of sophisticated fine-

(c) Recommendation

13.80 The Commission recommends that there is a need for an *Anti-Terrorism Bill* to remedy the deficiencies which presently exist in South African law.

C. PREAMBLE TO THE BILL

(a) Evaluation and proposal contained in discussion paper 92

13.81 The project committee noted that the SAPS drafters of the original Bill informed it that the real motivation for the Bill is to deal with internal incidents of terrorism although the motivation for the Bill is largely based on international precedents.

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grained computers and terrorism databases provide superb assets for the intelligence war against terrorism. If these developments are matched by greatly enhanced international intelligence sharing and counter-terrorism collaboration, they can lay the foundations of long-term success over terrorist organizations.

13.82 The project committee took into account the observations recently made by the International Policy Institute for Counter-terrorism. The Institute notes that on 19 October 1999 the United Nations Security Council unanimously adopted resolution No 1269 , condemning "all acts, methods and practices of terrorism as criminal and unjustified, regardless of their motivation."[1] **The Institute points out that this resolution is an important step towards achieving real and effective international cooperation against terrorism, that it is a step in the right direction, yet only a first step and that it must be followed by a bid for an acceptable international definition of terrorism. The Institute states that there are a great number of resolutions calling upon the international community to deepen and unify their efforts against international terrorism, that all of this is, however, unfortunately no more than lip service and that without reaching an acceptable international definition of the term "terrorism" one can sign any declaration or agreement against terrorism without having to fulfil ones obligations as per the agreement. The Institute points out that for every country participatory to the agreement will define the phenomenon of terrorism differently from every other country and that this lack of an internationally accepted definition of terrorism reflects the hypocrisy in international politics as a whole and in the case of counter terrorism as a case in point.**

13.83 The International Policy Institute for Counter-terrorism points out that when a violent act is aimed against a particular country, that country will define the act as terrorism and the perpetrators terrorists but when the same act is aimed against another country, then the countries not affected may refer to the perpetrators as guerillas, freedom fighters, an underground movement or some other terms — terms with a more positive connotation than the word "terrorist." The Institute explains that this situation is reflected in the well-known saying, "one men's terrorist is another man's freedom fighter" and that this saying reflects a misunderstanding and a misuse of the term "terrorism". The Institute considers that it implies that the definition of terrorism[2] is a matter of point of view and does not lend itself to objective judgment

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1 Security Council Resolution 1269: *What it Leaves Out* 20 October, 1999 see http://www.ict.org.il/

2 Boaz Ganor writes as follows in "Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?" (See http://www.ict.org.il/)
"In their book *Political Terrorism*, Schmidt and Youngman cited 109 different definitions of terrorism, which they obtained in a survey of leading academics in the field. From these definitions, the authors isolated the following recurring elements, in order of their statistical appearance in the definitions: Violence, force (appeared in 83.5% of the definitions); political (65%); fear, emphasis on terror (51%); threats (47%); psychological effects and anticipated reactions (41.5%); discrepancy between the targets and the victims (37.5%); intentional, planned, systematic, organized action (32%); methods of combat, strategy, tactics (30.5%).
Respondents were also asked the following question: 'What issues in the definition of terrorism remain unresolved?' Some of the answers follow:

but that this cliche is founded on the will of the perpetrators of violence to make a case that the same act will have a different interpretation depending on ones attitudes to the end goal of the perpetrators and that it is just another way of saying, "The end justifies the means". The Institute suggests that the question still stands on what is terrorism and that the Security Council resolution is one step in the right direction. The Institute considers that this is unfortunately not enough and that the Council must now reach an understanding on what constitutes a terrorist act. The Institute explains that it is clear that sometimes a non-state organization - a community, an ethnic group or a religious sect - may have just grievances against a regime and when a nation suffers from foreign occupation, or a society is controlled by a ruthless dictatorship, or a regime commits crimes against humanity, one can argue that the afflicted community has every right to use violence against the state or regime. The Institute notes that almost every nation has at some time in its past used violence against what it saw as an evil regime but that the question is - even in case of a just cause whether every use of violence is justified or are there certain types of violence that should always be forbidden?

(c) The boundary between terrorism and other forms of political violence
(d) Whether government terrorism and resistance terrorism are part of the same phenomenon
(e) Separating 'terrorism' from simple criminal acts, from open war between 'consenting' groups, and from acts that clearly arise out of mental illness
(f) Is terrorism a sub-category of coercion? Violence? Power? Influence?
(g) Can terrorism be legitimate? What gains justify its use?
(h) The relationship between guerilla warfare and terrorism
(i) The relationship between crime and terrorism

We face an essential need to reach a definition of terrorism that will enjoy wide international agreement, thus enabling international operations against terrorist organizations: A definition of this type must rely on the same principles already agreed upon regarding conventional wars (between states), and extrapolate from them regarding non-conventional wars (between an organization and a state).

The definition of terrorism will be the basis and the operational tool for expanding the international community's ability to combat terrorism. It will enable legislation and specific punishments against those perpetrating, involved in, or supporting terrorism, and will allow the formulation of a codex of laws and international conventions against terrorism, terrorist organizations, states sponsoring terrorism, and economic firms trading with them. At the same time, the definition of terrorism will hamper the attempts of terrorist organizations to obtain public legitimacy, and will erode support among those segments of the population willing to assist them (as opposed to guerrilla activities). Finally, the operative use of the definition of terrorism could motivate terrorist organizations, due to moral or utilitarian considerations, to shift from terrorist activities to alternative courses (such as guerrilla warfare) in order to attain their aims, thus reducing the scope of international terrorism.

The struggle to define terrorism is sometimes as hard as the struggle against terrorism itself. The present view, claiming it is unnecessary and well-nigh impossible to agree on an objective definition of terrorism, has long established itself as the 'politically correct' one. It is the aim of this paper, however, to demonstrate that an objective, internationally accepted definition of terrorism is a feasible goal, and that an effective struggle against terrorism requires such a definition. The sooner the nations of the world come to this realization, the better."

13.84 The International Policy Institute for Counter-terrorism considers that the next step that the Security Council must take is to declare unequivocally that even in case of a just cause - a cause in which the use of violence may be considered justified, one type of violence is never justified and that this is *the intentional use of violence against civilians*, or in other words, "terrorism", defined as "the deliberate use of violence against civilians in order to achieve political aims." The Institute suggests that this type of violence is always unacceptable even when used in the most righteous of causes. The International Policy Institute for Counter-terrorism argues that only when all states agree on what type of acts constitute terrorism, can resolutions such as this one of October 1999 have any real effect on the international arena and that such a consensus is not impossible. The Institute points out that precedent already exists in the parallel definition of the term "war crime", defined as the intentional targeting of civilians by military personnel. The Institute considers that it is this international agreement on the definition of the act that alone makes possible international extradition, prosecution and punishment of individuals who perpetrate such acts. The Institute remarks that the significance of the Security Council resolution lies in its insistence that when dealing with terrorism there is no taking into account the motivations of the perpetrators and that in the case of terrorism the end does not justify the means.

13.85 The International Policy Institute for Counter-terrorism considers that one cannot justify atrocities by saying "I am not a terrorist because I am a freedom fighter". The Institute notes that the answer in that case would be: "maybe you are a freedom fighter but if you are using violence against civilians then you are most certainly a terrorist as well". The Institute states that one of the great ironies in this Security Council action is that the draft of resolution 1269 was proposed by none other than Russia - the very country that once (in its communist phase) defended nearly every major terrorist organization in the world. The Institute further notes that Russian support for a number of such organizations was in fact based on the justification that their just cause excused any and all acts but when these experts in the use of the phrase "freedom fighters; not terrorists" came under attack by such groups themselves, they quickly saw the need to draw a clear line between terrorism and other types of violence. The Institute considers that those states that have seen their daily life disrupted by brutal attacks on civilians can see most clearly that the use of terrorism cannot be legitimized by any cause - no matter how just.

13.86 Boaz Ganor recently remarked that the terror attacks in the US on September

11th, and the subsequent efforts by the United States to build a broad-based anti-terrorism coalition, have thrown into sharp relief the question of *what constitutes terrorism*.[3] He notes that most researchers tend to believe that an objective and internationally accepted definition of terrorism can never be agreed upon; after all, they say, "one man's terrorist is another man's freedom fighter," and that the question of who is a terrorist, according to this school of thought, depends entirely on the subjective outlook of the definer; and in any case, such a definition is unnecessary for the international fight against terrorism. He points out that in their view, it is sufficient to say that what looks like a terrorist, sounds like a terrorist, and behaves like a terrorist is a terrorist. He explains that this position contributes nothing to the understanding of an already difficult issue, nor does the attempt to divide terrorism into categories such as "bad and worse terrorism," "internal terrorism and international terrorism," or "tolerable terrorism and intolerable terrorism." He says all these categories reflect the subjective outlook of whoever is doing the categorizing – and purely subjective categories will not help us to determine who are the real terrorists.

13.87 Boaz Ganor remarks that at the same time, there are others who say that a definition of terrorism is necessary, but that such a definition must serve their own political ends. He notes that States that sponsor terrorism are trying to persuade the international community to define terrorism in such a way that the particular terror groups they sponsor would be outside the definition – and thus to absolve them from all responsibility for supporting terrorism. He states that countries such as Syria, Libya, and Iran have lobbied for such a definition, according to which "freedom fighters" would be given carte blanche permission to carry out any kind of attacks they wanted, because a just goal can be pursued by all available means. He considers that both these schools of thought are wrong; and both attitudes will make it impossible to fight terrorism effectively. He remarks that an objective definition of terrorism is not only possible; it is also indispensable to any serious attempt to combat terrorism. Lacking such a definition, no coordinated fight against international terrorism can ever really get anywhere.

13.88 Boaz Ganor points out that a correct and objective definition of terrorism can be based upon accepted international laws and principles regarding what behaviours are permitted in conventional wars between nations. He explains that these laws are

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[3] "Terrorism: No Prohibition Without Definition" 7 October 2001 http://www.ict.org.il/articles/articledet.cfm?articleid=393 (It did not form part of the discussion paper but is included here for convenience sake.)

set out in the Geneva and Hague Conventions, which in turn are based upon the basic principle that the deliberate harming of soldiers during wartime is a necessary evil, and thus permissible, whereas the deliberate targeting of civilians is absolutely forbidden. He says these Conventions thus differentiate between soldiers who attack a military adversary, and war criminals who deliberately attack civilians. Boaz Ganor remarks that this normative principle relating to a state of war between two countries can be extended without difficulty to a conflict between a non-governmental organization and a state, and that this extended version would thus differentiate between guerilla warfare and terrorism. Exactly in parallel with the distinction between military and civilian targets in war, he says, the extended version would designate as "guerilla warfare" the deliberate use of violence against military and security personnel in order to attain political, ideological and religious goals. Terrorism, on the other hand, would be defined as "the deliberate use of violence against civilians in order to attain political, ideological and religious aims."

13.89 Boaz Ganor points out that what is important in these definitions is the differentiation between the goals and the means used to achieve these goals. The aims of terrorism and guerilla warfare may well be identical; but they are distinguished from each other by the means used – or more precisely, by the targets of their operations. The guerilla fighter's targets are military ones, while the terrorist deliberately targets civilians. He explains that by this definition, a terrorist organization can no longer claim to be "freedom fighters" because they are fighting for national liberation or some other worthy goal, and even if its declared ultimate goals are legitimate, an organization that deliberately targets civilians is a terrorist organization. He considers that there is no merit or exoneration in fighting for the freedom of one population if in doing so you destroy the rights of another population. He suggests that if all the world's civilian populations are not to become pawns in one struggle or another, terrorism – the deliberate targeting of civilians – must be absolutely forbidden, regardless of the legitimacy or justice of its goals. He considers that the ends do not justify the means, and by carrying out terrorist attacks, the perpetrators make themselves the enemies of all mankind.

13.90 Boaz Ganor remarks that only on the basis of an international agreement on the definition of terrorism will it be possible to demand that all nations withhold all support from terrorist organizations, and only on this basis can countries be required to act against terrorists, even when they agree with and support the terrorists' goals. He considers that the worldwide acceptance of the above definition of terrorism – and the adoption of international legislation against terrorism and support for terrorism

based upon this definition – could bring about a change in the cost-benefit calculations of terrorist organizations and their sponsors. He explains that at present, terrorist organizations may carry out either terrorist or guerilla attacks according to their preferences and local conditions only, with no external reason to choose one type of attack over the other. After all, as far as the rest of the world is concerned, the two types of attack are morally equivalent; punishment is identical in both cases. However, should these organizations and their sponsors be made aware that the use of terror will bring them more harm than good, they may opt to focus on guerilla warfare rather than on terrorism. He asks whether this definition of terrorism does legitimize guerilla warfare, and answers that it does and says that the definition does make a moral distinction between terrorism and guerilla warfare. Countries forced to deal with ongoing attacks on their military personnel will obviously perceive these attacks as acts of war, which must be thwarted. He considers that these countries cannot expect to enlist the world in a struggle against "legitimate" guerilla warfare, but they could justifiably demand that the international community assist them were they fighting against terrorism.

13.91 Boaz Ganor notes that yet another question to be answered is, can countries as well as organizations be held responsible for carrying out terrorist acts? He points out that in effect, this question has already been answered in the form of existing international legislation. He says that the term "terrorism" is superfluous when describing the actions of sovereign states – not because states are on a higher moral level, but because, according to the international conventions, any deliberate attack upon civilians in wartime by regular military forces is already defined as a war crime. He notes that should such an attack be carried out during peacetime, the act is defined by convention as a "crime against humanity," and, in both cases, such acts are already covered by international law, and provisions exist for dealing with the perpetrators. He remarks that it is when these actions are carried out by politically-motivated individuals or groups that the lack of legislation is felt, and, ironically, under current international law, organizations are not specifically prohibited from perpetrating actions that are considered illegal and abhorrent when carried out by sovereign states.

13.92 Boaz Ganor says that there have been previous attempts to address these issues; that the US State Department, for example, has put forward a definition according to which terrorism is the deliberate use of violence against *non-combatants*, whether civilian or not. He notes that this definition of terrorism will, however, not work in practice, as it designates attacks on non-combatant military

personnel as terrorism. He explains that despite the natural tendency of those who have been harmed by terrorism to adopt this broad definition, terror organizations and their supporters can justly claim that they cannot be expected to attack only military personnel who are armed and ready for battle, and if they were held to such a standard, they would lose the element of surprise and be quickly defeated. He points out that by narrowing the definition of terrorism to include only deliberate attacks on civilians, we leave room for a "fair fight" between guerillas and state armies. Thus we set a clear moral standard that can be accepted not only by Western countries, but also by the Third World and even by some of the terrorist organizations themselves. When such a moral distinction is internationally applied, terrorist organizations will have yet another reason to renounce terrorism in favour of guerilla actions.

13.93 Boaz Ganor considers that the definition of terrorism he proposes can serve as a guide for including or excluding various countries in the international anti-terror coalition, as well as for identifying those organizations and countries to be targeted by the coalition, but its main significance is in the drafting and enforcement of international legislation aimed at forcing states to act against terror organizations operating on their territory. He suggests that without an objective and authoritative definition, accepted by all nations, the fight against terrorism will always suffer from "cultural relativism." He points out that without a change in the priorities of all the enlightened countries, and their determination to fight against terrorism apart from any other political or economic interest, it will not be possible to wage an effective war against terrorism. He remarks that without such a unified stand by all nations, the September 11th 2001 attacks in the United States will be insignificant compared to the attacks yet to come. He considers that the free world must understand that "cultural relativism" applied to terrorism – whatever the terrorists' goals – will lead only to more terrorism.

13.94 The project committee noted when finalising the discussion paper that under the preamble of the Bill criminal acts intended or calculated to provoke a state of terror in the general public, any group of persons or particular persons for political purposes are under any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them. The project committee noted that the Convention of the Organisation for African Unity on the Prevention and Combating of Terrorism specifically excludes in Article 3(1) struggles waged by people in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by

foreign forces from being considered terrorist acts. However, the committee also took into account that in terms of Article 3(2) of the OAU Convention, political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act, and that nothing in Article 22(1) shall be interpreted as derogating from the general principles of international law, in particular the principles of international humanitarian law, as well as the African Charter on Human and Peoples' Rights.

13.95 The project committee also considered clause 25 of the Bill (the interpretation clause)[4]. The committee considered whether the proposed article in the preamble, its definition of terrorist act and the interpretation clause might conflict with the OAU Convention. The committee asked what are the drafters of the Bill saying, namely that whatever happened in South Africa before 1994, the line is now taken that if an Ethiopian comes to South Africa and if it is alleged that he has taken steps to overthrow a vicious and oppressive system in his own country, in terms of the proposed Bill it would under no circumstances be justified? The committee asked itself what message it would be sending and whether it would be accepting the OAU reservations. The project committee noted that in the preamble it is stated that criminal acts for political purposes are under any circumstances unjustifiable. The accused may allege that he or she did something for political purposes. The Bill, however, says that it is unjustifiable and contains a definition setting out which acts qualify as terrorist acts. The committee noted that one might have a situation where a certain organisation is carrying out bombing attacks but have never admitted that they have done so although it might be known that they have certain political objectives. The committee posed the question whether the Bill doesn't make it more difficult for the state to prove the political objective of such an organisation.

13.96 The committee raised the question whether the phrase "for the purpose of political, ideological and religious reasons" should be added to the definition of terrorist act. The committee considered that the Bill might have purposefully been drafted as saying that a terrorist act performed for the purpose of doing or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles. The committee therefore decided against including the phrase "for the purpose of political, ideological and religious reasons" in the definition. The committee considered a suggestion that an appropriate qualifier be added to the preamble to make the general recognition clear that in cases of legitimate struggles by people fighting for self-determination, such acts may not even

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4 The definition of "terrorist act" shall be interpreted against the principles of international law, in particular the international humanitarian law, in order not to derogate from those principles.

be appropriately categorised as terrorist acts, subject to the normal requirements under international humanitarian law. The committee noted that the OAU Convention on Terrorism says that terrorism cannot be justified under any circumstances. The committee considered why the Bill oughtn't provide likewise in the preamble and that it should talk about "terrorism" instead of "criminal acts".

13.97 The project committee decided that the preamble should provide that "whereas terrorist acts are under any circumstances unjustifiable whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them" instead of providing that "criminal acts intended or calculated to provoke a state of terror in the general public, any group of persons or particular persons for political purposes are under any circumstances unjustifiable ...".

(b) <u>Comment on discussion paper 92</u>

13.98 Ms Schneeberger remarks with regard to the third preambular paragraph that the last part of this paragraph "including those which jeopardise the friendly relations among States and peoples and threaten the integrity and security of States" has a highly charged political context in the United Nations. She explains that it is intended to be an oblique reference to State terrorism and is usually targeted at the United States and Israel, and in the international context it is part of a carefully balanced compromise. She suggests that as domestic legislation will deal with acts of individuals and groups only (not States) and in view of the controversy of this phrase, they would advise that it be deleted.

12.99 Ms Schneeberger further notes with regard to the ninth preambular paragraph that it refers to the prevention of financing of terrorism although there is nothing specific in the Bill on the financing of terrorism. She suggested that a separate section should be included for the financing of terrorist acts with appropriate amendments to Article 2 of the Terrorist Financing Convention.

13.100 Mr Saber Ahmed Jazbhay notes that in its Preamble, whilst it reaffirms its unequivocal condemnation of 'all acts, methods and practices of terrorism as criminal and unjustifiable', the Bill makes specific reference to, inter alia, 'considerations of a political, philosophical, ideological, racial, ethnic, *religious* or other nature that may be invoked to justify them'. He says that given official utterances by the likes of Minister Tshwete *et al* against Pagad and Qibla, a reasonable man will reach the inescapable conclusion that it has an anti-Islamic bent. He remarks that one has to read this with the real motivation of the drafters as conveyed to the project committee of the Commission. Mr Jazbhay notes that

Islam has been equated with terrorism in the world's media, given the hype associated with Emerson's *Jihad in America* as well as Hollywood inspired movies such as *The Siege* and Betty Mahmoody's *Not without my Daughter*. He considers that the official response attributing the criminal acts on unknown persons, in the absence of hard evidence, which lead to the loss of lives in the Planet Hollywood restaurant in the Western Cape to Pagad, is a typical case in point. He comments that it is arguable therefore that the ATB potentially targets and discriminates against Muslims and that, accordingly it, or parts of it fall to be declared unconstitutional and invalid.[5] **Mr Jazbhay states that the project committee has incidentally, considered that the ATB '*might have purposefully been drafted as saying that a terrorist act performed for the purpose of doing or abstaining from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles*.**

13.101 The SAPS: Legal Component: Detective Service and Crime Intelligence suggests that the reference in the preamble to "urban terrorism" should perhaps only be to terrorism, and not to "urban" terrorism where it provides : "AND WHEREAS terrorism presents a serious threat to the security of the Republic and the safety of the public". The Defence Secretariat[6] notes that the Preamble sets out the reason for the introduction of the Bill, and that it is important to note that the increase in crime especially in the type of criminal conduct which copies the pattern of criminality related to terrorist activities is on the increase in South Africa. The Secretariat states that this is particularly true in respect of the bombings which have in recent times plagued the Western Cape in particular and that it serves only to add to the growing feeling of insecurity experienced by South African society. They state that the Preamble is structured to prepare us in respect of the contents of clause 16 as certain fundamental rights of persons suspected of having committed terrorist acts are

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5 Another respondent who commented under the name Mohamed noted that SA has enough laws to deal with terrorism, that the Bill is biased as it is more against his religion Islam than terrorism and that consideration should be given to the fact that South Africa is a young democracy and that we do not need a biased government proclaiming unjust laws. He also sates that everyone wants the terrorists to be caught, that the government knows who these people are, the culprits should be arrested and the law abiding citizens should be left alone.

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infringed, although the purpose of the Bill is to effectively fight against terrorism which undermines the maintenance of law, order and stability in South Africa. The Secretariat also notes that the Bill is necessary as the South African legal system is not equipped to deal with terrorism effectively especially in accordance with international law.

(b) Evaluation

13.102 Ms Schneeberger's explanation of the compromise wording of the 3rd preambular paragraph is persuasive concerning the last part of this paragraph "including those which jeopardise the friendly relations among States and peoples and threaten the integrity and security of States" having a highly charged political context in the United Nations. It is accepted that it is intended to be an oblique reference to State terrorism, usually targeted at the United States and Israel, and in the international context it is part of a carefully balanced compromise. The Commission considers that it should be deleted as suggested. The Commission is also of the view that the SAPS's suggestion is persuasive and that the reference in the 8th preambular paragraph should be to "terrorism" and not to "urban terrorism".

(b) Recommendation

13.103 The Commission recommends that the words "including those which jeopardise the friendly relations among States and peoples and threaten the integrity and security of States" in the last part of the third preambular paragraph be deleted and that the reference in the 8th preambular paragraph should be to "terrorism" and not to "urban terrorism".

D. DEFINITIONS

(a) Arms

(i) Comment on discussion paper 92

13.104 Advocates Fick and Luyt of the Office of the Director of Public Prosecutions Transvaal consider that the definition in clause 1 of "arms" is not sufficient. They note that the definition of 'arms' in section 1 of the *Arms and Ammunition Act* (Act 75 of 1969) specifically excludes machine guns and machine rifles although it is well known that these types of weapons are more frequently used by terrorists than other weapons. They therefore

suggest that the following should be added to the definition after 'any arm', namely "and also 'machine guns' and 'machine rifles'".

(ii) Evaluation and recommendation

13.105 It was noted in the Discussion Paper in the footnote to the definition of "arm" provisionally proposed in the Bill that the *Firearm Control Bill* should be taken into account for purposes of the definition of *arm*. The *Firearm Control Act* 60 of 2000 was passed and it contains a definition of *firearm*.[1] **The Commission therefore considers that the definition to be included in the Bill should be "firearm" and that the suggestion that there should be a reference to machine guns and machine rifles is persuasive. The Commission recommends that the definition should provide as follows: 'firearm' means any device as defined in section 1 of the *Firearm Control Act*, 2000(Act No 60**

[1] The *Firearm Control Act* defines it as follows: 'firearm' means any —

(a) device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules (6 ft-lbs);
(b) device manufactured or designed to discharge rim-fire, centre-fire or pin-fire ammunition;
(c) device which is not at the time capable of discharging any bullet or projectile, but which can be readily altered to be a firearm within the meaning of paragraph (a) or (b);
(d) device manufactured to discharge a bullet or any other projectile of .22 calibre or higher at a muzzle energy of more than 8 joules (6 ft-lbs), by means of compressed gas and not by means of burning propellant; or
(e) barrel, frame or receiver of a device referred to in paragraphs (a), (b), (c) or (d),

but does not include any device contemplated in section 5;

of 2000) and includes a machine gun or machine rifle[2] as defined in the *Arms and Ammunition Act*, 1969 (Act No 75 of 1969).

(b) Combatting terrorism

13.106 In considering this definition the project committee explained in the discussion paper that it was of the view that the words “terrorist activities” should be replaced by “terrorist acts” in this definition and wherever else the words “terrorist activities”are used in the Bill. The project committee stands by this decision. The Commission agrees with this recommendation.

(c) Place of public use

13.107 The project committee noted in the discussion paper the definition of “place of public use” as set out in the *International Convention for the Suppression of Terrorist Bombings* and questioned the way it was drafted. The project committee was of the view that it is unnecessary to include in the definition the reference to “whether continuously, periodically or occasionally, and encompasses any commercial, business, cultural, historical, educational, religious, governmental, entertainment, recreational or similar place which is so accessible or open to the public, as well as any dwelling or place of residence.” The committee considered that a definition setting out that “‘place of public use’ means those parts of any building, land, street, waterway or other location that are at any time accessible or open to members of the public” would be sufficient.

13.108 Advocates Fick and Luyt of the Office of the Director of Public Prosecutions Transvaal consider that in order to include places to which the general public normally does not have access such as clubs, the words "or any group of members of the public" should be included in the definition of "place of public use". The project committee considered that the drafters of the Convention *for the Suppression of Terrorist Bombings* in all probability contemplated the same issue when they included the qualification “whether continuously,

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[2] The *Arms and Ammunition Act*, 1969 (Act No 75 of 1969)provides that 'machine gun' or 'machine rifle' includes any firearm capable of delivering a continuous fire for so long as pressure is applied to the trigger thereof, whether or not that firearm was originally designed to function in that manner.

periodically or occasionally" to the definition of *place of public use*. The project committee therefore reconsidered its preliminary proposal and recommended that these latter words should remain part of the definition. The Commission agrees with this recommendation.

(d) Financing

13.109 The project committee noted in the discussion paper the inclusion in the original Bill of a definition stating that "financing" means the transfer or reception of funds. The committee was of the view that the meaning of the word "financing" is apparent and that there is no need for the definition.

13.110 Ms Schneeberger points out, however, that the *International Convention for the Suppression of Financing of Terrorism* was adopted in late 1999. She explains that although the financing of terrorist acts can be prosecuted as an ancillary crime (accomplices, aiding and abetting etc) the international community felt that it was of such a serious nature, and so integral to the successful commission of a terrorist act, that it merited a separate legal regime. She suggests that similar arguments may well apply here, in which case a separate section should be included for the financing of terrorist acts, and with appropriate amendments to Article 2 of the *Terrorist Financing Convention*, such a provision would read:

> "Any person commits an offence if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out an act which constitutes an offence within the scope of, and as defined in this Act."

13.111 The project committee and the Commission agree with Ms Schneeberger on the insertion of separate clauses dealing with the financing of terrorism but remain of the point of view that there is no need for a definition of *financing*.

(e) Internationally protected persons

13.112 Ms Schneeberger notes in her comment on the discussion paper that section 4(c) of the *Diplomatic Immunities and Privileges Act* of 1989 makes provision for an *ad hoc* granting of immunities and privileges to certain persons which is used quite frequently in practice. She suggests therefore that a reference to section 4(c) should be included in the definition of internationally protected person. She also drew the Commission's attention to the fact that the Act was being amended, that the general principle for categories of internationally protected persons will remain the same, but that the changes to the Act may affect the cross-referencing in the Bill. This Act was replaced by the *Diplomatic Immunities and Privileges Act* 37 of 2001. The immunities and privileges of internationally protected

persons are now set out in sections 2 to 7 of this Act.[1] **(The Act commenced on 28**

[1] **3 Immunities and privileges of diplomatic missions and consular posts, and of members of such missions and posts**

(1) The Vienna Convention on Diplomatic Relations, 1961, applies to all diplomatic missions and members of such missions in the Republic.

(2) The Vienna Convention on Consular Relations, 1963, applies to all consular posts and members of such posts in the Republic.

4 Immunities and privileges of heads of state, special envoys and certain representatives

(1) A head of state is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as-

1.1 heads of state enjoy in accordance with the rules of customary international law;

1.2 are provided for in any agreement entered into with a state or government whereby immunities and privileges are conferred upon such a head of state; or

1.3 may be conferred on such head of state by virtue of section 7 (2).

(2) A special envoy or representative from another state, government or organisation is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as-

1. a special envoy or representative enjoys in accordance with the rules of customary international law;

2. are provided for in any agreement entered into with a state, government or organisation whereby immunities and privileges are conferred upon such special envoy or representative; or

3. may be conferred on him or her by virtue of section 7 (2).

(3) The Minister must by notice in the Gazette recognise a special envoy or representative for the purposes of subsection (2).

5 Immunities and privileges of United Nations, specialised agencies and other international organisations

(1) The Convention on the Privileges and Immunities of the United Nations, 1946, applies to the United Nations and its officials in the Republic.

(2) The Convention on the Privileges and Immunities of the Specialised Agencies, 1947, applies to any specialised agency and its officials in the Republic.

(3) Any organisation recognised by the Minister for the purposes of this section and any official of such organisation enjoy such privileges and immunities as may be provided for in any agreement entered into with such organisation or as may be conferred on them by virtue of section 7 (2).

(4) Any organisation contemplated in this section is vested with the legal capacity of a body corporate in the Republic to the extent consistent with the instrument creating it.

6 Immunities and privileges pertaining to international conferences or meetings convened in Republic

(1) The officials and experts of the United Nations, of any specialised agency and of any organisation, and representatives of any state, participating in an international conference or meeting convened in the Republic enjoy for the duration of the conference or meeting such privileges and immunities as-

1.1 are specifically provided for in the Convention on the Privileges and Immunities of the United Nations, 1946, or the Convention on the Privileges and Immunities of the Specialised Agencies, 1947, as the case may be, in respect of the participation in conferences and meetings;

1.2 are specifically provided for in any agreement entered into for this purpose; or

(c) may be conferred on any of them by virtue of section 7 (2).

(2) The Minister must by notice in the Gazette recognise a specific conference or meeting for the purposes of subsection (1).

7 Conferment of immunities and privileges

February 2002.) It is recommended that the references in the Bill be amended to reflect the provisions of the *Diplomatic Immunities and Privileges Act* of 2001.[2] **The definition should provide that "internationally protected person" means any person who enjoys immunities and privileges in terms of sections 2 to 6 of the *Diplomatic Immunities and Privileges Act*, 2001 (Act No.37 of 2001), or on whom such immunities and privileges have been conferred in terms of section 7 of the said Act.**

(f) <u>"Law enforcement officer"</u>

13.113 The project committee noted in the discussion paper that clause 16 sought to provide that a judge may issue a warrant for the detention for interrogation of a person at the request of a Director of Public Prosecutions if such Director submits information to the judge

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(1) Any agreement whereby immunities and privileges are conferred to any person or organisation in terms of this Act must be published by notice in the Gazette.
(2) The Minister may in any particular case if it is not expedient to enter into an agreement as contemplated in subsection (1) and if the conferment of immunities and privileges is in the interest of the Republic, confer such immunities and privileges on a person or organisation as may be specified by notice in the Gazette.

[2] Note the provisions of the Vienna Conventions of 1961 and 1963 to which the *Diplomatic Immunities and Privileges Act*, 2001 refer:
Article 37 of the Vienna Convention on Diplomatic Relations, 1961
1 The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36.
2 Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in Articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of Article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in Article 36, paragraph 1, in respect of articles imported at the time of first installation.
3 Members of the service staff of the mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in Article 33.
Article 43 of the Vienna Convention on Consular Relations, 1963:
1. Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.
Article 53 Beginning and end of consular privileges and immunities
1 Every member of the consular post shall enjoy the privileges and immunities provided in the present Convention from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when he enters on his duties with the consular post.
2 Members of the family of a member of the consular post forming part of his household and members of his private staff shall receive the privileges and immunities provided in the present Convention from the date from which he enjoys privileges and immunities in accordance with paragraph 1 of this Article or from the date of their entry into the territory of the receiving State or from the date of their becoming a member of such family or private staff, whichever is the latest.

that there is reason to believe that that person possesses or is withholding from a police officer information regarding any offence under the Bill. The Bill only made provision for police officers approaching Directors of Public Prosecution and the committee considered the question whether it is not too limited in referring to police officers only. The committee considered that provision should be made for customs and immigration officials in this clause as well. The committee therefore proposed that a definition be included in the Bill setting out that "law enforcement officer" include members of the police service and immigration and custom officials.

13.114 The Defence Secretariat suggests that the definition should include members of the SANDF whenever they are deployed with the police force as it is imperative that Defence Force members should be given the same powers as police officers in order to effectively carry out their duties. The same suggestion is made by the Special Forces Brigade[3] **and by the Chief: Military Legal Services. The latter comments that as the SANDF is currently employed in cooperation with the SAPS in execution of the National Crime Prevention Strategy, it is recommended that the same powers also be given to the SANDF when they act in cooperation with the SAPS. The Chief: Military Legal Services says that this will strengthen the arm of the law enforcement agency in the RSA, and as the SANDF can legally be requested to assist the SAPS, then they must be given the necessary powers to act according to their mandate.**

13.115 Advocates Fick and Luyt of the Office of the Director of Public Prosecutions Transvaal suggest that in the definition of *law enforcement officer*, members of forces like the Durban Police should be included.

13.116 Ms Esther Steyn[4] comments that it is disconcerting that the project committee proposed that the ambit of the legislation should be broadened to encompass the use thereof by all law enforcement officers and not only police officers. She considers that to grant such special powers to all law enforcement officers, including immigration and custom officials, in instances where the liberty of

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3 The Special Forces Brigade explains that they must be given the same powers as the SAPS when the SANDF are deployed in support of the SAPS for counter terror acts and specifically in those cases where the SANDF act on behalf of the SAPS where offences relating to maritime navigation or fixed platforms are concerned. They further indicate that through agreements and procedures probably (and not necessarily by the proposed legislation) between the various departments involved, the coordination of the execution of terror related operations and the collection, dissemination and processing of intelligence relating to combating terrorism need to be addressed.

4 "The draft Anti-Terrorism Bill of 2000: the lobster pot of the South African criminal justice system?" 2001 *SACJ* Vol 14 179 - 194 at 192.

individuals is at stake is not only extraordinary but also irresponsible. It is therefore considered that the proposed power to bring an application for bringing a witness before a judge for an investigative hearing in order to obtain information on terrorism should be given to police officers only. The definition of law enforcement officer should therefore be deleted. The project committee and the Commission consider that the suggestion on the inclusion of members of the SANDF whenever they are deployed in the Republic on police functions is persuasive and recommend this inclusion. The suggestion on the inclusion of forces like the Durban Police is, however, unclear.

(f) <u>State or government facility</u>

13.117 The Chief: Military Legal Services notes that it is unclear whether this definition is understood to include SANDF or SAPS structures or buildings.[1] **They also pose the question whether the words *members of government* include the SANDF or SAPS, and consider that greater clarity on this matter is needed. This remark caused the project committee to reconsider the preliminarily proposed definition which is also contained in the *Terrorist Bombing Convention.* It seems to the project committee that the relevant question is whether the intention ought not be that the definition should refer to facilities of *the State* instead of *a State* in view of the fact that the protection of property of foreign governments is addressed in a separate clause. On the other hand the intention could be to protect not only the State facilities of the Republic but of other States in South Africa as well. The project committee is of the view that the more inclusive approach would be more appropriate. If this amendment is effected it would clarify the doubt expressed by the respondent referred to above. The Commission agrees with this reasoning. The project committee and the Commission therefore recommend that the definition should provide as follows:**

> **"State or government facility", includes any permanent or temporary facility or conveyance that is used or occupied by representatives of a State, members of Government, the legislature or the judiciary or by officials or employees of a State, *the Republic* or any other public authority or entity or by employees or officials of an intergovernmental organization in connection with their official duties.**

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[1] The preliminary proposed definition said: "State or government facility", includes any permanent or temporary facility or conveyance that is used or occupied by representatives of a State, members of Government, the legislature or the judiciary or by officials or employees of a State or any other public authority or entity or by employees or officials of an intergovernmental organization in connection with their official duties.

(h) "Terrorist act"

(i) Evaluation and proposal contained in discussion paper 92

13.118 The project committee noted in the discussion paper that the definition of "terrorist act" seems to be taken from the OAU Convention and the committee considered whether it should retain the suggested definition or amend it in accordance with the wording of the English *Terrorism Bill*. The committee suggested that the phrase "put fear in" seems to be adopted from the OAU Convention and that it should be replaced with the words "instill fear". The committee noted that included in the Bill is a definition of "terrorist acts" and a definition of "terrorist activities". The question arose whether this is necessary. The committee was also concerned whether, if once "terrorist acts" have been defined, it does not follow from the criminal law that aiding and abetting and complicity would then also be covered by that which seems to be sought to be covered under the definition of "terrorist activities".[2]

13.119 The committee considered whether acts which are not to be regarded as terrorist acts should be set out in the definition of "terrorist act" as was done in article 3 of the OAU Convention. These acts would be exclusions from or a proviso to the definition of terrorist act and would include armed acts pursuant to a struggle for self-liberation or self-determination according to the principles of international law. The committee noted that under clause 25 the definition of "terrorist acts" has to be interpreted in accordance with the principles of international law, and in particular international humanitarian law, in order not to derogate from those principles, one of which is the OAU Convention on Terrorism. The committee felt that this was enough to exclude all acts that have the blessing of international law.

13.120 The committee decided that in the definition of "terrorist act" the words "does or" be inserted in the first line after "which" ("terrorist act means any act which is a violation of the criminal laws of the Republic and which does or may endanger the life, physical integrity or freedom of ..."). The committee considered that there is no need for the inclusion of the words "or cause serious injury or death to" because if

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[2] Note the definition of terrorism in the US Code Title 18 - Crimes and Criminal Procedure Part I - Crimes Chapter 113B - Terrorism
As used in this chapter - (1) the term "international terrorism" means activities that - (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended - (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum; (2) the term "national of the United States" has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act; (3) the term "person" means any individual or entity capable of holding a legal or beneficial interest in property; and (4) the term "act of war" means any act occurring in the course of - (A) declared war; (B) armed conflict, whether or not war has been declared, between two or more nations; or (C) armed conflict between military forces of any origin.

one endangers anyone's life or physical integrity then one has already injured or killed someone and that the word "does" covers that in any event now. The committee further resolved that the words "any number or group of" be deleted in the third line and that the words "or persons" be inserted. The committee also considered that the words "public or private" ought to be deleted in the third line as everything would be the property of someone. It noted that it raises the question of *res nullius* but that it is still not covered by "private or public" as it would fit into a third category not already being covered. The committee also decided that the words "natural resources, environmental or cultural heritage" should be deleted. The committee suggested that the words "instill fear, force" be deleted, to provide similar than the British definition of "terrorist act". The committee also decided that the words "any government or persons, the general public or section thereof" be substituted for the words "any government or persons, body, institution, office bearer, the general public or segment thereof". The committee considered whether it needs to include any other type of intervening or lesser organisation or body and whether it can leave the clause at just "government or persons, the general public or section thereof". The committee considered that it should retain the words "government" for obvious reasons but that "persons, the general public or section thereof" should cover any organisation or group of persons. The committee also posed the question whether the words "to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles" are needed and decided that they are superfluous. The committee was of the view that it is almost inevitable if one is intimidating or coercing someone that one is trying or forcing someone to do or not to do something.

13.121 The committee also considered subparagraph (ii) of the definition of terrorist acts in the discussion paper.[3] It was thought to be a derivative of the sabotage provision and that someone might say he or she didn't want to scare anybody but just wanted to disrupt the water supply or the railways. The committee noted that it has to be read subject to the preceding part under paragraph (a) - it has to be a criminal act causing damage or which may cause damage or which has the potential to cause damage. The committee did not have any problem with subparagraph (ii) and suggested that it be left in the definition.

13.122 The committee also considered a suggestion on subparagraph (iii) that

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[3] Terrorist act means- (a) any act which does or may endanger the life, ... or causes or may cause damage to property and is calculated or intended to-... (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency;

the Bill refers to a terrorist act creating a general insurrection in a state and whether this would include a state of general unrest or acts intended to raise or heighten hostility among various groups, but which need not be intended to create a general insurrection against a state.[4] **The committee stated that it has no difficulty saying "create unrest or insurrection in *any* state" instead of *a* state. The committee also decided to delete paragraph (b) of terrorist act considering that there is a need for the retention of the definition of "terrorist activity". The committee considered that there is no merit in having the definitions of "terrorist acts" and "terrorist activities". The committee was of the view that "terrorist activities" looks from the details of it, all the sorts of things that an accomplice, a conspirator and what not, can be guilty of. The committee considered that there is no reason why section 18 of the Riotous Assembly Act - which still remains in force, and that deals, inter alia, with conspiracy, incitement and attempt - does not cover these issues. The committee noted that section 18 uses somewhat different language - it does not use the word organising - but considered that nothing turns on that. The committee therefore considered that subparagraph (b) of "terrorist act" as well as the definition of "terrorist activities" should be deleted.**

(ii) Comment on discussion paper 92

13.123 Ms Schneeberger remarks in her comment on the discussion paper that they agree with the general approach to have a broad definition of terrorist act, and this is consistent with the approach adopted in some international instruments, most notably the OAU Convention on Terrorism. She considers that the amendments made by the Commission to the original draft would still encompass the obligations included in the international instruments. She remarks that they would however like to draw the Commission's attention to the recent debates in the UN Ad Hoc Committee where a proposal was made to have major economic loss included as a separate element for a crime. She explains that an argument was made that it is quite possible to have an effective act which does not cause physical damage but which is still performed with the requisite intention and is serious enough to merit classification as a terrorist act, noting that cyber attacks on a stock exchange or banking system were some of the examples given. She states that the South African delegation found some of these arguments to be quite compelling and suggests that the Commission may wish to include it as one of the elements for a "terrorist act".

13.124 Amnesty International comments that the proposed Bill will allow the authorities to use extraordinary measures against individuals suspected of crimes

[4] By Prof Medard Rwelamira at the time of the Department of Justice's Policy Unit.

involving extreme acts of violence against people and directed to particular ends. AI remarks that it is vital in this regard that the definition of a "terrorist act" is formulated very narrowly. AI notes that the current definition is too widely drawn and could encompass legitimate activities, as for instance trade union strikes which can at times result in damage to property or the disruption of the delivery of essential services or can be intended to induce the government, employers or members of the public to agree to something. AI says that the implications of the wide definition of a "terrorist act" can be seen in section 12 of the Bill, which refers to the protection of property of internationally protected persons, and under the provision, "any person who wilfully, with intent to intimidate, coerce, threaten or harass, enters or introduces any part of himself or herself or any object within that portion of the any building or premises...; or refuses to depart..." commits an offence and is liable on conviction to a fine and/or term of imprisonment of up to five years. AI remarks that arguably such activities could encompass non-violent demonstrators attempting to deliver a petition to an embassy.

13.125 Amnesty International states that if the definition remains vaguely or too widely worded, then the danger exists that the provisions of the law will be open to abuse or used for repressive purposes. AI explains that the need to narrow the definition is also underscored by the stringent sanctions, such as lengthy terms of imprisonment, laid down in clauses 2 to 14 for contraventions of the proposed Bill.

13.126 Prof Mike Hough[5] points out that although the Commission refers to "criminal" explosions, therefore including potential non-politically motivated incidents, the Commission also notes that "one should keep in mind numerous violent crimes, which could, in view of the number of perpetrators, type of weapons used and their *modus operandi* be classified as terrorist acts". He states that the issue of when an incident, even if it involves an explosion, can be deemed to be an act of terror, is a difficult one. Motives are one set of criteria, terrorism proper normally being associated with a political motive, and contrasted to pure "criminal" terror. He explains that the *Convention on the Suppression of Terrorist Bombings*, basically defines an act of terror where a person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility with the intent — to cause death or serious bodily injury; or cause extensive destruction of such a place, facility or system, where such de-

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[5] Of the University of Pretoria's Institute for Strategic Studies in the article "Urban Terror 2000: Some Implications for South Africa" *ISSUP Bulletin* 6/2000.

struction results in or is likely to result in major economic loss. He also points out that the Convention however stipulates that none of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. He remarks that a request for extradition or for mutual legal assistance based on such an offence may accordingly not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives, and the underlying reasoning is obviously to prevent extradition being refused on political grounds. He notes that this, however, does not mean that some political criterion is not to be used. He explains that to some extent, this is to be found in the intentions or objectives associated with a particular incident, linked to the type of target and the type of weapon used. He states that the Convention uses a particular combination of these criteria to determine an offence for purposes of the Convention, and notes that what is significant, is that it primarily refers to explosives or other lethal devices, state or government facilities, public places, public transport systems or infrastructure facilities. From this, he suggests that one could deduce some political objective, and interestingly though, threats to use such methods are not specifically included, only the act itself. He notes the proposed definition contained in the Bill on terrorist act. He considers that it is an open question whether the wording "any government or persons" is not too wide, as the term "persons" could be interpreted as implying that anybody coercing another person can be found guilty under the proposed legislation, whether there is a political objective or not, and whether or not it has implications for state security. He points out that the definition of a terrorist act contained in the original version (prior to amendments by the project committee) was similar to that contained in the OAU Convention on the Prevention and Combating of Terrorism.

13.127 Advocates Fick and Luyt of the Office of the Director of Public Prosecutions Transvaal consider that the wording "to do or to abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles" is superfluous and should be deleted from the draft. They however explain that the verbs, "intimidate, coerce and induce" are transitional verbs and have to refer to other acts (verbs). They note that whilst it is appreciated that this sub-clause is necessary to include terrorist acts in the RSA but aimed at foreign governments or organizations, they suggest that the original wording of the draft should be retained. They also consider that the inclusion of "general public" and "any person or persons" in the definition renders the definition to have too broad an application and that the well known intimidation during labour unrest, for instance,

will squarely fall within the ambit of this definition. They point out that it also includes intimidation for private reasons which is clearly against the spirit and purpose of the Bill and that there is, moreover, no definition of intimidation. They pose the question in view of the fact that section 1 of the *Intimidation Act* is repealed by this Bill, what would be the meaning of "intimidation".

13.128 Advocates Fick and Luyt remark that whilst the offence of sabotage has been deleted from the draft for reasons agreed with, there is no more detailed description of specific services addressed by the Bill. They consider that in sub-section (a)(ii) the interpretation of the term "essential" which describes "services" can cause problems, as certain services are interpreted by some as essential while others interpret them as luxurious, and therefore the services to be protected should be clearly defined. They thus suggest that the term "essential" be deleted and the services as defined by the deleted clause 5 (sabotage) be incorporated in the definition of terrorist acts. They further pose the question whether sub-clause (a) (iii) of this definition substitutes the common law offence of public violence.

13.129 The Media Review Network comments that the view that terrorist acts are unjustifiable accords with common sense but that the definition of a "terrorist act" and "terrorist organisation" contained in clause 1 of the Bill is patently and manifestly wider than is necessary.

13.130 Mr Saber Ahmed Jazbhay notes that the definition of 'terrorist act' is too wide and is vulnerable to constitutional attack. He comments that the Commission's preliminary recommendation is that it should read ' any act which does or may endanger the life, physical integrity or freedom of any person or persons . . .' He considers that it is so widely framed that it covers acts of random violence which have the maximum effect on the country's psyche for instance. Mr Jazbhay points out that with the proliferation of organized crime in this country, sophisticated crime syndicates could use the hysteria and the hype generated by anti-Pagad sentiments publically expressed to whip up support against terrorism to implicate those bona-fide organizations, including Pagad, who are fighting organized drug syndicates as well as crime especially in the Western Cape region. He says the Deon Mostert expose has shown the dark side of this potential whilst we wait for the truth to unveil itself regarding this affair.[6] He says that a good example to use would be the taxi

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[6] Mr Jazbhay remarks that it will be recalled that Mr Mostert revealed the existence of third force activity in the region whose intention was, and he submits still is, to de-stabilize the Western Cape region and to pin the blame on Pagad.

related violence in the Western Cape which has led to the deaths of many people, including drivers of the Golden Arrow bus company, the perpetrators are unknown, and their acts come within the definition of terrorism or terrorist acts despite the fact that they are being committed by persons with a criminally intentional point to dissuade the bus company to drop its fares. He notes that such acts are already punishable at law but bringing them within the ambit of terrorism is sheer extravagance. Mr Jazbhay states that if the much deprived inhabitants of the Wallacedene squatter community,[7] in the Kraaifontein area of the Western Cape, decide to invade vacant lands belonging to the municipality as well as private persons and they resort to acts of violence as they resist attempts to evict them, their acts will fall within the definition of terrorism even though a limited degree of violence is used. He points out that this is a chilling thought, especially if the scheme of the ATB is considered which empowers the DPP to detain people for interrogation who might have or who are suspected of possessing information of the commission of terrorist offences . He asks whether this is what the ATB seeks to do, namely to stifle protest which might become violent.

13.131 Dr Imtiaz Sooliman who commented on behalf of the Gift of the Givers Foundation says that from a practical point of view, the definition of terrorism is not properly defined and would put it at odds with the constitutional guarantees of freedom of association in relation to an individual's membership of an organisation if the provisions of clause 2(2) were to be implemented.

13.132 IDASA notes that "terrorist act" is defined as any act which does or may endanger the life, physical integrity or freedom of any person or persons or causes . . . damage to property . . . and is calculated or intended to intimidate, coerce or induce any government to . . . disrupt any public service, the delivery of any essential service to the public or to create a public emergency or create unrest or general insurrection in any state . . . " Linked to this is the definition of "terrorist

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[7] Who Mr Jazbhay notes are tired of waiting for the courts to come to their rescue regarding the provision of adequate housing in terms of their constitutional rights guaranteed to them which the authorities in the region are slow to deliver or make real. See *Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC) where the Constitutional court held that the State was obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. The interconnectedness of the rights and the Constitution as a whole had to be taken into account in interpreting the socio-economic rights and, in particular, in determining whether the State had met its obligations in terms of them and it was not only the State who was responsible for the provision of houses but that other agents within society had to be enabled by legislative and other measures to provide housing. Section 26 of the Constitution placed, at the very least, a negative obligation upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.

organisation" which means an organisation which has carried out, is carrying out or plans to carry out terrorist acts. IDASA says that as is evident the definitions are intrinsically linked to each other, and they are of the view that the definition of "terrorist act" is too wide and its ambit ought to be limited. They remark as other respondents do too, that the draft definition, as a result of its wide ambit could become a tool to prevent legitimate opposition to government, and that any strike, any blockade by taxi drivers or legitimate forms of protest could be construed as a "terrorist act" should it disrupt "any public or essential service." IDASA suggests that this may pose a threat to democracy.

13.133 IDASA submits that the definition of "terrorism" in the United Kingdom *Terrorist Act*, 2000, namely, "the use or threat of action that is designed to influence a government or to intimidate the public for the purpose of advancing a political, religious or ideological cause", is preferable since it clearly indicates the type of action that the legislature seeks to proscribe, and acts fall under this definition if they involve "serious violence" against persons or property, or create a serious risk to public health or safety. IDASA also notes that the use of threat or action that involves the use of firearms or explosives is to be considered as terrorism in terms of the definition. IDASA points out that in terms of the draft South African definition, no mention is made of "advancing a political, religious or ideological cause". They are of the view that it would perhaps be preferable to incorporate such a reference so that the context of any action may be considered when deciding whether an offence is a "terrorist act" or not. They note that this will enable the police to effectively monitor terrorist organisations and their activities. They also remark that they are satisfied that the draft legislation does not, as in the United Kingdom specifically name those organisations that are to be branded as "terrorist organisations". IDASA says that they believe that it is preferable to utilise definitions to ascertain whether the actions of individuals or groups are prohibited or not.

13.134 The South African Human Rights Commission comments that the definition of a terrorist act is overly wide and may potentially bring under the umbrella of the Act activities as diverse as traffic blockades of the kind seen recently in Gauteng, legitimate public demonstrations that may overrun the bounds of legality, labour strikes that may involve violence or some form of intimidation, etc. The SAHRC says that while it may be argued that the intention would not be to apply the definition under such relatively non threatening circumstances, the fact of the matter is that once it becomes law, it becomes part of the arsenal of the law enforcement agencies and nothing can prevent its use in the wider sense described. The SAHRC

states that they must point out that they do not seek to pass judgement on the government nor are the scenarios they sketch an indication of how they predict government will act and respond, however, what they are mindful of is the potential consequences of the definition, and as governments come and go, any law that is promulgated becomes a tool for the use of any current or future government. The SAHRC says that they cannot assume that South Africa will always have a government that is committed to the rule of law and the protection of human rights. The SAHRC notes that given that membership of a terrorist organisation is also a criminal offence[8], the very wide definition of a terrorist act renders the potential list of terrorist organisations virtually endless. The SAHRC states that this not only gives undue and unnecessary powers to the State, but also has the potential of making serious inroads into the right of association, which is protected by the Bill of Rights[9]. The SAHRC considers that it is possible that a bona fide organisation that represents no more than an irritation to the State can be brought within the ambit of the Act with all the consequences that then go with it, and the Bill can very easily become a tool to stifle legitimate dissent and opposition.

10.135 The Ministry of Community Safety of the Western Cape comments similarly that the definition would seem to be too wide as it would include for example certain kinds of lawful industrial action in the public sector, that there is no doubt that militant strike action which often occurs, *may cause damage to property and is calculated . . . to disrupt public service*. The Ministry considers that certainly the intention cannot be to declare this type of strike action a *terrorist act*. Martin Schönteich notes that the Bill's definition of a 'terrorist act' has been criticised for being too broad.[10] He says that the definition includes lawbreakers who would clearly not be terrorists in the normal meaning of the word, that for example, the definition includes "any act which may cause damage to property and is intended to disrupt any public service". He points out that minibus taxi owners who blockade a street used by municipal bus services, and where some parked vehicles are subsequently damaged, or a group of youths who destroy a Post Office letterbox would be guilty of committing a terrorist act as defined by the Bill. He notes that in its submission on the Bill, Amnesty International raises the concern that the broad definition could encompass legitimate activities, such as trade union strikes that result in damage to property or the disruption of the delivery of essential services, and that AI argues that if the definition remains vaguely or too widely worded, then the danger exists that the

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8 See Clause 4.

9 Section 18 of the Bill of Rights.

10 "Fear in the City, Urban Terrorism" Published in Monograph No 63 ISS 2001.

provision of the law will be open to abuse or used for repressive purposes.

13.136 The Defence Secretariat says that the word *terrorist* is used consistently in the Bill although it is not defined. They consider that the definition of *terrorist act* encompasses the gist of what *terrorism* should entail but suggest that in view of the use of the word in the media, other forms of reporting and the day to day perceptions of the man in the street that it be isolated and defined. The Secretariat states that the definition *terrorist act* limits the activity to an act and that the definition is lacking in that it does not take into account the threat of a terrorist act and suggests that the threat of a terrorist act should be included in the definition. The Chief: Military Legal Services also points out that the definition covers an act committed, that noting is said about a verbal threat or threats to persons and suggests that the words *or threat of an act* be inserted after the word *act* in line 1. They suggest further that the words *is likely to* be substituted for the word *may* in line 1 and 3. They point out that the words *physical integrity* is not defined and that it is uncertain how they will be interpreted. They suggest that the definition of *psychological integrity* as set out in section 12 of the Constitution be considered.[11] They remark that no definition is provided of the words *unrest* or *general insurrection* and consider that it contributes to the ambiguity of the definition. They further note that a terrorist act can be committed in any state, that no definition is given of the word *state* (which does not necessarily include the RSA as South Africa is referred to as *a government* and suggest that the words *in the RSA and/or any other State* be substituted for the words *any State*. They also propose that it be explained in the Bill that the singular includes the plural and vice versa. The Chief: Military Legal Services remark that it is unclear what is understood by the word *persons* in the phrase *and is calculated or intended to — (i) intimidate, coerce or induce any government or persons* and poses the question whether this implies *persons* from a Government and or does this include natural or juristic persons.

(iii) Evaluation

13.137 The project committee noted the concern that the definition of terrorist act is too wide. The committee considers that the reasons proffered for excluding lawful and peaceful dissent and labour demonstrations from the ambit of the

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[11] 12(2) Everyone has the right to bodily and psychological integrity, which includes the right-
(a) to make decisions concerning reproduction;
(b) to security in and control over their body; and
(f) not to be subjected to medical or scientific experiments without their informed consent.

definition are persuasive. The committee considered the definitions contained in the Australian *Criminal Code*,[12] the UK *Terrorism Act* of 2000,[13] the Canadian *Anti-*

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[12] In this Division - "act of terrorism" means the use or threatened use of violence -

(f) to procure or attempt to procure -
(1) the alteration of; (ii) the cessation of; or (iii) the doing of,
any matter or thing established by a law of, or within the competence or power of, a legally constituted government or other political body (whether or not legally constituted) in the Territory, the Commonwealth or any other place;

(f) for the purpose of putting the public or a section of the public in fear; or
(g) for the purpose of preventing or dissuading the public or a section of the public from carrying out, either generally or at a particular place, an activity it is entitled to carry out;

54. Any person who commits an act of terrorism is guilty of a crime and is liable to imprisonment for life.

55. (1) Any person who obtains for himself or another or supplies anything with the intention that it be used, or knowing that it is intended to be used, for or in connection with the preparation or commission of an act of terrorism is guilty of a crime and is liable to imprisonment for 10 years.

(2) Any court by or before which a person is found guilty of a crime defined by this section may order the forfeiture to the Crown of any property that, at the time of the crime -

(a) he had in his possession or under his control; and (b) he intended should be used for or in connection with the preparation or commission of an act of terrorism.

[13] 1(1) In this Act "terrorism" means the use or threat of action where-

(f) the action falls within subsection (2),
(g) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
(h) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

(2) Action falls within this subsection if it-
(a) involves serious violence against a person,
(b) involves serious damage to property,
(c) endangers a person's life, other than that of the person committing the action,
(d) creates a serious risk to the health or safety of the public or a section of the public, or
(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section-

(f) "action" includes action outside the United Kingdom,
(g) (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
(h) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
(i) "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

Terrorism Act* of 2001**[14] **and the Australian *Security Legislation Amendment

[14] ``Terrorist activity'' means
(*a*) an act or omission committed or threatened in or outside Canada that, if committed in Canada, is one of the following offences:

(f) the offences referred to in subsection 7(2) that implement the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on December 16, 1970,
(g) the offences referred to in subsection 7(2) that implement the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, signed at Montreal on September 23, 1971,
(h) the offences referred to in subsection 7(3) that implement the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, adopted by the General Assembly of the United Nations on December 14, 1973,
(i) the offences referred to in subsection 7(3.1) that implement the *International Convention against the Taking of Hostages*, adopted by the General Assembly of the United Nations on December 17, 1979,
(j) the offences referred to in subsection 7(3.4) or (3.6) that implement the *Convention on the Physical Protection of Nuclear Material*, done at Vienna and New York on March 3, 1980,
(k) the offences referred to in subsection 7(2) that implement the *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, supplementary to the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, signed at Montreal on February 24, 1988,
(l) the offences referred to in subsection 7(2.1) that implement the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, done at Rome on March 10, 1988,
(m) the offences referred to in subsection 7(2.1) or (2.2) that implement the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, done at Rome on March 10, 1988,
(n) the offences referred to in subsection 7(3.72) that implement the *International Convention for the Suppression of Terrorist Bombings*, adopted by the General Assembly of the United Nations on December 15, 1997, and
(o) the offences referred to in subsection 7(3.73) that implement the *International Convention for the Suppression of Terrorist Financing*, adopted by the General Assembly of the United Nations on December 9, 1999, or

(b) an act or omission, in or outside Canada,
(i) that is committed
(a) in whole or in part for a political, religious or ideological purpose, objective or cause, and
(b) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the person, government or organization is inside or outside Canada, and

(ii) that intentionally

(f) causes death or serious bodily harm to a person by the use of violence,
(g) endangers a person's life,
(h) causes a serious risk to the health or safety of the public or any segment of the public,
(i) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or

***(Terrorism) Bill* of 2002.**[15] **The Committee also noted the remarks made by Alex Obote-Odora**[16] **where he noted as follows on the failure of the UN to produce an internationally endorsed definition of *terrorism*:**[17]

(j) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of lawful advocacy, protest, dissent or stoppage of work that does not involve an activity that is intended to result in the conduct or harm referred to in any of clauses (A) to (C),

and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.

15 *Terrorist act* is defined in the Security Legislation Amendment (Terrorism) Bill 2002 to mean a specified action or threat of action that is made with the intention of advancing a political, religious or ideological cause. The types of actions covered by the definition of "terrorist act" are set out in proposed subsection 100.1(2) and include actions involving serious harm to persons, serious damage to property and interference with essential electronic systems. Electronic systems include information systems; telecommunications systems; financial systems; and systems used for essential government services, essential public utilities and transport providers. The new offence in proposed section 103.1 will apply to the financing of actions which fall within this definition. Lawful advocacy, protest and dissent, and industrial action are expressly excluded from the ambit of the definition.

16 Alex Obote-Odora "Defining International Terrorism" http://www.murdoch.edu.au/elaw/issues/v6n1/obote-odora61.html

17 It was reported that on 2 October 2001 when the General Assembly entered the second day of its weeklong debate on measures to combat international terrorism, several speakers called attention to the need to define the scourge in order to effectively combat it.
"Yemen's Ambassador, Abdalla Saleh Al-Ashtal, joined numerous others who have expressed support for the recently adopted Security Council resolution on fighting terrorism, but pointed out that its implementation would be affected by the fact that there was no agreed definition of terrorism.
Echoing this view, the Ambassador of Malaysia, Hasmy Agam, stressed that without a clear definition, it would be difficult to enforce international agreements to combat the menace. "Acts of pure terrorism, involving attacks against innocent civilian populations - which cannot be justified under any circumstances - should be differentiated from the legitimate struggles of peoples under colonial or alien domination and foreign occupation for self-determination and national liberation," he said.
Speaking on behalf of the Arab Group, Libyan Ambassador Abuzed Omar Dorda said States that harboured terrorists of Arab nationalities should surrender them to their countries so that these elements may be brought to justice. The Arab Group also advocated convening an international conference to arrive at a definition of terrorism, he said, adding that the Group would oppose any attempt to classify resistance to occupation as a terrorist act. "Such an attempt will turn concepts topsy-turvy, and only hatred can be engendered from this kind of oppression."
Supporting the call for an anti-terrorism conference, Iran's Vice-Minister for Foreign Affairs, Javad Zarif, said the forum should elaborate objective criteria that would allow the

The failure of the international community, acting through the United Nations, to define terrorism is political, not legal or technical. The political reasons are many and diverse. From among the members of the United Nations, there are States that are frustrated because they are disempowered. There are also states that consider themselves victims of economic and social wrongs, imposed on them by the developed countries.

However, the central point is not whether the allegations made by developing countries against the developed ones are true or false, right or wrong. What is relevant is that these allegations form the political basis for terrorist actions and subsequently serve to justify it. Significantly, these States refuse to accept a legal order that, according to their perception, perpetrates such real or perceived inequalities. Consequently these states tend to refuse to embrace factual definition of terrorism that do not include the root causes of their backwardness and disempowerment. They are therefore disinclined to sign, let alone ratify, a definition which would restrict their freedom of action and might result in condemning militants who are the object of public admiration in their respective states. Examples of these political situations are many: In World War II, resistance fighters were seen and treated as terrorists by Nazi Germany, while considered heroes by the Allies. Today, many Islamic militants who are considered terrorists by many developed and developing countries, are treated as heroes by the disempowered in the Middle East, Asia, Africa, and other places where they operate.

Failure to separate legitimate struggles, using lawful means to effect political, economic and social changes, tend to result in unilateral responses by victim states. Partly because international terrorism is not defined, and partly because there are no legal ways to respond to violent terrorist attacks, victim states often find themselves in breach of international law itself under the pretence of self-defence, by resorting to methods sometimes similar to the ones it denounces.

One way of addressing the problem of international terrorism is constructive engagement through dialogue between victims states and terrorists. The two groups should attempt to see the other´s point of view. For example, the fact that a terrorist act is inexcusable should not preclude a political assessment of the situation. Exploring the political depth of a given terrorist manifestation does not in the least suggest the approval of what remains, legally, a criminal act.

On the other hand, recognizing the political dimension of terrorism can influence the handling of the problem, and thus lead closer to defining terrorism. It is important to understand and address a terrorist´s message notwithstanding that one does not agree with it. This exercise is relevant solely for the purpose of acknowledging the political dimension of the terrorist act. This alternative approach accounts for a better appreciation of the act, and does not necessarily favours the terrorist. By acknowledging terrorist messages and acts, terrorism can be condemned by a greater number of States, or by the international community through the United Nations.

There is, however, a caveat. Political dialogue may only be possible when terrorist organisations, and their messages, are identifiable, endorsed by a foreign State or

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international community to identify and combat terrorism. "Legitimacy as well as sustainability of the global struggle against terrorism rests on applying a single set of standards to all," he said.

Pledging his country's full support for the fight against terrorism, Ambassador Shamshad Ahmad of Pakistan emphasized the need to tackle the root causes of that peril, noting that stability and mutual prosperity were critical to that effort. "It will continue to haunt us if the roots of terrorism, which lie in the inequality of societies, in the exploitation of downtrodden, in the denial of fundamental rights and in the sense of injustice, are not addressed," he said.

The Ambassador of the Sudan, Elfatih Mohamed Ahmed Erwa, stressed that his country would never be a haven for terrorist groups and would fully cooperate in any effort to eliminate terrorism. The Sudan would support international laws and General Assembly resolutions aimed at combating terrorism and apprehending the perpetrators.

Guatemalan Ambassador Gert Rosenthal pointed out that the battle against terrorism would require fighting crime, drug trafficking and money laundering "given the actual or potential links between these scourges, which are becoming increasingly international in nature." . . . .

somehow linked to another State. For example, "terrorist" organisations such as the PLO and IRA were able to negotiate durable political settlements once the victim states were prepared to listen to their clear an unambiguous political messages. In these cases, unfortunately the Oslo Agreement and the Good Friday Agreement did not include definition of international terrorism in the overall peace agreements.

On the other hand, this alternative approach does not necessarily apply to terrorist activity aimed at challenging the economic order or religious belief, conducted by isolated individuals or small groups over which States have no practical means of control outside repression. Red Brigades, Baader Meinhof and assortment of extreme religious groups tend to loosely fit this category.

It is also relevant for one to be mindful of the reasons why victim States often refuse to deal directly with those whom they consider criminals. Victim States that refuse to deal directly with "terrorists" should be encouraged to use other procedures such as inquiries, mediation or conciliation. Of course the particular method used will depend in the end on the type of underlying political conflict. Whatever form is adopted by the parties, a definition of international terrorism should be placed high on the agenda, only then may those who engage in terrorist acts help in the formulation of a definition of their trade - terrorism.

Debates in the Sixth Committee, General Assembly and the Security Council demonstrate that all members of the United Nations, including states that are suspected of sponsoring terrorism, condemn terrorism, and terrorist attacks in all their manifestations, at least in public. No single state came out openly in support of terrorism. Similarly, the ICJ condemned all forms of terrorism and terrorist attacks. It is therefore reasonable to conclude that the international community, either individually, or through the United Nations, condemns international terrorism and terrorist acts.

However, member states are divided on the methods of combating terrorism, including providing a definitive definition of terrorism. The problem of definition as observed above, is not legal, but political. Consequently, questions relating to definition of terrorism is best solved when addressed by political and legal committees of the United Nations. This is because causes of terrorism are usually political. Thus, a purely legal approach may not necessarily address the political dimension of international terrorism. Moreover, causes of terrorism can not, and should not, be separated from its consequences. Linking the two factors necessarily involve states and organisations that have, or may have, connection with terrorists. It is only through constructive engagement - bringing all the major players at the conference table - that a working definition of international terrorism, with the possibility of creating rules that provide for effective enforcement of international law, may be achieved.

13.138 The committee considers that it should amend its proposed definition along the lines of the Canadian legislation including elements of the UK and Australian legislation.[18] The committee considers the argument adopted in the UK not

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[18] ***terrorist act*** means action or threat of action where:

(f) the action falls within subsection (2); and
(g) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause;

but does not include:

(1) lawful advocacy, protest or dissent; or
(d) industrial action.

(f) Action falls within this subsection if it:

(h) involves serious harm to a person; or
(i) involves serious damage to property; or
(j) endangers a person's life, other than the life of the person taking the action; or

persuasive that if the act concerned involves serious violence against a person, serious damage to property, endangers a person's life, other than that of the person committing the action, creates a serious risk to the health or safety of the public or a section of the public, or is designed seriously to interfere with or seriously to disrupt an electronic system, and the action involves the use of firearms or explosives then it constitutes terrorism whether or not the use or threat is designed to influence the government or to intimidate the public or a section of the public. The committee however considers it should follow the Australian provision regarding interference with essential electronic systems. This legislation defines electronic systems as including information systems; telecommunications systems; financial systems; and systems used for essential government services, essential public utilities and transport providers. The Commission agrees with the project committee's views on the definition of "terrorist act".

(k) creates a serious risk to the health or safety of the public or a section of the public; or

(l) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:

(1) an information system; or

(2) a telecommunications system; or

(3) a financial system; or

(4) a system used for the delivery of essential government services; or

(5) a system used for, or by, an essential public utility; or

(6) a system used for, or by, a transport system.

(iv) Recommendation

13.139 The project committee and Commission recommend that the definition of *terrorist act* should read as follows:

terrorist act means an act, in or outside the Republic,

(c) that is committed —

(i) in whole or in part for a political, religious or ideological purpose, objective or cause, and

(ii) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the person, government or organization is inside or outside the Republic, and

(b) that intentionally —

(i) causes death or serious bodily harm to a person by the use of violence;

(ii) endangers a person's life;

(iii) causes a serious risk to the health or safety of the public or any segment of the public;

(iv) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of subparagraphs (i) to (iii); or

(v) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, including, but not limited to an information system; or a telecommunications system; or a financial system; or a system used for the delivery of essential government services; or a system used for, or by, an essential public utility; or a system used for, or by, a transport system, other than as a result of lawful advocacy, protest, dissent or stoppage of work that does not involve an activity that is intended to result in the conduct or harm referred to in any of subparagraphs (i) to (iii),

but, for greater certainty, does not include conventional military action in accordance with customary international law or conventional international law.

(i) "Terrorist organisation"

(i) Evaluation and preliminary proposal contained in discussion paper 92

13.140 The project committee noted the originally proposed definition which provided that "terrorist organisation" means (a) an organisation created with the intention to carry which has carried out, is carrying out or plans carrying out terrorist acts or activities or an organisation that approves of the possibility of using terrorism in its activities ; or (b) any organisation, of which at least one of its divisions is involved in terrorist acts or activities and at least one governing body is aware of such involvement. The committee raised the

question whether the definition ought not perhaps be simplified. The committee noted that the words “or activities or an organisation that approves the possibility of using terrorism” deal with indirect or constructive intention and the question arose whether it would be sufficient if the clause were to say “terrorist organisation means an organisation having the intention directly or indirectly to carry out terrorist acts”. The committee wondered whether this was an attempt to cater for the provisional IRA type of organisation and considered that an organisation might start of as a struggle organisation without embracing violence and gradually it does or the members foresee that it might embrace violence and reconcile themselves with that. The committee also considered that the clause would be too limiting if it were to say “created with the intention to carry out terrorist acts” as the organisation might say the organisation was not created with the intention to carry out terrorist acts. The committee considered that the clause should cover the various possibilities, ie of an organisation presently carrying out terrorist acts, one which has done so in the past or will in future do so. The committee therefore decided that the clause should read as follows: “‘Terrorist organisation’ means an organisation which has carried out, is carrying out or plans carrying out terrorist acts”.

13.141 The project committee noted the formulation contained in the proposed subclause (b) that “any organisation, of which at least one of its division is involved in terrorist acts or activities and at least one governing body is aware of such involvement” and was of the view that it is not clear. The committee noted that this subclause was taken from legislation of the Russian Federation and was of the view that it should be deleted.

(ii) Comment on discussion paper 92

13.142 The Media Review Network comments that the view that terrorist acts are unjustifiable accords with common sense but the definition of a “terrorist act” and “terrorist organisation" contained in clause 1 of the Draft Bill is patently and manifestly wider than is necessary.

(iii) Evaluation and recommendation

13.143 It is expected of South Africa in terms of resolutions 1373 and 1390 to have the necessary measures in place to combat the financing of terrorism and to freeze and forfeit funds, to prevent supplies to terrorists and to prevent their entry into member States. It was noted above that in Canada it was decided to make provision for listed entities whereas their proposed legislation talked of a *terrorist group*. Terrorist group was defined as — an entity that has as one of its purposes or activities facilitating or carrying out any

terrorist activity, or a listed entity, and includes an association of such entities. The Canadian Government backed a cosmetic change in the list of terrorist organizations to be compiled by the government, and instead of terrorist groups, such organizations would now be known as "listed entities." The change was suggested by a Senate committee that worried innocent groups would be stigmatized by the name terrorist, even if they were wrongly included on the list and were later deleted.

13.144 The project committee is of the view that it should reconsider its decision not to proscribe organisations or entities. One way of giving effect to resolution 1373 where funding of organisations, entities or persons is suspected of being used for the purpose of facilitating or carrying out any terrorist activity, or for the purpose of benefiting any person who is facilitating or carrying out such an activity, or that it is to be for the benefit of a terrorist group, would be to list the group, entity or person. The committee therefore has to decide whether the Bill should still provide for *terrorist organisations* or *listed organisations* or *entities*. Giving effect to the Convention for the Suppression of the Financing of Terrorism seems to necessitate the listing or proscription of individuals and organisations. It is also apparent to the project committee that the one does not exclude the other necessarily and that the Bill could provide for the listing and proscription of persons and entities (as the Australian proposed legislation does). The Australian Suppression of the Financing of Terrorism Bill 2002 provides that proscribed person or entity means: (a) a person or entity listed by the Minister under section 15; or (b) a person or entity proscribed by regulation under section 18.[1] It was noted above that the Canadian legislation provides for an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or a listed entity, and includes an association of such entities. The project committee and Commission are of the view that it should still provide for *terrorist organisations* in the Bill and make provision for the power of the Minister[2] to proscribe organisations. The project committee and Commission recommend the following definition:

> "Terrorist organisation" means an organisation that has as one of its purposes or activities facilitating or carrying out any terrorist act, which has carried out, or plans carrying out a terrorist act.

(h) Use of weapons of mass destruction

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1 See below the discussion of membership offences.

2 A definition of "Minister" is also therefore included in the Bill which provides that "Minister" means the Minister to whom the administration of this Act has been assigned in terms of section 63. Section 63 provides that the President may by proclamation in the Gazette assign the administration of this Act to any Minister, and may determine that any power or duty conferred or imposed by this Act on such Minister, shall be exercised or carried out by that Minister after consultation with one or more other Ministers. (Section 91(2) of the Constitution of 1996 provides that the President appoints Ministers and assigns their powers and functions.)

13.145 It was suggested to the Commission that consideration be given to include an offence in the Bill aimed at weapons of mass destruction as well. The Commission has noted that in the UK although the heading to part 6 of their *Anti-terrorism, Crime and Security Act* 2001 talks of weapons of mass destruction[3] it is not defined there, neither is it defined in their *Chemical Weapons Act* of 1996. It is, however, defined as follows in Title 18 of the US Code on Crime and Criminal Procedure:

> the term ''weapon of mass destruction'' means -

[3] Part 6 of the *Anti-terrorism, Crime and Security Act* strengthens current legislation controlling chemical, nuclear and biological weapons (WMD). It makes it an offence to aid or abet the overseas use or development of chemical, nuclear, biological. It introduces offences equivalent to those in the Chemical Weapons Act 1996 in relation to biological and nuclear weapons. This brings legislation on biological and nuclear weapons into line with existing legislation on chemical weapons. These provisions will cover nuclear and radiological weapons, chemical weapons and biological agents and toxins. There is also a new provision for customs and excise to prosecute.

(A) any destructive device as defined in section 921[1] of this title;
(B) any weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals, or their precursors;
(C) any weapon involving a disease organism; or
(D) any weapon that is designed to release radiation or radioactivity at a level dangerous to human life.

13.146 The project committee and Commission agree with the suggestion to include a reference to weapons of mass destruction and proposes that the definition on weapons of mass destruction contained in the *Non-proliferation of Weapons of Mass Destruction Act 87 of 1993* be applied namely:

> 'weapon of mass destruction' means any weapon designed to kill, harm or infect people, animals or plants through the effects of a nuclear explosion or the toxic properties of a chemical warfare agent or the infectious or toxic properties of a biological warfare agent, and includes a delivery system exclusively designed, adapted or intended to deliver such weapons.

E. CLAUSE 2: TERRORIST OFFENCES

(a) Evaluation and preliminary proposal contained in discussion paper 92

13.147 The project committee considered that the words “if such act falls, in terms of

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[1] The term "destructive device" means -
(A) any explosive, incendiary, or poison gas -
(i) bomb,
(ii) grenade,
(iii) rocket having a propellant charge of more than four ounces,
(iv) missile having an explosive or incendiary charge of more than one-quarter ounce,
(v) mine, or
(vi) device similar to any of the devices described in the preceding clauses;

(A) any type of weapon (other than a shotgun or a shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and
(B) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.

The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10; or any other device which the Secretary of the Treasury finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes.

this Act within the jurisdiction of the courts of the Republic"[2] in clause 2 is superfluous and was of the view that they should be deleted. The committee proposed that clause 2 should provide as follows: "Subject to this Act, any person who commits a terrorist act or any other contravention of this Act, commits an offence and shall be liable on conviction to imprisonment for life".

(b) Comment on the discussion paper

13.148 Ms Schneeberger comments that although the section is preceded by the qualifier "subject to the provisions of this act" they still found it confusing that a life sentence was imposed on all offences, while specific offences under clauses 7, 10, 12 and 13 all made provision for lesser sentences. She remarks that in their opinion it would be clearer if the different offences could be dealt with under each separate section, with the addition of a new section for penalties for a terrorist act.

13.149 The Chief: Military Legal Services suggests that the words *shall be guilty of an offence* be inserted after the words *of this Act* and that the words *commits an offence* be deleted. They also suggest that the words *knowingly commits* be inserted after the words *terrorist act, or*. They consider that the wording of the clause is ambiguous in that a person can commit a terrorist act in the Republic or elsewhere and that the person can be imprisoned for life on conviction. They consider that where the wording *or elsewhere* is used in the Bill it infringes on the international law in that the country where the offence is committed will always have jurisdiction over the offender. They state they are uncertain how it is visualised how RSA courts will have jurisdiction over the offender other than by extradition treaties or agreements. They note that this clause cannot be enforced in any other country without infringing on its sovereignty. The Chief: Military Legal Services also says that it is unclear from the wording whether the drafters had in mind that terrorist acts are only carried out by groups of persons and cannot be carried out by individuals. They suggest that from the wording of clause 2 of the Bill it seems as though any person can carry out acts of terrorism, although no definition can be found for a terrorist. They state that from a practical point of view a person is normally charged for committing a specific offence, for example the offence of assault. The Chief: Military Legal Services point out that no specific offence is mentioned in the definition. They therefore suggest that the offence of terrorism should be included in the Bill and should be defined in section 1 of the Bill. They consider that it will make the prosecution for the offence of terrorism easier.

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[2] The original clause provided as follows: "Any person who, in the Republic or elsewhere, commits a terrorist act, if such act falls, in terms of this Act, within the jurisdiction of the courts of the Republic, commits an offence and is liable on conviction to imprisonment for life".

13.150 Messrs Fick and Luyt of the Office of the Director of Public Prosecutions: Transvaal comment that clause 2 prescribes life imprisonment for terrorist acts or any other contravention of the Act, and that for many other offences introduced by the Bill, however, other sentences are specifically prescribed. They remark also that this creates an anomaly which would most definitely cause problems in the prosecution of the offences, and suggest that this can be rectified by either deleting the words "or any other contravention of the Act" and prescribe the sentence for each introduced offence separately in the description of the offence (which is in anyway the case in most of the offences already) or to add the words "unless otherwise prescribed". They suggest that if the last suggestion is to be followed, the separate prescribed sentences of life imprisonment throughout the Bill should be deleted and only the sentences other than life imprisonment be retained. They however consider that to ensure easier reading of the Bill and certainty, it is suggested that the first suggestion be followed. Advocates Fich and Luyt further note that the provision that an act committed "elsewhere" also causes concern and pose the question whether our courts will have jurisdiction for instance if an act that fits the definition is committed in Northern Ireland. They point out that as the jurisdiction of our courts is provided for in clause 15, they recommend that the words "in the Republic or elsewhere" are superfluous and should be deleted.

(c) Evaluation

13.151 The project committee agrees with Ms Schneeberger and Messrs Fick and Luyt that clause 2 imposes a life sentence on all offences, while specific offences under clauses 7, 10, 12 and 13 make provision for lesser sentences. The committee considers the reasoning persuasive on the deletion of the words "or any other contravention of the Act" and to prescribe the sentence for each introduced offence separately in the description of the offence. The committee also agrees with the argument that since the jurisdiction of our courts is provided for in clause 15, the words "in the Republic or elsewhere" are superfluous and should be deleted. The committee also agrees that the words *shall be guilty of an offence* should be substituted for the words *commits an offence*. The Commission agrees with the project committee.

(d) Recommendation

13.152 The project committee and Commission recommend the following provision:

> Any person who commits a terrorist act shall be guilty of an offence and shall be liable on

conviction to imprisonment for life.

F. CLAUSE 3: PARTICIPATION IN AND FACILITATION OF TERRORIST ACTS AND HARBOURING AND CONCEALING

(a) Evaluation and preliminary proposal contained in discussion paper 92

13.153 The Bill contained in the discussion paper contained clause 3 which dealt with material support, harbouring and concealing terrorist acts. The project committee noted that the wording of clause 3 was taken from the American section 2339A Title 18 (Crimes and Criminal Procedure) which provides as follows:

> "(a) Whoever, within the United States, provides material support or resources or conceals or distinguishes the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or carrying out, a violation of section 32, 37, 81, 175, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332c, or 2340A of this title or section 46502 of title 49,[1] or in preparation for, or in carrying out, the concealment or an escape from the commission of any such violation, shall be fined under this title, imprisoned not more than 10 years, or both.
>
> (b) Definition. In this section, the term 'material support or resources' means currency or other financial securities, financial services, lodging, training, safe-houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials."

13.154 The committee noted that the definition in the proposed Bill related to "material support or resources" and that the only differences between the proposed definition and the American provision are the use of the words "funds or financing" where the American provision uses the phrase "currency or other financial securities"; the insertion at the end of the definition of the words "funds or financing"; and the deletion in the proposed definition of the phrase "except medicine or religious materials" which is contained in the American provision.

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[1] See the discussion of the American legislation in Chapter 6 above in regard to the sections referred to in this section.

13.155 The committee noted that the heading to the clause says "providing material support in respect of terrorist acts" but that clause 3(1)(i) provides for "an offence under the provisions of this Act" and that it includes other offences such as highjacking and so forth. The committee therefore suggested that the heading should not be confined only to "terrorist acts" but should say "any offences under the Act". The committee initially suggested that the word "partakes" used in the original clause should be substituted by the word "participates" but was then concerned whether there is any point in saying in clause 3(1)(c) "participates in terrorist acts" (or activities) since aiding or promoting terrorist acts would already be covered by the definition of terrorist acts in any event. The committee therefore decided that clause 3(1)(c) should be deleted. The project committee also noted that clause 3(2) is intended to cover the case of someone assisting an offender to escape arrest. The committee considered whether it should be criminal to harbour or conceal an offender and noted that one will have to show knowledge and objective facts for a reasonable suspicion under clause 3(2)(a). The committee also considered whether it should be criminal to have no *mens rea* other than the failure to appreciate what another reasonable person might otherwise have appreciated. The committee was of the view that the phrase in the original draft "has reason to suspect" should be deleted and be replaced with the word "knows".[1]

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[1] Section 7 of the South African Protection of Information Act, 84 of 1982 and section 81 of the Australian Commonwealth Crimes Act of 1914 is noteworthy. They provide as follows:

7 Any person who-

(a) knowingly harbours or conceals any person whom he knows or has reason to believe to be a person who is about to commit or who has committed an offence under this Act, or knowingly permits any such persons to meet or assemble in any premises in his occupation or under this control;

(b) having harboured or concealed any such person, or permitted such persons to meet or assemble in any premises in his occupation or under his control, wilfully omits or refuses to disclose to any member of the South African Police Service any information it is in his power to give in relation to any such person; or

(c) knowing that any agent or any person who has been or is in communication with an agent, whether in the Republic or elsewhere, is in the Republic, fails forthwith to report to any member of the South African Police Service the presence of or any information it is in his power to give in relation to any such agent or person,

shall be guilty of an offence and liable on conviction to a fine not exceeding R1 000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment.

81(1) Any person who:

(a) knowingly harbours any person whom he knows or has reasonable ground for supposing to be a spy; or

(b) knowingly permits any persons, whom he knows or has reasonable ground for supposing to be spies, to meet or assemble in any premises in his occupation or under his control; or

(c) having harboured any person whom he knows or has reasonable ground for supposing to be a spy, or having permitted any persons whom he knows or has reasonable ground for supposing to be spies to meet or assemble in any premises in his occupation or under his control, refuses to disclose to any authorized officer any information which it is in his power to give in relation to that person or those persons;

shall be guilty of an offence. Penalty: Imprisonment for 7 years.

The committee further suggested that the words “to which the person so harboured or concealed would have been liable on conviction of” be deleted in order to provide as follows, namely “liable on conviction to the penalty for the offence which that person intended to commit or has committed, as the case may be ”.

13.156 The committee further decided that clause 3(1)(a) should be amended by the insertion of the words “logistical or organisational” because the person who invites , addresses, manages and all that is surely providing organisational or logistical support. The committee also noted a suggestion that the scope of the term “conceal” in clause 3(1)(b) is not quite clear and whether it would include a situation where witnesses for one reason or another refuse to testify.[2] It was also suggested that one may need to consider this aspect since the acts envisaged under the Bill are of a nature where intimidation is bound to be significant. The committee presumed that what is meant is someone who knows certain things but then refuses to testify. The committee was of the view that the Criminal Procedure Act could be used in this regard where someone has given a statement but then when called to testify, refuses to do so. The committee however noted that the applicable penalty in the case of someone who refuses to testify is that penalty which the intending offender would be liable to. The committee was of the view that the clause actually aims at someone who provides support or resources or who harbours a terrorist as opposed to someone who simply refuses to testifying at a trial. It didn’t strike the committee as the right place to deal with this issue as the Criminal Procedure Act seems to be the appropriate measure for dealing with it.

(b) <u>Comment on discussion paper 92</u>

13.157 Ms Schneeberger remarks that the clause appears to be dealing with accessories and accomplices to an offence, which is an essential component of the offences. She points out that the international conventions on terrorism traditionally identify four main ancillary offences, i.e. attempts, accomplices, organising and directing, and persons acting with a common purpose. She says that they do note that section 18(1) and (2) of the *Riotous Assemblies Act* will cover attempt, conspiracy, instigation, commands and procurement and that the *Riotous Assemblies Act*, together with section 3 of the Bill would therefore cover attempt, organising and directing and some forms of accomplices as identified in the international conventions. They are, however, not certain whether the current formulation would cover all accomplices and persons acting with a common purpose.

13.158 Ms Schneeberger states that the point has been made by delegates

[2] By Prof Medard Rwelamira formerly of the Department of Justice’s Policy Unit.

negotiating international conventions that the ancillary crimes are used more frequently than the main offence to prosecute a crime and it is therefore quite possible that South Africa will have more prosecute or extradite requests for an ancillary offence than for the main offence. She points out that it is therefore essential to ensure that the all the possible ancillary crimes, in particular all types of accessories and persons acting with a common purpose, are covered in the South African legislation. They would request that the Commission bears this in mind when drafting the *Anti-Terrorism Bill*.[3]

13.159 Mr Jazbhay comments that this clause is taken from the American s 2339A Title 18 (Crimes and Criminal Procedure) and is straightforward in its meaning. He considers that what is onerous though is that any person who has knowledge that another person intends to commit or has already committed an offence under the Bill commits an offence and is liable to punishment as if he intended to or has committed the offence. He suggests that this provision is too wide and that it ignores the possibility of the role of intimidation or coercion in the equation. Mr Jazbhay considers that a 'whistle-blower' type of protection is desirable in order to blunt the impact of this provision. The Pretoria Muslim Congregation comments that the definitions of "material support" and "funds" are extremely wide and effectively prohibit the accumulation of funds by whatever means by Pagad and curtails the religious duty of Muslims to give charity and support worthy causes ie in this instance to eliminate the social evils of gangsterism and drugs.

13.160 The SAPS: Legal Component: Detective Service and Crime Intelligence comments that this clause may be too broad and could perhaps be qualified by inserting the words "*knowingly*" prior to the word "*participates*". The Chief: Military Legal Services suggests that the plural be used in the clause where the singular is presently used.

13.161 Mr MR Essack submitted a petition to the Commission in which he says that they object to the Bill as the motivation for the Bill is explained to be to deal with urban terrorism, that they believe strong action should be take against urban terrorism but that the existing laws are adequate and that compelling evidence should be advanced for the reintroduction of detention without trial. They are strongly opposed to the clauses dealing with international terrorism and consider that they are strongly based on the Anti-Terrorism Bill of the United States of America which they say is used to target and neutralise any kind

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[3] Ms Schneeberger points out that although the references to the ancillary crimes have been deleted in some clauses, on the basis that the are covered by the *Riotous Assemblies Act*, they are included in others. There is a need for consistency in this respect, and they would favour specific mention of the ancillary offences, either in respect of each offence or as a generic clause for all the offences covered by the Act.

of support for liberation movements[4] especially in the Middle East as even humanitarian aid to individuals and families suffering oppression is outlawed. They remark that they strongly oppose the idea that South Africa should fall in line with US foreign policy objectives.

13.162 Messrs Fick and Luyt of the Office of the Director of Public Prosecutions: Transvaal comment that although "material support" is defined in clause 1, there is no definition of logistical or organisational support. They suggest that the reference to "logistical or organisational support or any resources" be deleted from clause 3 and that the words "notwithstanding the normal meaning" be added to the definition of "material support" in clause 1. Martin Schönteich notes that the Bill seeks to criminalise the actions of those who provide material support in respect of terrorist activities and that, for example, anyone who provides material, logistical or organisational support, knowing or intending that such support will be used in the commission of an offence in terms of the Bill, is deemed to have committed a criminal offence. The same would apply to anyone who participates in the activities of a terrorist organisation. On conviction of such an offence, a penalty of up to 10 years imprisonment, without the option of a fine, is proposed. He also notes that anyone who conceals a person knowing that that person intends to commit or has committed an offence in terms of the Bill, also commits an offence.

(c) Evaluation and recommendation

13.163 The committee noted that the issue of giving support to groups lead to serious concern from various quarters. It was alleged that the State would target also those

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[4] See however http://www.fas.org/irp/news/2000/01/000121-terror3.htm "Terrorist groups often try to raise money in countries where they are not active, but where their sympathizers can take advantage of ordinary people's misplaced generosity. Claiming to raise funds for peaceful purposes, front organizations turn the money they get over to the terrorist groups they are secretly working for. The United Nations International Convention for the Suppression of the Financing of Terrorism is intended to make this more difficult. Nations that become a party to the convention are required to make it a crime for anyone to provide or collect funds for terrorism. They must also extradite or prosecute offenders and cooperate in investigating and preventing the financing of terrorist activities. . . . It is a critical advance in counter-terrorism policy. As Secretary of State Madeleine Albright said, "It is wrong to finance terrorist groups. . . . Every nation has a responsibility to arrest or expel terrorists, shut down their finances and deny them safehaven. . . . Our purpose is to weave a web of law. . . that will . . .deny them the mobility and sustenance they need to operate."While all states criminalize acts of terrorism, few have prohibitions on the financing of terrorists. Supporters of terrorist groups ranging from Hizballah in Lebanon to the Tamil Tigers of Sri Lanka to the Armed Islamic Group in Algeria and the Kurdistan Workers Party in Turkey have been adept at raising money, supposedly for humanitarian or educational purposes. The UN convention will improve efforts by governments to prevent financial assets from being used to help terrorists. If necessary, assets can be seized or frozen. Individuals involved in channeling money to terrorists can be arrested. If they are not tried in the country where they are apprehended, they must be extradited to a requesting state to stand trial. Fighting terrorism requires international cooperation. Most of the world's states are aware that they are vulnerable. By promoting a collective effort to confront a common problem, the UN is helping to stop this international scourge".

organisations and individuals who give humanitarian support to certain foreign groupings. It raised great discomfort and was heavily criticised. The fact remains, however, that there is almost universal acceptance since 11 September 2001 that one effective method of preventing and combating terrorism is to ensure that terrorist groups receive no funding or other support. It is noteworthy that international obligations compel South Africa to take note of and consider the question of the ratification of the Convention on the Suppression of Financing of Terrorism.[5] The latest in a series of interlocking conventions intended to combat terrorism, the International Convention for the Suppression of the Financing of Terrorism was adopted by the United Nations General Assembly on 9 December 1999. Speaking at a press conference following its adoption, Philippe Kirsch, of Canada, who chaired the working group that drafted the legislation, called the Convention a model instrument. He pointed out that it recognizes the fundamental importance of the international problem posed by the financing of terrorism; it establishes the act of financing terrorism as an independent crime; it does not require that an act of terrorism actually be committed; and it contains important provisions on the liability of legal entities, such as organizations or groups — a new concept in the struggle against international terrorism. [6]

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[5] See http://www.peacezine.org/UNinfo/anti%20terrorism%20convention.htm and also http://www.france.diplomatie.fr/actual/dossiers/terroris/fiche1.gb.html
"Why A New Convention on Terrorism?"
". . . Effective measures to strengthen security have been taken in many spheres, for example, that of the safety of civil aviation. International cooperation has developed, particularly in the multilateral fora, thus creating a framework for more extensive judicial and police cooperation. Finally, several international conventions have been drawn up to bolster the fight against specific terrorist activities, such as hostage-taking or aircraft hijacking, and more recently terrorist attacks involving explosives. The need has nevertheless been felt for a broader approach to enable us to fight against all terrorist activities by directly attacking their financing. Carrying out an act of terrorism requires considerable resources in order to maintain clandestine networks, train units, mount complex operations, procure weapons and purchase collusion. There is someone behind every terrorist act; behind every terrorist group there are financiers. The fight against terrorist financing, whether from "legal" (commercial or charitable activities for example) or "illegal" sources (racketeering, trafficking, robbery, procuring, etc.) is a priority objective for the services actively engaged in the fight against terrorism. It requires sophisticated means and techniques to thwart the operation of what are intrinsically complex and impenetrable financial networks, often related to those used by the Mafia. It also requires a specific national and international legal framework so that we can obtain vitally-needed cooperation from banks and ensure collaboration between international law enforcement agencies. However, the existing conventions are insufficient. Firstly, because they do not cover all acts committed by terrorists, such as those not involving explosives (for example, murders committed with automatic weapons - the case in Luxor in Egypt in 1997). Secondly, because no specific mechanism for judicial cooperation exists to combat terrorist financing. . . ."

[6] "The new Convention is intended to have 'teeth'. In today's electronic environment, huge quantities of money can circle the globe in seconds. If a significant number of countries become States parties, the Convention will provide powerful enforcement possibilities to governments who want to put an end to acts of terrorism. Every time terrorist monies pass through the territory of a State party, an international crime has been committed which can be prosecuted.
The international community historically has been unable to agree on a definition of terrorism, as one man''s terrorist is often another man''s freedom fighter. Because of this difficulty, countries have taken the approach of creating the network of conventions which criminalize

specific acts, such as setting bombs, kidnapping or hijacking airplanes. While this Convention does not specifically define an act of terrorism, it does come significantly closer. According to the text, it is a crime to provide or collect funds with the knowledge or intention that they are to be used in acts of violence targeting civilians with the intention of intimidating a government. This is a much broader category of crime than has previously been outlawed. A person is also guilty of an offence if he participates as an accomplice in such an act, if he organizes or directs other to commit such an act, or if he contributes in any other way to the crime. In addition, the Convention makes it a crime to provide or collect funds with the knowledge or intention that they are to be used to carry out any of the acts described in nine previously adopted anti-terrorism conventions referred to by the Convention.

States parties are required to adopt measures, such as domestic legislation, to ensure that the criminal acts described in the Convention will under no circumstances be considered justifiable because of political, philosophical, ideological, racial, ethnic or religious considerations.

For the first time, the Convention specifically targets the financial sponsors of terrorist activity, rather than simply the actual perpetrators of the specific acts. Previously, the financial backers of such criminal acts could only be charged with aiding or abetting that crime. Under this law, it is not even necessary that an act of terrorism has taken place; according to article 2, the intention or knowledge of the use of the funds collected or provided is sufficient. Proceeds from illicit activities, such as opium production or the small arms trade now often find their way to the hands of terrorists through a transnational ""shadow banking"" system. Front businesses, such as travel agencies that can change currencies, are easily used to launder dirty money and to transfer funds. In the globalizing world, cooperation between transnational criminals and international terrorists is on the rise.

The Convention sets new limits on the banking secrecy traditionally provided by some countries, which has been such a useful tool for transnational criminals and terrorists. States parties will be required to take “all practicable measures”, such as adapting their domestic legislation, to prevent the relevant offences, whether by persons or organizations. Banks and other financial institutions must identify account holders, and must pay special attention to unusual or suspicious transactions and report any they suspect may stem from criminal activity.

The Convention suggests a number of specific measures, such as requiring banks and

13.164 The project committee noted the provisions contained in the Canadian Terrorism legislation of 2001 which provides as follows:

> 83.18 (1) Every one who knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.
>
> Prosecution
>
> (2) An offence may be committed under subsection (1) whether or not
>
> (c) a terrorist group actually facilitates or carries out a terrorist activity;
>
> (d) the participation or contribution of the accused actually enhances the ability of a terrorist group to facilitate or carry out a terrorist activity; or
>
> (e) the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist group.
>
> Meaning of participating or contributing
>
> (3) Participating in or contributing to an activity of a terrorist group includes —
>
> (d) providing, receiving or recruiting a person to receive training;
>
> (e) providing or offering to provide a skill or an expertise for the benefit of, at the direction of or in association with a terrorist group;
>
> (f) recruiting a person in order to facilitate or commit
>
> (i) a terrorism offence, or
>
> (ii) an act or omission outside Canada that, if committed in Canada, would be a terrorism offence;
>
> (g) entering or remaining in any country for the benefit of, at the direction of or in association with a terrorist group; and
>
> (h) making oneself, in response to instructions from any of the persons who constitute a terrorist group, available to facilitate or commit
>
> (i) a terrorism offence, or

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financial institutions to verify the legal existence of a customer by obtaining proof of incorporation, or requiring banks to maintain transaction records for at least five years. The Convention also calls for efforts to identify, detect, and freeze or seize any funds used or allocated for the purpose of committing a terrorist act, and asks that States consider establishing mechanisms to use such funds to compensate victims and/or their families. States parties will be required to provide information to other States regarding the whereabouts and activities of suspects, or regarding the movement of funds. They must provide assistance when requested to obtain evidence in their possession. They should consider measures, such as introducing licensing for money- transmission agencies and monitoring the cross-border movement of cash and bearer negotiable instruments.

All the offences in the Convention are to be deemed 'extraditable offences'. But States may no longer refuse extradition on the grounds that the crime concerned is political in nature. Similarly, extradition may no longer be denied because the offence is of a fiscal nature, as the Convention specifies that none of the crimes it covers are to be considered fiscal offences.

(ii) an act or omission outside Canada that, if committed in Canada, would be a terrorism offence.

Factors

(4) In determining whether an accused participates in or contributes to any activity of a terrorist group, the court may consider, among other factors, whether the accused—

(a) uses a name, word, symbol or other representation that identifies, or is associated with, the terrorist group;

(b) frequently associates with any of the persons who constitute the terrorist group;

(c) receives any benefit from the terrorist group; or

(d) repeatedly engages in activities at the instruction of any of the persons who constitute the terrorist group.

Facilitating terrorist activity

83.19 (1) Every one who knowingly facilitates a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Facilitation

(2) For the purposes of this Part, a terrorist activity is facilitated whether or not

(c) the facilitator knows that a particular terrorist activity is facilitated;

(d) any particular terrorist activity was foreseen or planned at the time it was facilitated; or

(e) any terrorist activity was actually carried out.

Commission of offence for terrorist group

83.2 Every one who commits an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of or in association with a terrorist group is guilty of an indictable offence and liable to imprisonment for life.

Instructing to carry out activity for terrorist group

83.21 (1) Every person who knowingly instructs, directly or indirectly, any person to carry out any activity for the benefit of, at the direction of or in association with a terrorist group, for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity, is guilty of an indictable offence and liable to imprisonment for life.

Prosecution

(2) An offence may be committed under subsection (1) whether or not —

(c) the activity that the accused instructs to be carried out is actually carried out;

(d) the accused instructs a particular person to carry out the activity referred to in paragraph (*a*);

(e) the accused knows the identity of the person whom the accused instructs to carry out the activity referred to in paragraph (*a*);

(f) the person whom the accused instructs to carry out the activity referred to in paragraph (*a*) knows that it is to be carried out for the benefit of, at the direction of or in association with a terrorist group;

(g) a terrorist group actually facilitates or carries out a terrorist activity;

(h) the activity referred to in paragraph (*a*) actually enhances the ability of a terrorist group to facilitate or carry out a terrorist activity; or

(i) the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist group.

Instructing to carry out terrorist activity

83.22 (1) Every person who knowingly instructs, directly or indirectly, any person to carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for life.

Prosecution

(2) An offence may be committed under subsection (1) whether or not —

(c) the terrorist activity is actually carried out;

(d) the accused instructs a particular person to carry out the terrorist activity;

(e) the accused knows the identity of the person whom the accused instructs to carry out the terrorist activity; or

(f) the person whom the accused instructs to carry out the terrorist activity knows that it is a terrorist activity.

Harbouring or concealing

83.23 Every one who knowingly harbours or conceals any person whom he or she knows to be a person who has carried out or is likely to carry out a terrorist activity, for the purpose of enabling the person to facilitate or carry out any terrorist activity, is guilty of an indictable

offence and liable to imprisonment for a term not exceeding ten years.

13.165 The project committee is of the view that the Canadian provision should be followed rather than the provision proposed in the discussion paper. The committee believes it is more comprehensive and better suited to address the issue of the giving of support to terrorist acts and of harbouring terrorists than the provision proposed in the discussion paper. The committee also considers that provisions dealing with facilitating, collecting, providing or making available, directly or indirectly, property or inviting a person to provide or make available property or financial or other related services, intending that they be used to carry out a terrorist act; using property, directly or indirectly, for the purpose of facilitating or carrying out a terrorist act; and possessing property intending that it be used, directly or indirectly for the purpose of facilitating or carrying out a terrorist act should be included in this provision. The Commission agrees with the project committee. The project committee and Commission therefore recommend the following provision on participation in and facilitation of terrorist acts and harbouring and concealing of terrorists:

(1) Any person who knowingly participates in, or contributes to, the activities of a terrorist organisation or does anything which will, or is likely to, enhance the ability of any terrorist organisation to facilitate or carry out a terrorist act is guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years.

(2) An offence may be committed under subsection (1) whether or not —

(a) a terrorist organisation actually facilitates or carries out a terrorist act;

(b) the participation or contribution of the accused actually enhances the ability of a terrorist organisation to facilitate or carry out a terrorist act; or

(c) the accused knows the specific nature of any terrorist act that may be facilitated or carried out by a terrorist organisation.

(3) Without limiting the generality of subsection (1), participating in or contributing to the activities of a terrorist organisation includes —

(b) providing, receiving or recruiting a person to receive training;

(c) providing or offering to provide a skill or an expertise for the benefit of, at the direction of or in association with a terrorist organisation;

(d) collecting, providing or making available, directly or indirectly, property[1] or inviting a person to provide, facilitate or make available property or financial or other related services on behalf of such an organisation;

(e) using property, directly or indirectly, on behalf of such an

[1] Paragraphs (c) to (e) was added here to incorporate clauses 31 to 33 which dealt with the property offences in response to the concern that these offences do not differ from these set out under clause 3.

organisation;

(f) possessing property intending that it be used, directly or indirectly on behalf of such an organisation;

(g) recruiting a person in order to facilitate or commit —

(i) a terrorist act, or

(ii) an act or omission outside the Republic that, if committed in the Republic, would be a terrorist act;

(g) entering or remaining in any country for the benefit of, at the direction of or in association with a terrorist organisation; and

(h) making oneself, in response to instructions from any of the persons who constitute a terrorist organisation, available to facilitate or commit —

(i) a terrorist act, or

(ii) an act or omission outside the Republic that, if committed in the Republic, would be a terrorist act.

(4) Nothing in subsection (3) makes it an offence to provide or collect funds intending that they be used, or knowing that they are to be used, for the purpose of advocating democratic government or the protection of human rights.[1]

(5) In determining whether an accused participates in or contributes to any act of a terrorist organisation, the court may consider, among other factors, whether the accused—

(a) uses a name, word, symbol or other representation that identifies, or is associated with, the terrorist organisation;

(b) frequently associates with any of the persons who constitute the terrorist organisation;

(c) receives any benefit from the terrorist organisation; or

(d) repeatedly engages in acts at the instruction of any of the persons who constitute the terrorist organisation.

(6) Any person who knowingly facilitates a terrorist act is guilty of an offence and liable on conviction to imprisonment for a period not exceeding fifteen years.

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[1] A subclause recently added to the New Zealand Terrorism (Bombing and Financing) Suppression Bill of 2002 provides as follows:

(g) To avoid doubt, nothing in subsection (1) makes it an offence to provide or collect funds intending that they be used, or knowing that they are to be used, for the purpose of advocating democratic government or the protection of human rights.

(7) A terrorist act is facilitated whether or not —

(a) the facilitator knows that a particular terrorist act is facilitated;

(b) any particular terrorist act was foreseen or planned at the time it was facilitated; or

(c) any terrorist act was actually carried out.

(8) Any person who commits an offence under any Act or the common law for the benefit of, at the direction of or in association with a terrorist organisation is guilty of an offence and liable on conviction to imprisonment for life.

(9) Any person who knowingly instructs, directly or indirectly, any person to carry out any act for the benefit of, at the direction of or in association with a terrorist organisation, for the purpose of enhancing the ability of any terrorist organisation to facilitate or carry out a terrorist act, is guilty of an offence and liable on conviction to imprisonment for life.

(10) An offence may be committed under subsection (9) whether or not —

(a) the activity that the accused instructs to be carried out is actually carried out;

(b) the accused instructs a particular person to carry out the activity referred to in paragraph (*a*);

(c) the accused knows the identity of the person whom the accused instructs to carry out the activity referred to in paragraph (*a*);

(d) the person whom the accused instructs to carry out the activity referred to in paragraph (*a*) knows that it is to be carried out for the benefit of, at the direction of or in association with a terrorist organisation;

(e) a terrorist organisation actually facilitates or carries out a terrorist act;

(f) the activity referred to in paragraph (*a*) actually enhances the ability of a terrorist organisation to facilitate or carry out a terrorist activity; or

(g) the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist organisation.

(11) Any person who knowingly instructs, directly or indirectly, any person to carry out a terrorist act is guilty of an offence and liable on conviction to imprisonment for life.

(12) An offence may be committed under subsection (11) whether or not —

(a) the terrorist act is actually carried out;

(b) the accused instructs a particular person to carry out the terrorist act;

(c) the accused knows the identity of the person whom the accused instructs to carry out the terrorist act; or

(d) the person whom the accused instructs to carry out the terrorist act knows that it is a terrorist act.

(13) Any person who knowingly harbours or conceals any person whom he or she knows to be a person who has carried out or is likely to carry out a terrorist act, for the purpose of enabling the person to facilitate or carry out any terrorist act, is guilty of an offence and liable on conviction to imprisonment for a period not exceeding fifteen years.

G. CLAUSE 4: MEMBERSHIP OF TERRORIST ORGANISATION AND PROSCRIPTION

(a) Evaluation and preliminary proposal contained in discussion paper 92

13.166 It was provisionally proposed in the discussion paper that clause 4 should provide that any person who becomes or is a member of a terrorist organisation commits an offence, and is liable on conviction to imprisonment for a period not exceeding five years without the option of a fine. The project committee raised the question whether under clause 4 it is necessary to proscribe organisations. The committee considered that it obviously makes the job of a prosecutor and the job of the Minister easier since the latter does not have to ban organisations or having to find out whether the ABC tennis club is the same as the organisation he is really after since most of these organisations would be plainly front organisations. The project committee was of the view that it may be to simplify the work of the prosecution, but one still has to prove that the organisation is involved in terrorist acts, that the accused was a member at the time when the organisation was involved in terrorist acts and that the accused knew this.

13.167 The project committee noted the drafters' motivation for not providing for a mechanism for proscribing or "banning" organisations: in 1996 section 4 of the *Internal Security Act* of 1982 which provided for the banning of organisations was repealed; and the

thinking at the time seems to have been that it would be more expedient to target criminal activities than to proscribe or ban organisations, a activity which led in the past only to a proliferation of new structures being formed and a constant growing list of organisations having to be identified in attempting to deal with them. The drafters were of the view that it would suffice if membership of a terrorist organisation constituted an offence and that no provision should be made for proscribing organisations.

13.168 The committee also noted a suggestion that membership of terrorist organisations is difficult to prove.[1] The committee pointed out that aiding or promoting terrorism is already dealt with in the definition of terrorist acts and that really any form of association with terrorism might be sufficient to cover the problem. The committee considered if the aim was to cover also a passive member, the activities of such a member would not qualify for aiding or complicity or conspiracy. The committee pointed out that the person's knowledge of another person intending to commit or of having committed offences under the Act would be covered under clause 3(2)(a). However, under clause 3 one will have to prove such knowledge whereas under clause 4 one only has to prove membership. The committee considered section 11 of the Prevention of Organised Crime Act to see whether it contains useful criteria in establishing membership of a terrorist organisation. The committee concluded that nothing contained in section 11 really seems to be of assistance. The committee was of the view that if the prosecution wishes to prove anything less than for example complicity then it is up to the prosecutor to find the relevant evidence and by that time complicity will in all probability have been proven. The committee therefore decided to leave it at that.

(b) <u>Comment on discussion paper 92</u>

13.169 Mr Jazbay comments that his concern is that the enactment of a Bill aimed so clearly at a particular identifiable segment of the population could be used as a tool in the hands of persons who would see certain political and or ideological opponents neutralised. Further, blame for the urban terror campaign in the Western Cape has been placed almost solely at the door of PAGAD and ordinary Muslims who may not even be involved or sympathetic to the aims of PAGAD are already being victimised by business persons and the security forces. To him such incidents indicate a growing anti-Muslim sentiment and he fears that the *Anti-Terrorism Bill* will further add to this, and he adds that any resident of the Western Cape will be able to say that this is not something to be taken lightly, as the Muslims form a fairly large proportion of the population and a sustained campaign of victimisation could in fact have the effect of driving more moderate Muslims closer to the

[1] By Prof Medard Rwelamira at the time of the Department of Justice's Policy Unit.

fringe elements in PAGAD, as well as violating the freedom of association clauses in the Constitution.

13.170 Mr Jazbay notes that the parts of the proposed Bill which most concern him are the "bad company" clauses which seem to indicate that one could be branded a terrorist merely by being acquainted with identified terrorists. If one then applies this to the PAGAD situation one could conceivably end up with a situation where a sizeable portion of the Muslim and Coloured communities in the Western Cape would be criminalised as these communities are so closely knit that one could have PAGAD members, gangsters and ordinary citizens all in one family group. He considers that this is a very frightening scenario although it also seems to be a very convenient way to deal with the Urban Terror and Gang problem in the Western Cape without having to use the normal law enforcement channels.

13.171 Amnesty International says that a concern arises from clause 4 which makes it an offence to become a member of a “terrorist organisation” and provides for a term of imprisonment of up to five years upon conviction for this offence. AI notes that paradoxically, the Bill does not provide for a mechanism for proscribing organizations, which would of course have raised concerns about infringements of the right to freedom of association. AI remarks that the creation of this “membership” offence contains the possibility that a member of a particular organization could be prosecuted even if he or she, when joining the organization, was unaware that it was regarded as a terrorist organization. AI considers that the same liability to prosecution may also arise even if he or she did not commit or intend to commit acts of violence, or conspire, aid, abet or in any other way facilitate the commission of terrorist acts. AI comments that besides the further freedom of association concerns that would arise from criminalizing membership in this way, how would a court of law adjudicate such a case, given that there are no guidelines provided in the legislation for determining when an organization can be considered to be a terrorist organization?

13.172 The Media Review Network comments that the *Anti-Terrorism Bill* throws its tentacles in a way that it attempts to crush certain political organizations. The Network says that it also appears that certain individuals holding views that may not be consistent or reconcilable with the government may be victims in terms of this Bill, that the definition of "terrorist act" would ensure for this view and to a great extent, the *audi alterem partem* rule is excluded in the implementation and application of the Bill.

13.173 Mr Saber Ahmed Jazbhay notes that membership of a terrorist organization is an offence for which a person can be imprisoned for a period of five years on conviction. He

points out that the Act is silent as to the criteria that would make it a “terrorist” a term that is too wide, and asks whether the organization, for instance, would be a beneficiary of the *audi alteram partem* rule. He remarks that the Bill is silent on this point. He comments that although the organization is not proscribed, such a drastic step as declaring it a “terrorist” organization is in effect of such an effect and this would put is at odds with the constitutional guarantees of freedom of association as well.

13.174 The Human Rights Committee notes that clause 4 makes it an offence to become or be a member of a "terrorist organisation", which is defined in clause 1 as "an organisation which has carried out, is carrying out or plans carrying out terrorist acts"; that the definition of "terrorist act" is a modified version of the definition found in the *OAU Convention on the Prevention and Combating of Terrorism*, although the definition applies to any person committing such acts in any territory, including South Africa, including past acts. The HRC explains that terrorism according to this drafting includes domestic criminal acts that fall under the definition of "terrorist act". The Human Rights Committee points out that it foresees two problems with this drafting:

< Under international conventions, alleged international terrorists receive the protection of communicating without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person's rights or, if that person is a stateless person, the State in the territory of which that person habitually resides. They have a right to be visited by a representative of that State. These guarantees become impossible to implement in a purely domestic context and there seems to be no parallel protection in terms of the draft Bill.

< Being tried for the crime of being a member of a terrorist organisation could amount to being tried for "an offence in respect of an act or omission that was not an offence under either national or international law at the time it was committed or omitted."[1] The retroactive aspect of the clause is confusing.

13.175 The HRC states further that the clause also has implications in connection with freedom of association and that further attention to the definitions section is needed as these are just some of the problems that might arise. The HRC says that it is also not clear what is meant by an organisation "committing" terrorist acts - presumably it is individuals who are members who commit the acts, and that, in addition, the definition of a "terrorist act" is at least potentially broad enough that it could conceivably include vandalism on a McDonald's restaurant after a protest, which is obviously not a good thing, but arguably does not merit a life sentence in jail either.

13.176 The Legal Resources Centre (LRC) Cape Town comments that clause 4 deals with membership of a terrorist organisation and that the clause threatens to have

[1] See section 35(3)(l) of the Constitution Act of South Africa, Act No. 108 of 1996.

serious implications to the freedom of association. The LRC says that clause 4 retains some of the most recognizable features of its repealed counterpart. The revised version omits the banning of organizations and proscription of organization. It deals with membership of a terrorist organization. It states that a person who becomes a member of a terrorist organization commits an offence. The LRC says this clause presents a number of complex scenarios, and that at a glance, the provisions of clause 3 seems to have dealt with these problem because if anyone provides support, conceals, aids a "terrorist" commits a terrorist act. THE LRC notes that the distinguishing feature between the offence in clauses 3 and 4, as the discussion paper tells, is "knowledge", and that the offence in clause 4 does not require any knowledge of the activities on the part of the member, membership alone constitutes an offence. The LRC remarks that the project committee felt that the proscription of organization led to a proliferation of new organizations being formed and to constant growing lists attempting to identify and deal with these organizations. The LRC notes that this approach begs the question how can any person be hold liable for anything that he did not know? The LRC considers that the ghost of the apartheid terrorism Act threatens to revisit the statute books, and such a provision makes banning of organizations less evil and has a potential of raising the casualty that again. The LRC considers that the worst-case scenario would be to join an organization because it purports to be something else and latter to have a member of the organisation convicted of a "terrorist act" or uncovered that the organization is involved in acts of terror. The LRC suggests that it is a firmly established and very sound human rights principle that people have to be accountable for their own actions, not for other people, and giving effect to the Constitution should be interpreted as prohibiting conduct not mere association with a perceived terrorist group. The LRC says that with the benefit of hindsight we know how reckless it is to legislate in times of perceived crisis, and the limitation of any guaranteed freedoms need to be sanctioned taking due regard of the limitation clause in the Constitution. The LRC points out that the limitation clause of the Constitution grants the exception to limit a right to the extent that the limitation is reasonable and justifiable in an open and democratic society based on freedom and equality but that the legislation at hand threatens those fundamental freedoms.

13.177 The SAPS: Legal Component: Detective Service and Crime Intelligence notes that both in German and British legislation there are provisions for the proscription of terrorist organisations. The SAPS explains that under previous British legislation (*Prevention of Terrorism Act, and Emergency Provisions Act*, proscription was only applicable to organisations concerned in Irish terrorism, whereas under the new Terrorism Act, 2000[2] it will be possible in Britain to proscribe organisations concerned in international or domestic terrorism. The SAPS says that under this new Act, any organisation deemed to

[2] Which received Royal assent on 20 July 2000.

merit proscription will be proscribed throughout the whole of the United Kingdom, and the British Government is also considering which organisations involved in international terrorism might be added to the Schedule of proscribed organisations.[3]

13.178 The SAPS: Legal Component: Detective Service and Crime Intelligence notes that terrorism in the past was practised by individuals belonging to identifiable organisations with clear command structures and objectives, and targeting tended to be more selective. The SAPS points out that the Institute for Strategic Studies of the University of Pretoria's (ISSUP) Bulletin reflects however that currently, religious and cult groups with more amorphous aims, with loosely based organisation and membership have been increasingly emerging seemingly with tactical independence and that investigators confirm that also in South Africa, the tendency of terrorist groups is to be loosely structured, without formal membership, or membership cards.[4] They foresee that it would even be difficult to prove that a particular person held membership of a terrorist group, as would be required for a prosecution in terms of the proposed clause on membership. The SAPS explains that it might be possible to determine the executive members, the spokesperson, etc. of an organisation, but mere supporters identified at rallies would not necessarily be linked to the organisation as members. The SAPS notes that in terms of the British *Terrorism Act* 2000, the Secretary of State may proscribe an organisation, if it — commits or participates in acts of terrorism, prepares for terrorism, or promotes or encourages terrorism. The SAPS also points out that the prohibition of organisations (*Vereinen*) in Germany is regulated in terms of the *Gesetz zur Regelung des öffentlichen Vereinsrechts***,** that in Indian Law there has been provisions for declaring organisations unlawful since 1967, and in a recent review of terrorism legislation, the Indian Law Commission has found that such measures in respect of terrorist organisations are still necessary. In conclusion, however, the SAPS says that it is still of the opinion that it is not necessary to make provision for the proscription of organisations.

13.179 The Ministry of Community Safety of the Western Cape remarks that the proposed clause is problematic. The Ministry notes that firstly, proof of membership could be extremely difficult and secondly, it will be difficult to proof that an organisation is a *terrorist organisation*. The Ministry poses the question whether formal authorisation by the structures of the organisation of terrorist acts or the intention to commit such actions is required. The Ministry considers if this is not required, it could lead to serious injustice and individuals

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3 The SAPS refers to the Explanatory Note to Terrorism Act 2000 ISBN 010561100X, Her Majesty's Stationery Office.

4 *Urban Terror 2000: Some Implications for South Africa*, 6/2000 University of Pretoria, Institute for Strategic Studies at 6.

could be prosecuted for deeds that they were completely unaware of.

13.180 The Chief: Military Services suggests that the words “knowing that that organisation is a terrorist organisation” be inserted after the words “member of a terrorist organisation”. They consider that the clause is worded too wide and may be unconstitutional if it is allowed that a person can be convicted if he or she becomes a member of a organisation not knowing that the organisation is a terrorist organisation. They state that another problem they foresee in the implementation of the clause is how an individual will know or become aware that a specific organisation is a terrorist organisation. They note that it must be understood that a specific organisation can only become unlawful once declared unlawful by the State.

13.181 Prof Mike Hugh also notes that the Bill makes it an offence to be or to become a member of a terrorist organisation, but that it does not provide for a mechanism for proscribing organisations. He points out that this seems to be based on the reasoning that; "it would be more expedient to target criminal activities than to proscribe or ban organisations since the banning of organisations led in the past only to a proliferation of new organisations being formed and a constant growing list attempting to identify and deal with these organisations".

13.182 Advocates Fick and Luyt note that regarding the definition of a "terrorist organization, in view of what was said regarding the definition of "terrorist acts", a trade union, for instance, would qualify as a "terrorist organisation", and that even the ANC would fall within this description as it is well known that, along the same reasoning, it has carried out terrorist acts. They ask when is it decided that an organization is involved, maybe when certain members are involved, and if so, how many members need to be involved, how many acts need to be performed? They consider that taking into consideration clause 4, the definition of "terrorist organization" is totally inadequate. They pose the question how would any person know that he or she is joining such an organization. They point out that the Minister of Safety and Security's stance on PAGAD, for instance, would render it a terrorist organization, although PAGAD denies that. They ask how would a person know whether he is allowed to join PAGAD or not and consider that it would be virtually impossible to prove a contravention of clause 4 without proper criteria upon which a court can decide whether the involved organization is a terrorist organization. They consider that even with extensive criteria described in the Act it is quite foreseeable that there will be endless problems for the prosecution in proving in the first instance that the involved organization complies with the criteria and secondly that the accused had knowledge of wrongfulness. Advocates Fick and Luyt suggest that a procedure be introduced whereby the Minister can declare certain

organizations to be terrorist organizations, and that strict criteria must be followed in performing this administrative duty which should, inter alia, involve that information regarding compliance with the criteria should be under oath. They propose that such a declaration should be subject to scrutiny by the High Court by means of automatic review and appeal procedures and that these declarations should only come into force after the High Court scrutiny procedures have been completed and published in the Government Gazette, the printed and electronic media.

13.184 Martin Schönteich points out that the Bill proposes that any person who is a member of a "terrorist organisation" commits an offence through such membership and would be liable, on conviction, to imprisonment for up to five years without the option of a fine. He explains that the Bill defines a terrorist organisation broadly as "an organisation which has carried out, is carrying out or plans carrying out terrorist acts". He comments that given the broad definition of what constitutes a terrorist act, such a provision could be used to criminalise the actions of a wide range of people. He remarks that is could apply to all members of a taxi organisation that organise a street blockade, whether such members are actually involved in the blockade or not, and, moreover, to secure a conviction under this provision the state would not have to prove that an accused person knew that he was a member of a terrorist organisation as the state would merely have to prove membership of a terrorist organisation. He points out that the concern has been raised that the creation of such a membership offence could result in the prosecution of a member of a particular organisation even though such a person is unaware that the organisation is regarded as a terrorist organisation.

(c) <u>Evaluation and recommendation</u>

13.185 The provisions of a number of countries was noted. The Australian *Criminal Code* provides as follows on unlawful organisations and membership:

> "organization" means an association, society or confederacy;
> "unlawful organization" means an organization that uses, threatens to use or advocates the use of unlawful violence in the Territory to achieve its ends;
> "violence" means violence of a kind that causes, or is likely to cause, the death of, or grievous harm to, a person.
> 51. Membership of Unlawful Organization
> (1) Any person who, knowing an organization to be an unlawful organization -
> (a) belongs or professes to belong to it;
> (b) solicits or invites financial or other support for it or knowingly makes or receives a contribution of money or other property to or for its resources; or
> (c) arranges or assists in the arrangement or management of or addresses a meeting of 3 or more persons knowing that the meeting is to support or further the activities of that unlawful organization or is to be addressed by a person belonging or professing to belong to that unlawful

organization,

is guilty of a crime and is liable to imprisonment for 2 years.

(2) The court by or before which a person is found guilty of a crime defined by this section may order the forfeiture to the Crown of any money or other property that, at the time of the offence, he had in his possession or under his control for the use or benefit of the unlawful organization.

52. Evidence of Knowledge of Unlawfulness

Proof of the fact that a person has belonged to an unlawful organization for 28 days or was a member of any committee of it is evidence that he knew it to be an unlawful organization.

53. Display of Support for Unlawful Organization

Any person who, knowing an organization to be an unlawful organization, in a public place, or in any other place with the intention that it can be seen by persons in a public place -

(a) wears an item of dress; or

(b) wears, carries or displays a sign or article,

in such a way or in such circumstances that it can reasonably be inferred he is a member or supporter of an unlawful organization, is guilty of an offence and is liable to imprisonment for 6 months.

13.186 The Australian *Security Legislation Amendment (Terrorism) Bill* 2002 provides as follows on proscribed organisations:

102.1 Definitions

In this Division:

member of an organisation includes:

(a) a person who is an informal member of the organisation; and

(b) a person who has taken steps to become a member of the organisation; and

(c) in the case of an organisation that is a body corporate--a director or an officer of the body corporate.

proscribed organisation means an organisation in relation to which a declaration under section 102.2 is in force.

the Commonwealth, when used in a geographical sense, includes the Territories.

Subdivision B--Declarations of proscribed organisations

102.2 Attorney-General may make declarations

(1) The Attorney-General may make a declaration in writing that an organisation is a proscribed organisation if the Attorney-General is satisfied on reasonable grounds that one or more of the following paragraphs apply in relation to the organisation:

(a) if the organisation is a body corporate--the organisation has committed, or is committing, an offence against this Part (whether or not the organisation has been charged with, or convicted of, the offence);

(b) a member of the organisation has committed, or is committing, an offence against this Part on behalf of the organisation (whether or not the member has been charged with, or convicted of, the offence);

(c) the declaration is reasonably appropriate to give effect to a decision of the Security Council of the United Nations that the organisation is an international terrorist organisation;

(d) the organisation has endangered, or is likely to endanger, the security or integrity of the Commonwealth or another country.

(2) The Attorney-General must publish a declaration in:

(a) the *Gazette*; and

(b) a newspaper circulating in each State, in the Australian Capital Territory and in the Northern Territory.

(3) A declaration comes into force at the time it is published in the *Gazette* and stays in force until:

(a) it is revoked; or

(b) the beginning of a day (if any) specified in the declaration as the day the declaration ceases to be in force.

(4) The Attorney-General may delegate powers and functions under this section to a

Minister.

102.3 Revocation of declarations

(1) The Attorney-General must revoke a declaration made under section 102.2 in relation to an organisation if the Attorney-General is satisfied on reasonable grounds that none of the paragraphs in subsection 102.2(1) apply in relation to the organisation.

(2) The Attorney-General may revoke a declaration made under section 102.2.

(3) The Attorney-General must publish a revocation in:

(d) the *Gazette*; and

(e) a newspaper circulating in each State, in the Australian Capital Territory and in the Northern Territory.

(6) A revocation comes into force at the time it is published in the *Gazette*.

(5) The Attorney-General may delegate powers and functions under this section to a Minister.

13.187 The Australian *Security Legislation Amendment (Terrorism) Bill* 2002 provides as follows on offences in regard to proscribed organisations:

102.4 Directing activities etc. of proscribed organisations

(2) A person commits an offence if the person:

(e) directs the activities of a proscribed organisation; or

(f) directly or indirectly receives funds from, or makes funds available to, a proscribed organisation; or

(g) is a member of a proscribed organisation; or

(h) provides training to, or trains with, a proscribed organisation; or

(i) assists a proscribed organisation.

Penalty: Imprisonment for 25 years.

(2) Strict liability applies to the element of the offence against subsection (1) that the organisation is a proscribed organisation.

(3) It is a defence to a prosecution of an offence against subsection (1) if the defendant proves that the defendant neither knew, nor was reckless as to whether:

(b) the organisation, or a member of the organisation, had committed, or was committing, an offence against this Part; and

(c) there was a decision of the Security Council of the United Nations that the organisation is an international terrorist organisation and that decision was in force at the time the person engaged in the conduct constituting the offence; and

(d) the organisation had endangered, or was likely to endanger, the security or integrity of the Commonwealth or another country.

(4) It is a defence to a prosecution of an offence against paragraph (1)(c) if the defendant proves that the defendant took all reasonable steps to cease to be a member of the organisation as soon as practicable after the organisation became a proscribed organisation.

(5) Section 15.4 (extended geographical jurisdiction--category D) applies to an offence against subsection (1).

5 Application

The Attorney-General may make a declaration under section 102.2 of the *Criminal Code* after the commencement of that section in relation to:

(a) acts or omissions committed before or after the commencement of that section; or

(b) decisions of the Security Council of the United Nations made before or after the commencement of that section.

13.188 The UK *Terrorism Act* of 2002 provides as follows:

PROSCRIBED ORGANISATIONS

Procedure Proscription.

3.(1) For the purposes of this Act an organisation is proscribed if-

(a) it is listed in Schedule 2, or

(b) it operates under the same name as an organisation listed in that Schedule.

(2) Subsection (1)(b) shall not apply in relation to an organisation listed in Schedule 2 if its entry is the subject of a note in that Schedule.

(3) The Secretary of State may by order-

(b) add an organisation to Schedule 2;

(c) remove an organisation from that Schedule;

(d) amend that Schedule in some other way.

(4) The Secretary of State may exercise his power under subsection (3)(a) in respect of an organisation only if he believes that it is concerned in terrorism.

(5) For the purposes of subsection (4) an organisation is concerned in terrorism if it-

(a) commits or participates in acts of terrorism,

(b) prepares for terrorism,

(c) promotes or encourages terrorism, or

(d) is otherwise concerned in terrorism.

Deproscription: application.

4. - (1) An application may be made to the Secretary of State for the exercise of his power under section 3(3)(b) to remove an organisation from Schedule 2.

(2) An application may be made by-

(b) the organisation, or

(c) any person affected by the organisation's proscription.

(3) The Secretary of State shall make regulations prescribing the procedure for applications under this section.

(4) The regulations shall, in particular-

(a) require the Secretary of State to determine an application within a specified period of time, and

(b) require an application to state the grounds on which it is made.

Deproscription: appeal.

5. - (1) There shall be a commission, to be known as the Proscribed Organisations Appeal Commission.

(2) Where an application under section 4 has been refused, the applicant may appeal to the Commission.

(3) The Commission shall allow an appeal against a refusal to deproscribe an organisation if it considers that the decision to refuse was flawed when considered in the light of the principles applicable on an application for judicial review.

(4) Where the Commission allows an appeal under this section by or in respect of an organisation, it may make an order under this subsection.

(5) Where an order is made under subsection (4) the Secretary of State shall as soon as is reasonably practicable-

(b) lay before Parliament, in accordance with section 118(3), the draft of an order under section 3(3)(b) removing the organisation from the list in Schedule 2, or

(c) make an order removing the organisation from the list in Schedule 2 in pursuance of section 118(4).

(6) Schedule 3 (constitution of the Commission and procedure) shall have effect.

Offences Membership.

10. - (1) A person commits an offence if he belongs or professes to belong to a proscribed organisation.

(2) It is a defence for a person charged with an offence under subsection (1) to prove-

(a) that the organisation was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and

(b) that he has not taken part in the activities of the organisation at any time while it was proscribed.

(3) A person guilty of an offence under this section shall be liable-

(d) on conviction on indictment, to imprisonment for a term not exceeding ten years, to a fine or to both, or

(e) on summary conviction, to imprisonment for a term not

exceeding six months, to a fine not exceeding the statutory maximum or to both.

(3) In subsection (2) "proscribed" means proscribed for the purposes of any of the following-

(b) this Act;
(c) the Northern Ireland (Emergency Provisions) Act 1996;
(d) the Northern Ireland (Emergency Provisions) Act 1991;
(e) the Prevention of Terrorism (Temporary Provisions) Act 1989;
(f) the Prevention of Terrorism (Temporary Provisions) Act 1984;
(g) the Northern Ireland (Emergency Provisions) Act 1978;
(h) the Prevention of Terrorism (Temporary Provisions) Act 1976;
(i) the Prevention of Terrorism (Temporary Provisions) Act 1974;
(j) the Northern Ireland (Emergency Provisions) Act 1973.

Support.

11. - (1) A person commits an offence if-

(a) he invites support for a proscribed organisation, and
(b) the support is not, or is not restricted to, the provision of money or other property (within the meaning of section 14).

(2) A person commits an offence if he arranges, manages or assists in arranging or managing a meeting which he knows is-

(b) to support a proscribed organisation,
(c) to further the activities of a proscribed organisation, or
(d) to be addressed by a person who belongs or professes to belong to a proscribed organisation.

(3) A person commits an offence if he addresses a meeting and-

(a) the purpose of his address is to encourage support for a proscribed organisation or to further its activities, or
(b) he knows that the meeting is to be addressed by a person who belongs or professes to belong to a proscribed organisation.

(4) In subsections (2) and (3) "meeting" means a meeting of three or more persons, whether or not the public are admitted.

(5) A person guilty of an offence under this section shall be liable-

(a) on conviction on indictment, to imprisonment for a term not exceeding ten years, to a fine or to both, or
(b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.

13.189 Provision for proscription of terrorist organisations, for revocation of the proscription and review should be made. The issue also arises to whom the administration of the Act should be assigned. It is considered that the Bill should provide that 'Minister' means the Minister to whom the administration of this Act has been assigned by the President by proclamation in the Gazette. The President should also be empowered to determine that any power or duty conferred or imposed by the Act on such Minister, shall be exercised or carried out by that Minister after consultation with one or more other Ministers. (Section 91(2) of the Constitution of 1996 provides that the President appoints Ministers and assigns their powers and functions.) The project committee and Commission also propose the following provisions on terrorist organisations, proscription, revocation of proscription and review:

4(1) Any person commits an offence if he belongs or professes to belong to a proscribed organisation.

4(2) A person guilty of an offence under this section shall be liable-

(a) on conviction to imprisonment for a term not exceeding ten years, to a fine or to both, or

4(3) For purposes of this section —

(a) member of an organisation includes:

(i) a person who is an informal member of the organisation; and

(ii) a person who has taken steps to become a member of the organisation;

(b) *proscribed organisation* means an organisation in relation to which a declaration by the Minister under section 4(5)is in force.

4(4) The Minister may by notice in the *Gazette* declare an organisation to be a proscribed organisation, if he or she is satisfied on reasonable grounds that one or more of the following paragraphs apply in relation to the organisation:

(a) the organisation has committed, or is committing, a terrorist act (whether or not the organisation has been charged with, or convicted of, the terrorist act);

(b) a member of the organisation has committed, or is committing, a terrorist act on behalf of the organisation (whether or not the member has been charged with, or convicted of, the act);

(c) the declaration is reasonably appropriate to give effect to a decision of the Security Council of the United Nations that the organisation is an international terrorist organisation;

(d) the organisation has endangered, or is likely to endanger, the security or integrity of the Republic or another country.

4(5) A declaration comes into force at the time it is published in the *Gazette* and stays in force until:

(a) it is revoked; or

(b) the beginning of a day (if any) specified in the declaration as the day the declaration ceases to be in force.

4(6) The Minister must by notice in the *Gazette* revoke a declaration made under subsection (4) in relation to an organisation if the Minister is satisfied on reasonable grounds that none of the paragraphs in subsection (4) applies in relation to the organisation.

4(7) A revocation comes into force at the time it is published in the *Gazette*.

4(8) If a proscribed organisation makes an application in writing to the Minister alleging that there are reasonable grounds why its declaration should be revoked, the Minster must without delay decide the application and notify the applicant accordingly.

4(9) The applicant may apply to a High Court for judicial review of the Minister's decision.

4(10) When an application is made under subsection (9), the judge shall, without delay —

(*a*) examine, in private, any security or criminal intelligence reports considered in proscribing the organisation and making the Minister's decision and hear any other evidence or information that may be presented by or on behalf of the National Director of Public Prosecutions and may, at the request of the National Director of Public Prosecutions, hear all or part of that evidence or information in the absence of the applicant and any counsel representing the applicant, if the judge is of the opinion that the disclosure of the information would injure national security or endanger the safety of any person;

(*b*) provide the applicant with a statement summarizing the information available to the judge so as to enable the applicant to be reasonably informed of the reasons for the Minister's decision, without disclosing any information the disclosure of which would, in the judge's opinion, injure national security or endanger the safety of any person;

(*c*) provide the applicant with a reasonable opportunity to be heard; and

(*d*) determine whether the Minister's decision is reasonable on the basis of the information available to the judge and, if found not to be reasonable, order that the applicant no longer be a listed entity.

4(11) The Minister shall cause to be published, without delay, in the Gazette notice of a final order of a court that the applicant no longer be a proscribed organisation.

4(12) A proscribed organisation may not make another application under subsection (8), except if there has been a material change in its circumstances since the time when the organisation made its last application.

H. SABOTAGE

(a) Evaluation contained in discussion paper 92

13.190 The project committee questioned the separate offence of "sabotage" and raised the question whether the crime of sabotage should not rather be included in the

definition of “terrorist act”, especially in view of the definition of terrorist act setting out that “terrorist act” includes disrupting any public service, the delivery of essential services to the public or to create a public emergency and creating general insurrection in a state. The project committee’s point of view was that it should remove from the Bill those aspects which will possibly cause unnecessary litigation, debate or concern. The committee noted that the under the *Internal Security Act* of 1982 two offences exist presently, namely “terrorism”[1] and “sabotage”[2]. The committee noted the way in which clause 5 is drafted and that it largely corresponds with section 54(3) of the *Internal Security Act*. The project committee was of the view that the required intent for the different acts to constitute sabotage is the same as the intent required to constitute a terrorist act and should also fall under the definition of terrorist act. The committee was therefore of the view that it can do away with clause 5 (sabotage) altogether as it seems to be covered by the definition of “terrorist act”. The project committee noted on the matter of the possible over-breadth of the offence of sabotage, and leaving out unnecessary wording, when considering clause 5(a)(vi), that any person who commits an act with the intent to impede the free movement of traffic on land commits the offence of sabotage and furthermore, that the taxi blockades or farmers

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1 54(1) Any person who with intent to -(a) overthrow or endanger the State authority in the Republic; (b) achieve, bring about or promote any constitutional, political, industrial, social or economic aim or change in the Republic; induce the Government of the Republic to do or to abstain from doing any act or to adopt or to abandon a particular standpoint; or ... in the Republic or elsewhere - (i) commits an act of violence or threatens or attempts to do so; (ii) performs any act which is aimed at causing, bringing about, promoting or contributing towards such act or threat of violence, or attempts, consents or takes any steps to perform such act; (iii) conspires with any other person to commit, bring about or perform any act or threat referred to in paragraph (i) or act referred to in paragraph (ii), or to aid in the commission, bringing about or performance thereof; or (iv) incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about or perform such act or threat, shall be guilty of the offence of terrorism and liable on conviction to the penalties provided for by law for the offence of treason.

2 54(3) Any person who with intent to -(a) endanger the safety, health or interests of the public at any place in the Republic; (b) destroy, pollute or contaminate any water supply in the Republic which is intended for public use; (c) interrupt, impede or endanger at any place in the Republic the manufacture, storage, generation, distribution, rendering or supply of fuel, petroleum products, energy, light, power or water, or of sanitary, medical, health, educational, police, fire-fighting, ambulance, postal or telecommunication services or radio or television transmitting, broadcasting or receiving services or any other public service; (d) endanger, damage, destroy, render useless or unserviceable or put out of action at any place in the Republic any installation for the rendering or supply of any service referred to in paragraph (c), any prohibited place or any public building; (e) cripple, prejudice or interrupt at any place in the Republic any industry or undertaking or industries or undertakings generally or the production, supply or distribution of commodities or foodstuffs; or (f) impede or endanger at any place in the Republic the free movement of any traffic on land, at sea or in the air,
in the Republic or elsewhere - (i) commits any act; (ii) attempts to commit such act; (iii) conspires with any other person to commit such act or to bring about the commission thereof or to aid in the commission or the bringing about of the commission thereof; or (iv) incites, instigates, commands, aids, advises, encourages or procures any other person to commit such act, shall be guilty of the offence of sabotage and liable on conviction to imprisonment for a period not exceeding twenty years.

blockading roads or highways that we see from time to time, qualify as acts of sabotage. It also considered that such an act would in any event constitute an offence under the *Traffic Act*. The committee further noted that under clause 5(a)(v) any person who commits an act with intent to interrupt any industry or undertaking, in the production, supply or distribution of commodities or who would in other words participate in a strike would be committing sabotage.[3]

13.191 This clause was considered above and the project committee's view was that it should be deleted. The committee considered that the definition of "terrorist act" provide sufficiently for the offences presently constituting sabotage.

(b) <u>Comment on discussion paper 92</u>

13.192 The SAPS: Legal Component: Detective Service and Crime Intelligence suggests that in view of the observations on "terrorist bombings" as a separate offence, the same arguments in respect of the difference between the forms of intent required respectively in respect of the definition of "terrorist act" and in the offence of "sabotage", they request that the offence of sabotage be retained as a separate offence, in order to cater for

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[3] The committee also took into account the criticism expressed in the past on the over-breadth of the offence. See Prof Anthony Mathews *Freedom, State Security and the Rule of Law: Dilemmas of the Apartheid Society* Kenwyn: Juta 1986 who remarked as follows:
"A person who organises a school boycott will have committed an act 'which interrupts ... educational services' and will therefore be chargeable for sabotage. An unlawful strike will usually 'interrupt ... the production, supply or distribution of commodities or foodstuffs' and therefore fall under the broad mantle of the offence of sabotage. These two simple examples provide chilling evidence of the potential impact of security crimes on protest politics and industrial action in South Africa."
In "The newspeak of sabotage" 1988 *SACJ* 175 - 186 Prof Mathews remarked as follows on p 179: "The range of activities that falls under one or other (or both) of the crimes of subversion and sabotage is truly immense. The activities which constitute the criminal conduct for subversion, and the guilty mind requirement for sabotage, cover most kinds of prejudicial involvement in industry and manufacturing, in the provision of facilities, services and goods, in the free flow of traffic, in the functions of the security forces and in relations between the races. It does not appear to matter, moreover, that the prejudicial involvement is trivial (interrupting the teaching of one small class of pupils) rather than serious or far-reaching (closing down all the schools in a large area). On the face of it all forms of interference are covered with the result that tripping up a waiter in a diningroom and blowing up a goods train are both instances of sabotage because in each case the perpetrator has committed an act which interrupts 'the supply or distribution of commodities of foodstuffs'. Statutes that are overbroad, as this one is, are simultaneously vague because it is virtually impossible for the citizen to determine when the security authorities will strike. ...
No amount of linguistic straining , moreover, can avoid one absurdity that flows from the conviction of the accused in *S v Nel* for the crime of sabotage. The accused was a miner who had blown up twelve mine offices with dynamite to settle a private grudge against a mine manager. After holding that a person could be convicted of sabotage without proof of an intention to prejudice the interests of the state or the community, the court decided that the accused was guilty of the crime of sabotage even if his objective was one of private vengeance; his actions need not have a political colouring. ..."

the cases where considerable damage is caused to key infrastructure or installations, and it is possible that the act is not committed with the intent to coerce the Government or the population, or was committed for a political or other cause.

(c) Evaluation and recommendation

13.193 The project committee does not consider the SAPS's reasoning persuasive for retaining the offence of sabotage in the Bill. The committee agrees that it will not always be possible to prove that an act was committed with the intent to coerce the Government or the population, or was committed for a political or other cause. The project committee notes that it has expanded the definition of terrorist act drastically by including aspects contained in the Australian proposed legislation, such as where someone seriously interferes with an information system; a telecommunications system; a financial system; a system used for the delivery of essential government services; a system used for, or by, an essential public utility; or a system used for, or by, a transport system. It is considered that the expanded definition of "terrorist act" provides sufficiently for the offences presently constituting sabotage. The committee considers that there is no more necessity for the inclusion of an offence of sabotage. The Commission agrees with this point of view.

I. CLAUSE 5: HIJACKING

(a) Evaluation contained in discussion paper 92

13.194 In *S v Hoare*[1] the court considered the offences under the *Civil Aviation Offences Act*, 1972 and said the following:

> "It can, I think, be accepted that, if the accused's conduct can be properly described as a hi-jack in the popular sense, it was a most unusual one. It was not a planned hi-jack specifically embarked upon to escape from an oppressive regime, or to advance some political or sociological theory, or to exact some political or financial advantage by taking hostages. The accused's conduct in getting onto the plane and persuading the captain by methods which will be discussed in this judgment to fly them to Durban was not part of a long term plan but arose as a result of the providential arrival of the Air India plane on a routine flight at a time when the accused were in a perilous situation of their own creation when their plan to take over the Seychelles by force of arms was in serious danger of collapse. The arrival of the plane was, in a real sense, *a deus ex machina* and once the captain of the aircraft had been persuaded (by whatever means) to fly them to Durban and once arrangements were made to monitor him during the flight they had no occasion to treat the members of the crew or the passengers impolitely or uncivilly. This was wholly unnecessary as long as their decision to fly to Durban was respected and very little can be made out of the fact that the accused behaved well on the plane. However, even if these facts are accepted in general outline and the accused's conduct does not amount to a typical hi-jacking (as it is popularly understood), it must not be forgotten that the Civil Aviation Offences Act 10 of 1972 does not make hi-jacking (as such) a specific offence nor does it seek to distinguish between differing types of unlawful interference in the operations of civil aviation, for example, between cases where the motive is self-preservation and cases involving political or financial blackmail or violent intimidation. The Act treats virtually every unlawful interference with the smooth operation of civil aviation with the utmost seriousness and takes little or no account of the motive for such interference, as can be readily appreciated when it is observed that the Act imposes a minimum sentence of five years' imprisonment for any contravention of s 2 (1) of the Act regardless of the motives of the perpetrator."

13.195 Although "any interference" with the navigation of an aircraft is already covered in the *Civil Aviation Offences Act* of 1972, the committee recommended that a specific offence of hijacking of an aircraft be created, in addition to the existing offences under the *Civil Aviation Offences Act*. The committee suggested that the word "detained" is enough to cover "confined or imprisoned" in clause 6(a) and should be amended accordingly. The project committee also noted that clause 6(d) seeks to provide that it is an offence to cause an aircraft to deviate *materially* from its course. The committee supposed that it would normally mean that when a person unlawfully seizes or exercises control of an aircraft with the intent to cause the aircraft to deviate from its course that there will be a material geographical deviation. The committee was, however, of the view that "*materially*" should be deleted and that the Bill should make it an offence if someone causes an aircraft to *deviate* from its flight-plan. The committee considered also that there is no need to set out the sentence to be imposed under this clause as it is the same sentence as provided for

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[1] 1982(4) SA 865 (T) at 871D - I.

already in clause two, namely imprisonment for life.

(b) Comment on discussion paper 92

13.196 Ms Schneeberger points out that they have no recommendation or objection to the inclusion of this section but would simply like to point out the following: Paragraphs (a) – (d) of section 6 are additions to an offence of hijacking formulated in Article 1 of the Convention for the Suppression of the Unlawful Seizure of Aircraft, to which South Africa is a party and accordingly is obliged to give effect to the Convention through its domestic law. She notes that technically therefore the added dimension of the intent may create differences in our domestic law that are not countenanced by the Convention. She remarks that it is, however, difficult to conceive of a situation where a hijacking would not be accompanied by one of the intentions listed in section 6. She notes that in an exceptional case, moreover, the offence in section 2(1) of the *Civil Aviation Offences Act* will remain and can therefore deal with such unusual situations. She points out that South Africa's international obligations under the Convention are therefore covered.

13.197 The Chief: Military Legal Services considers that the explanatory note given in the footnote to the clause is inconsistent with the spirit of the Bill regarding the punishment for the offence of highjacking. They note that the Bill makes provision for a sentence in respect of each offence and suggest that the deleted penalty be retained. Mr H Wildenboer[2] comments that the main objects of the 1963 Tokyo Convention were—

< to ensure that persons committing crimes aboard an aircraft in flight, or on the surface of the high seas or any area outside the territory of any country on committing acts aboard such aircraft to the danger of air safety, would not go unpunished simply because no country would assume jurisdiction to apprehend them;

[2] Legal Adviser of the South African Civil Aviation Authority.

< for protective and disciplinary purposes to give special authority and powers to the aircraft commander, member of the crew, and even passengers.[1]

13.198 Mr Wildenboer points out that the shortcomings of the Tokyo Convention were said to be with regard to hijacking, that it is fair to say that the Tokyo Convention made no frontal attack upon this offence but that it dealt in only a limited manner with hijackers, for example, by enabling hijackers to be taken into custody or subjected to restraint in the same manner as other offenders, and by providing for restoration of control of the hijacked aircraft to the lawful commander, and for the continuance of the journey of passengers and crew. He notes that this aspect was recognised by the court in *S v Hoare*. Mr Wildenboer further points out that the 1970 Convention was confined to hijacking, leaving the matter of armed attacks, sabotage and other forms of inviolent action directed against civil aviation and aviation facilities to be dealt with by a later diplomatic conference. He explains that the Convention did not fully apply the *aut punire, aut dedere* principle (ie the country where the offender might happen to be should prosecute him or her or extradite him or her to a country having jurisdiction to try him or her for the offence) but provided a reasonably adequate framework for the exercise of jurisdiction with obligations of extradition or rendition according to the existence of an extradition treaty or of a reciprocal practice of rendition. He also states that the 1971 Convention covered, moreover, the related aircraft crimes of armed attacks, sabotage and other forms of violence and intimidation directed against civil aviation including the appearance of bomb-hoax extortion as a new kind of menace undermining public confidence in the security of international air transport and prejudicing the administrative and financial conduct of air services.

13.199 Mr Wildenboer notes that section 2(1)(g) of the Act to a certain extent incorporates the supplement to article 1 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation by the Protocol for the Suppression of Unlawful Acts at Airports Serving International Civil Aviation. He points out that at the moment the *Civil Aviation Offences Act* is being scrutinized by a committee consisting of members of the Department of Transport, the Authority, South African Airways, Airports Company Limited and the South African Police Service with a view to the drafting of a new *Civil Aviation Offences Act* which would inter alia also reflect the amendments of the relevant Conventions which have not been adopted by the Republic.

13.200 Mr Wildenboer remarks that in the light of the wide wording of the expression "terrorist act" it would see that acts contemplated in section 2 of the *Civil Aviation Offences*

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[1] Mr Wildenboer notes the author Sheare -Starkes *International Law* (1994) at p 213 — 214).

Act would also resort under the definition and a prosecuting authority would therefore have a choice of prosecuting in terms of either this Bill or the 1972 Act. He says it has, however, to be pointed out that in terms of clause 2 of the proposed Bill a sentence of life imprisonment has to be imposed while a maximum sentence of 30 years imprisonment may be imposed in terms of section 2(1) of the Act. He notes that the sentence of life imprisonment would seem to be a mandatory sentence which does not give the court a discretion in sentencing. Mr Wildenboer points out that clause 6 of the proposed Bill makes provision for the hijacking of an aircraft as an offence, based on the recommendation of the Court in *S v Hoare*. He supports the wording of the proposed clause.

13.201 Mr Wildenboer states that considering clause 15(a), (b)(ii) and (b)(vii) with relation to the jurisdiction of the Courts it appears that jurisdiction will only exist in respect of South African aircraft. He points out that section 3 of the *Civil Aviation Offences Act* makes provision in regard to acts or omissions taking place outside the Republic and for jurisdiction in respect of non South African aircraft. He explains that in terms of section 3(2), acts committed outside the Republic of South Africa and on board of non-South African aircraft are deemed to have been committed within the territory of the Republic. He suggests that clause 15 be amended to make provision for jurisdiction in respect of non-South African aircraft, noting that the facts in *S v Hoare* fall within the ambit of section 3(2)(a) of the Act.

13.202 Mr Wildenboer suggests with regard to the wording of clause 15(b)(vii) that the wording be amended to read as follows: “On board an aircraft in respect of which the operator is licenced in terms of the *Air Services Act* 1990 (Act No 115 of 1990) or the *International Air Services Act 1993* (Act No 60 of 1993)”. He notes that the word licensee is defined in section 1 of both Acts. He further suggests, in the light of the content of clause 6 that the provisions of section 6 of the *Civil Aviation Offences Act* (powers of commanders of aircraft and certain other persons on board on aircraft) be incorporated into the Bill. He considers that it is essential that these powers, which may be exercised in respect of an offence contained in section 2(1) also be available in the event of a contravention of clause 6 of the Bill. In his view there is no reason to differentiate between an offence as contemplated in clause 6 of the Bill and an offence referred to in section 2(1) of the Act. He also notes that should any of the offences listed in section 2(1) of the Act fall within the ambit at the definition of a "terrorist act" as set out in clause 1 of the Bill it would be possible to institute a prosecution in terms of the Bill which would enable the State (unlike in the case of a prosecution in terms of Act No 10 of 1972) to utilize the provisions of clauses 16, 20 and 22 of the Bill. He also considers that the proposed insertion of section 2(1)(h)[2] into Act 10 of

[2] (h) unlawfully and intentionally uses any device, substance or weapon and performs an act of violence against a person at a designated airport, airport, heliport or navigational facility.

1972 is unnecessary and that the proposed wording could be incorporated into section 2(1)(g)[3] of the Act.

13.203 Messrs Fick and Luyt of the Office of the Director of Public Prosecutions: Transvaal comment that the sentences prescribed in clauses 6 and 7 do no make sense. They explain that upon a conviction for the prohibited acts pertaining to an aircraft, the sentence would be life imprisonment, however, save for the killing of a person or persons, the prescribed sentence in clause 7 for even worse acts committed aboard a ship is a fine or imprisonment not exceeding 20 years.

(a) Evaluation and recommendation

[3] (g) performs any other act which jeopardizes or may jeopardize the operation of an air carrier or the safety of a designated airport, airport, heliport, aircraft in service or of persons or property thereon or therein or which may jeopardize good order and discipline at a designated airport, airport or heliport or on board an aircraft in service.

13.204 Although "any interference" with the navigation of an aircraft is already covered in the *Civil Aviation Offences Act* of 1972, the committee recommends that there is still a need for a specific offence of hijacking of an aircraft to be created, in addition to the existing offences under the *Civil Aviation Offences Act*. The project committee agrees with Mr Wildenboer on amending clause 15 as he suggests. The committee considers that the clause should provide that on conviction the offender should be liable to imprisonment for life. The court would then have a discretion when imposing sentence and life imprisonment would be the maximum to be imposed. Imprisonment for life would not be a mandatory minimum sentence as one respondent seems to argue. The committee does not agree that the powers of commanders of aircraft and certain other persons on board on aircraft be incorporated into the Bill. Section 2 of the *Civil Aviation Offences Act* should also provide that it constitutes an offences if any person unlawfully and intentionally uses any device, substance or weapon and performs an act of violence against a person at a designated airport, airport, heliport or navigational facility, as was proposed in the discussion paper.[1] The Commission agrees with these recommendations made by the project committee.

J. CLAUSE 6: ENDANGERING THE SAFETY OF MARITIME NAVIGATION

(a) Evaluation contained in discussion paper 92

13.205 The project committee noted that in the old days piracy was maritime robbery. The committee was of the view that any interference with a ship or a navigational facility which endangers maritime safety should qualify as an offence. The project committee also considered that in view of the provisions of the *Riotous Assemblies* Act there is no need set out separately in clause 7(h) that attempting or conspiring or instigating any act contemplated in clause 7 constitutes an offence.[2]

(b) Comment on discussion paper 92

13.206 Ms Schneeberger comments that they note that section 7 deals with ships registered in the Republic, whereas section 15 on jurisdiction deals with offences committed

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1 This offence would bring the *Civil Aviation Offences Act*, 1972 in line with the provisions of the *Protocol for the Suppression of Violence at Airports serving International Civil Aviation*.

2 Section 18(1) of the Riotous Assemblies Act provides that any person who attempts to commit any offence against a statute or a statutory regulation shall be guilty of an offence and, if no punishment is expressly provided thereby for such an attempt, be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable. In terms of section 18(2) any person who conspires with any other person to aid or procure the commission of or to commit, or incites, instigates, commands, or procures any other person to commit, any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

on board a ship flying the flag of the Republic, and it seems to be a discrepancy. It is, however, beyond their expertise to comment on whether this would amount to a conflict between the two provisions, but they suggest it be noted. She further remarks that they also note that Article 3 of the Convention for the Suppression of Unlawful Acts Against Maritime Navigation provides in paragraph 2(c), for threats aimed at compelling a person to commit one of the offences listed. She points out that this element of the crime has not been incorporated into section 7. She states that article 2(c)(i) of the Convention, as they interpret it, is however a discretionary clause, and the offence is only covered if it is provided for under national law. It is therefore not essential to provide for threats as an offence in terms of South Africa's international obligations under this Convention. Ms Schneeberger suggests that the Commission may wish to consider including the element of a threat as some of the crimes under the Bill include threats whereas others don't. She states that since a viable and serious threat could have as serious a consequence as the terrorist act itself, it may be necessary to consider providing for threats in respect of all the offences under the Bill.

13.207 The Chief: Military Legal Services suggests that the word "seriously" in clause 7(e) be omitted or, alternatively, if it were retained, that a definition be included in clause 1 on "seriously damages and seriously interferes with their operation".

(c) <u>Evaluation and recommendation</u>

13.208 It should constitute an offence if someone interferes with, seizes or exercises control over a ship by force or threat, destroys a ship or causes damage to such ship or to its cargo which is likely to endanger the safe navigation of that ship or endangers maritime safety. The project committee notes that the concept of *seriously interfere* and *seriously damage* is also applied extensively in other jurisdictions such as the UK and Australia,[3] without defining the meaning thereof. The committee considers that the concept *seriously* denotes the degree of interference required, that it is self-explanatory and that a definition would be superfluous. The committee considers that since section 18 of the *Riotous Assembly Act* deals with threats it is unnecessary to make provision for threats in this clause. The project committee also recommends that there should not be reference in this provision to a fine to be imposed. The committee and Commission agrees with Ms

[3] For example clause (2) of the *Security Legislation Amendment (Terrorism) Bill* 2002 provides that action falls within the subsection if it: (a) involves serious harm to a person; or (b) involves serious damage to property; or (c) endangers a person's life, other than the life of the person taking the action; or (d) creates a serious risk to the health or safety of the public or a section of the public; or (e) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to: . . .

Schneeberger in so far as the provisions should be consistent and recommends that references to threats should be deleted in this and the other clauses.

K. CLAUSE 7: BOMBING OFFENCES

(a) Evaluation contained in discussion paper 92

13.209 The project committee raised the question in the discussion paper whether the committee can say in the light of the definition of terrorist act, in regard to clause 2 (offences relating to terrorist acts) and the other provisions in the Bill, that there is any need for providing separately for terrorist bombings. The committee noted the I*nternational Convention for the Suppression of Terrorist Bombings*, and thought that an attempt was probably made by the drafters to get everything possible into the proposed Bill, but that it may be an unnecessary duplication.[4] The SA Police Service were of the view that the intent required under this clause is different from the intent required for terrorist activity and could be proved much easier than the intent required to qualify as a "terrorist act". The SA Police Service consequently thought that there is a need for dealing with terrorist bombings in a separate clause. The committee was of the view that "terrorist bombings" is covered by "terrorist acts" and that it is really the prosecutor's problem in relation to the required intent because surely if a person performs a bombing act his act would qualify as coercing or inducing etc other persons to do or abstain from doing things. The committee invited specific comment on the question whether there is any need for making provision separately for terrorist bombings in the Bill.

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[4] It is noteworthy that the English *Terrorism Bill* dealt with terrorist bombings by addressing the issue of jurisdiction and extradition. The clause as submitted to the House of Lords provided as follows on the issue of jurisdiction:

62. (1) If-

(a) a person does anything outside the United Kingdom as an act of terrorism or for the purposes of terrorism, and

(b) his action would have constituted the commission of one of the offences listed in subsection (2) if it had been done in the United Kingdom,

he shall be guilty of the offence.

(a) The offences referred to in subsection (1)(b) are-

(c) an offence under section 2, 3 or 5 of the Explosive Substances Act 1883 (causing explosions, etc.),

(d) an offence under section 1 of the Biological Weapons Act 1974 (biological weapons), and

(e) an offence under section 2 of the Chemical Weapons Act 1996 (chemical weapons).

13.210 The question also arose whether the exemption contained in clause 8(2)[5] of the Bill should be retained and, if so, where in the Bill it should be set out. The committee noted that the exemption for the military seemed to apply solely in relation to bombings, and enables the members of the military in an armed conflict to perform bombings as part of their official duties. This exemption seems to be subject to a war-time situation although the military wouldn't be able to perform terrorist acts. The committee noted that the military may detonate suspected packets and that the intentionally detonation of explosives would theoretically fall within clause 8(1) although it would also be part of their legitimate crime prevention exercises. Another suggestion considered by the committee was to insert a clause in the Bill which provides that the Bill binds the State save for detonations or bombings carried out by the military during an armed conflict and in the exercise of their official duties. The committee realized that the military taking hostages for example can hardly be exempted, even in a time of war. The committee wondered, however, whether the drafters didn't intend the exemption contained in clause 8(2) to be somewhat broader than actually detonations or bombings.[6] The project committee noted that the drafters said in the Bill that detonations constitute an offence but that this clause doesn't apply to the military if they undertake activities in the exercise of their official duties during an armed conflict. The committee also noted that clause 8(2) refers to "the military forces of a State" and not the government of the day or the State and that it could be of any state even outside forces. The committee further noted article 19 of the Convention for the Suppression of Terrorist Bombings. The committee was of the view that if an exemption were to be included in the Bill, an audit ought to be made in respect of each offence created under the Bill. The committee considered that the question then need to be asked whether the military should be exempted or not and from what they should be exempted. The committee considered that there shouldn't be an omnibus exemption. The committee however also considered clause 25 of the Bill which provided that the definition of "terrorist acts" must be interpreted in accordance with the principles of international law. The committee was of the view that if the military or armed forces were to act in accordance with the applicable conventions, one of which is the Terrorist Bombing Convention, clause 25 was enough and that there would be no need for an exemption clause.

(b) <u>Comment on the discussion paper</u>

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5 8(2) This section does not apply to the military forces of a State - (a) during an armed conflict; or (b) in respect of activities undertaken in the exercise of their official duties.

6 The drafters however suggested that criticism may be raised if the military forces of the State were to be exempted from causing death or serious bodily injury under other clauses of this Bill and considered that the savings clause should apply specifically to terrorist bombings only.

13.211 Ms Schneeberger comments that they support the inclusion of a separate offence for terrorist bombings in the Bill and that they agree with the drafters that the intent is different from the more stringent test for "terrorist act". She remarks that the specificity of this crime, which is based on the International Convention for the Suppression of Terrorist Bombings, will allow for compatibility with other legal systems, thereby enabling South Africa to fulfil the requirement for specificity in an extradition request. She notes however that clause 8(1) includes the ancillary offences of conspiracy, instigation and attempt. She says that as these ancillary offences have been omitted from other sections of the Bill on the basis that they are included in the *Riotous Assemblies Act* it would seem to be consistent to omit them here as well. She remarks that this however is subject to their point that it is essential to ensure that all ancillary crimes, including accomplices and persons acting with a common purpose are covered by the Bill. Ms Schneeberger explains that the corresponding clause was notoriously controversial when it was negotiated in the UN Ad Hoc Committee. She remarks that as the drafters noted, it was only included in the exceptional circumstance of the Terrorist Bombings Convention because it was accepted that the military might have to detonate explosives, and that the compromise however was that there should be equal treatment between armed forces and military forces i.e. that the Convention would also not apply to armed forces during armed conflict. She points out that this is on the basis of equality for treatment between military forces and armed forces in armed conflict in accordance with international humanitarian law, and specifically the Second Additional Protocol to the Geneva Conventions of 1949.

13.212 Ms Schneeberger says that they are of the opinion that the same equality of treatment will have to be reflected in the Bill in order to accord with our obligations under international law, both in terms of the Terrorist Bombings Convention and the Second Additional Protocol. She suggests that if this was done in paragraph 2 of section 8 it should read as follows: "This section does not apply to armed forces during armed conflict and to military forces of a State in respect of activities undertaken in the exercise of their official duties". She points out that such a formulation however incorporates all the controversy of the international negations and has an inflexibility that may not be suited to legislation of this kind. She comments that an alternative can be to utilise the interpretation clause in clause 25 of the Bill to deal with the difficult situation of armed conflicts and military and other armed forces, and clause 25 could then be amended to read: "The provisions of this Act shall be interpreted in accordance with the principles of international law, and in particular international humanitarian law, in order not to derogate from those principles".

13.213 Ms Schneeberger notes that utilising the interpretation clause is admittedly an indirect method of dealing with the difficulties raised by the current formulation of paragraph

2 of clause 7. She considers that an indirect method might, however, in this instance may well be preferably as it allows for the necessary flexibility for the courts to deal with a variety of situations. She considers that amending section 25 in the manner suggested above would also have the added advantage of ensuring that the entire Bill, and not just the definition of terrorist act, are consistent with our international obligations. She notes that it is for this reason that they prefer the latter formulation i.e. the deletion of paragraph 2 of section 8 and the amendment of section 25.

13.214 The SAPS: Legal Component: Detective Service and Crime Intelligence comments that there is a difference between the intent required for the offence of *"terrorist bombing*", as opposed to the intent required in the definition of a *"terrorist act*". The SAPS explains that in the Terrorist Bombing Convention, the intent required for a terrorist act is "*with the intent to cause death or serious injury; or with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss*." The SAPS points out that on the other hand, the intent required for a terrorist act, in terms of the Bill, is "*to intimidate, coerce or induce any government or persons, the general public or any section thereof, or disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or to create unrest or general insurrection in a State*". The SAPS notes, furthermore, that the *Terrorist Bombing Convention* specifically requires the broader offence to be enacted. The SAPS states that they hold the opinion that separate provision should therefore be made for terrorist bombings, as the widening of the definition of "terrorist act" might make the definition unacceptable. The SAPS proposes that the offence of "terrorist bombing" should be retained as either a separate offence or that the intent referred to in the *Terrorist Bombing Convention* should be added to the definition of a "terrorist act" in the Bill, together with the other elements of the offence of terrorist bombing.

13.215 The SAPS: Legal Component: Detective Service and Crime Intelligence notes that it is appreciated that a decision will eventually have to be made on the question whether one should have only a very comprehensive definition of a "terrorist act" and to criminalise that, or to have a comprehensive definition of a "terrorist act" which is criminalised, as well as separate offences which specifically give effect to the respective international instruments on terrorism. The SAPS explains that it is in favour of the latter approach, simply to ensure legal certainty on questions such as jurisdiction and extradition and more serious penalties. The SAPS points out that it should be mentioned in this respect that the penalties in the Bill should be seriously reviewed to ensure that it is not less than existing penalties of related offences drawing attention particularly to the offence of abduction or kidnapping, and the proposed offence of kidnapping of diplomats.

13.216 The SAPS: Legal Component: Detective Service and Crime Intelligence states that it is a fact that the types of bombings as set out in the *Terrorist Bombing Convention*, namely bombings at public places, are regarded in terms of that *Convention* as terrorist bombings, despite the fact that they are not linked to the type of intent required in the usual definitions of terrorist acts or terrorism. The SAPS notes that "terrorism" is described in the British *Terrorism Act* 2000 as follows:

> (a) In this Act, terrorism" means the use or threat of action where-
>
> (ii) the action falls within subsection(2),
>
> (iii) the use of threat is designed to influence the government or to intimidate the public or a section of the public, and
>
> (iv) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
>
> (b) Action falls within this section if it-
>
> (ii) involves serious violence against a person,
>
> (iii) involves serious damage to property,
>
> (iv) endanger a person's life, other than the person committing the action,
>
> (v) creates a serious risk to the health or safety of the public or a section of the public, or
>
> (vi) is designed seriously to interfere with or seriously to disrupt an electronic system.
>
> (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

13.217 The SAPS: Legal Component: Detective Service and Crime Intelligence considers that even this definition is indicative of acknowledging that the use of explosives or firearms need not to be aimed at influencing or intimidating government, although the British definition still requires that the use of violence should at least be for some cause of a political, religious or ideological cause, to qualify as terrorism. The SAPS remarks that it is obvious that the thinking behind the *Terrorist Bombing Convention* is that the detonation of an explosive device in a public place with the intent to cause death or serious bodily injury or major economic loss, is so abhorrent that it falls within the same category as terrorism, despite the fact that it was not done with a political, religious or ideological cause or to coerce the government or the public. The SAPS remarks that one cannot but agree with this thinking, and that one might be able to prove that an individual has been responsible for the placing of an explosive device at a court or at a police station, although the motive might be related to a case completely remote from an ideological, political or religious cause, for

example, mere retribution, a person dissatisfied, because the court has acquitted the rapist of his child. The SAPS points out that the motive in this case does not make the act less abhorrent, and it should be placed on the same footing of a terrorist act, at least for purposes of investigation and sentence.

13.218 The SAPS: Legal Component: Detective Service and Crime Intelligence also says that the argument of the Commission is supported, namely that it might not be necessary to enact the exemption clause, noting that this aspect would probably also be commented on by the State Law Adviser International Law. The SAPS believes that the latter have in the past expressed reservations against the phrase "that the definition of "terrorist act" must be interpreted against the principles of international law, in particular international humanitarian law, in order not to derogate from those principles", the argument of the State Law Advisers having been that the principles of the international law which are incorporated in South African Law are applicable, irrespective of the proposed provision.

13.219 The South African Human Rights Commission (SAHRC) comments that they take note of the argument that terrorist bombings would form part of the offence "terrorist act", as defined in clause 1, and also note the argument of the drafters that separate provision was made for terrorist bombing because it would be easier for the prosecution to prove the required intent in the case of a terrorist bombing than it would be in the case of an act of terrorism. The SAHRC points out that for the prosecution authorities to prove an act of terrorism in terms of clause 1 it will have to establish an intentional link between the act that was committed and certain objectives.[7] The SAHRC remarks that if terrorist bombings are removed from the Bill as a distinct offence, a prosecutor will have to prove above reasonable doubt that the accused planted and detonated a bomb with the intent to *intimidate, disrupt and cause unrest*. The SAHRC remarks that the aforesaid are in the first place subjective objectives and may be difficult to verify independently. The SAHRC points out that in the case of a terrorist bombing, as provided for by clause 7, the prosecution will have to prove an intentional link between the bombing and certain other objectives[8] that may be easier to verify objectively, for example, a prosecutor will only have to prove that the accused planted a bomb with the intent to *cause death, injury or damage to property*. The SAHRC says that to prove the aforesaid elements of intent will require no more than the presentation of evidence that a bomb was planted and the death, injury and damage it caused whereas in the case of a terrorist act, as defined by clause 1, the prosecutor will have to lead evidence

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7 See Clause 1, namely, to intimidate, coerce or induce any government or persons, the general public or any section thereof, or to disrupt any public service, the delivery of any essential service to the public or to create a public emergency, or to create unrest or general insurrection.

8 See Clause 7(1)(a), namely, causing death or serious injury, or causing extensive damage to property that results in major economic loss.

to establish that people were intimidated, services were disrupted and unrest create as a result of the bomb. The SAHRC notes that in view of the aforesaid, they support the inclusion to the Bill of clause 8 to cater specifically for terrorist bombings, and particularly in the light of the Cape Town bombings, the SAHRC welcomes constitutionally sound measures that would facilitate the effective eradication of this offence. The SAHRC states that they also agree with the exclusion of the savings clause relating to the military forces. The SAHRC remarks that if the armed forces were to act in terms of applicable international conventions to which South Africa is a signatory, taking into account clause 25 of the Bill, the need of an armed forces exemption will fall away.

13.220 The Chief: Military Legal Services suggests that the words “or unlawfully and intentionally causes to deliver, discharge or detonate” be inserted after the words “intentionally delivers” explaining that the common-purpose-principle will be applicable to both persons. They note that it is unclear whether the definition in clause 1 includes SANDF/SAPS structures as the destruction of facilities used or occupied by “members of government” is made an offence, and that it is also unclear whether SANDF/SAPS structures are included so as to make it an offence to unlawfully and intentionally destroy SANDF/SAPS structures. They comment that if these structures are excluded, it constitutes unfounded discrimination and that it might render SANDF/SAPS structures legitimate targets if not declared an offence.

13.221 Messrs Fick and Luyt of the Office of the Director of Public Prosecutions: Transvaal consider that the acts referred to in clause 7 are already covered by the definition of a terrorist act. They say that the intent referred to in sub-clauses (1)(a) and (1)(b) can be added to the definition of terrorist acts. They consider that to do this will not only simplify the identification of offences in drafting charge sheets or indictments, but will also broaden the scope of intents on which to formulate terrorist acts. They argue that if this clause is, however, retained, the prohibited acts pertaining to the explosives should be supplemented with the acts of the instructing, building, manufacturing and the making available of such devices. They pose the question why is it necessary that the device be placed at a public place, what about the private dwellings of people like judges, magistrates or ministers? They are of the view that no reason can be found why clause 7(1)(b) should include the phrase "where such a destruction results in or is likely to result in major economic loss". They note that surely, because of the basic despicable nature of a bomb attack, even bombings with minor results or likely results should fall within the ambit of the Act. They consider that the exemption clause in clause 8(2) is clearly superfluous as the obvious criminal intent described in this clause as well as in the definition of a terrorist act clearly excludes lawful acts by the armed forces.

(c) Evaluation and recommendation

13.222 The Australian *Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002* provides as follows:.

> 72.2 ADF members not liable for prosecution
> Nothing in this Division makes a member of the Australian Defence Force acting in connection with the defence or security of Australia liable to be prosecuted for an offence.
> 72.3 Offences
> (1) A person commits an offence if:
> (a) the person intentionally delivers, places, discharges or detonates a device; and
> (b) the device is an explosive or other lethal device and the person is reckless as to that fact; and
> (c) the device is delivered, placed, discharged, or detonated, to, in, into or against:
> (ii) a place of public use; or
> (iii) a government facility; or
> (iv) a public transportation system; or
> (v) an infrastructure facility; and
> (d) the person intends to cause death or serious harm. Penalty: Imprisonment for life.
> (2) A person commits an offence if:
> (a) the person intentionally delivers, places, discharges or detonates a device; and
> (b) the device is an explosive or other lethal device and the person is reckless as to that fact; and
> (3) the device is delivered, placed, discharged, or detonated, to, in, into or against:
> (a) a place of public use; or
> (b) a government facility; or
> (c) a public transportation system; or
> (d) an infrastructure facility; and
> (e) the person intends to cause extensive destruction to the place, facility or system; and
> (f) the person is reckless as to whether that intended destruction results or is likely to result in major economic loss. Penalty: Imprisonment for life.

13.223 The project committee and the Commission are of the view after having considered what Ms Schneeberger and the SAPS: Legal Component: Detective Service and Crime Intelligence commented, and particularly that the exception for the military forces was only included in the exceptional circumstance of the Terrorist Bombings Convention because it was accepted that the military might have to detonate explosives, that the compromise was that there should be equal treatment between armed forces and military forces i.e. that the Convention would also not apply to armed forces during armed conflict and that this is on the basis of equality for treatment between military forces and armed forces in armed conflict in accordance with international humanitarian law, and specifically the Second Additional Protocol to the Geneva Conventions of 1949. The committee and the

Commission therefore recommend the proposed clause making provision for the offence of terrorist bombings but with the exception recognising that the clause does not apply to the military forces of a State during an armed conflict; or in respect of activities undertaken in the exercise of their official duties.

L. CLAUSE 8: TAKING OF HOSTAGES

(a) Comment on the discussion paper

13.225 Ms Schneeberger remarks that the reference in the *chapeau* to "or elsewhere" creates an almost unlimited extra-territorial jurisdiction, and could include offences which have no jurisdictional link with South Africa through either the nationality of the victim or the perpetrator or the place of the crime. She points out that as clause15 of the Bill deals with all viable jurisdictions they suggest that the phrase be amended to read "Any person who . . .", as jurisdictional issues can be, and are, dealt with in clause 15. The Chief: Military Legal Services suggests that clause 6(a), namely *highjacking of an aircraft* be noted and that a proper definition be included in the Bill describing *hostages*. They consider that the intention of the offender(s) is the same which justifies one detention and suggest the wording "any person detained against his or her will on land, air or sea". They consider clause 6(a) could then be deleted and the clause be absorbed into clause 8(a). They also suggest that the word "and" at the end of clause 9(a) be replaced as this will create another offence which is equally as serious as the offence in section 9(a). The Chief: Military Legal Services notes that as the word "State" is not defined in clause 9(a) it can be assumed that it must be understood to include the RSA although the clause may not necessarily be applicable to the RSA. They thus suggest that the words "the RSA Government" be inserted after the words "in order to compel" at the beginning of clause 9(b) and that the words "threatens to kill" be inserted in clause 8(b).

13.226 Messrs Fick and Luyt of the Office of the Director of Public Prosecutions: Transvaal consider that clause 8 seems to be superfluous. They note that the offence described is clearly covered by the definition of a terrorist act, the detaining of a person endangers the freedom and physical integrity of a person, and if subclause (a)(i) in the definition of a terrorist act is retained as suggested above, clause 8(b) is covered by the definition of a terrorist act. They consider that the described aim as set out in clause 8(b) is in anyway too broadly put, as a person who, for instance, takes a family member hostage in order to compel other family members to act in a way he or she wishes to, like the changing of a last will and testament, will also fall within the ambit of this offence and will be liable to life imprisonment. They also point out a situation where students, for example, take

University Management Members hostage in order to enforce some or other claim? They consider many other examples can be quoted which will fall within the ambit of this clause, but which should not be covered by the Bill. They further consider that for the same reasons as mentioned under clause 2, the words "or elsewhere" should be deleted in this clause.

(b) Evaluation and recommendation

13.227 Provision should be made for the offence of hostage taking. The project committee and Commission agree with the reasoning why the words “or elsewhere” should be deleted, but do not agree with respondents that clause 6 dealing with highjackings of aircraft be absorbed into clause 8 dealing with hostage taking.

M. CLAUSE 9: INTERNATIONALLY PROTECTED PERSONS

(a) Evaluation contained in discussion paper 92

13.228 The project committee noted in the discussion paper that there may be a lot of instances where the jurisdiction of different countries are going to overlap. The committee considered that this would have to be dealt with on diplomatic level by the countries involved. The committee questioned the use of the phrase “offers violence to ...” and suggested that it should substituted with the word “threatens”. The committee also considered that since clause 12 deals separately with the issue of the protection of property occupied by internationally protected persons, references to protection of property should be deleted in clause 10. The committee recommended that the wording of clause 10(1) should be as follows: “Any person who perpetrates or threatens any attack upon the person or liberty of an internationally protected person commits an offence and is liable on conviction to ...” The committee further noted that under clause 10(1)(a) a sentence of three years imprisonment may be imposed for committing an offence against the person or liberty of an internationally protected person whereas a five year sentence may be imposed for committing an offence against the property of internationally protected persons. The committee considered that the term of imprisonment should correspond in the two clauses and that it should be five years in clause 10(1)(a) as well. The committee further considered that clauses 10(1)(a) and (b) should not only make provision for a sentence of a fine or imprisonment but also for imposing both a fine and imprisonment. The project committee also noted that the sentence dramatically increases in clause 10(1)(b) to ten years imprisonment where a deadly or a dangerous weapon is used in the commission of the offence. The project committee was further of the view that there is no need for clauses 10(2)(a) and (b) which provide that it is an offence to intimidate, coerce, threaten, or harass

an internationally protected person in the performance of his or her duties or to attempt to intimidate, coerce, threaten, or harass such an internationally protected person in the performance of his or her duties.[1]

(b) Comment on discussion paper 92

13.228 Ms Schneeberger remarks that the provisions of clauses 10 and 11 appear to conflict. She notes that clause 10 provides *inter alia* for an attack on the liberty of an internationally protected person and provides for sentences of 5 or 10 years, whilst clause 11 on the other hand provides for the kidnapping of an internationally protected person with a life sentence. She says that it is difficult to conceive of a situation when kidnapping would also not be classified as an attack on the liberty of a person, in which case there are conflicting sentences. She suggests that clauses 10 and 11 should accordingly be reconciled. She comments that this is dealt with in the *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents* by dealing with the various crimes in the same provision. She notes further that the provisions regarding attempt are also dealt with inconsistently in clauses 10 and 11. Thus in clause 10(2)(b) references to attempt are deleted on the basis that this is covered by section 18(1) and (2) of the *Riotous Assemblies Act* while in section 11(1)(b) a separate provision is made for attempt. She remarks that the ancillary crimes such as attempt, threat; common purpose etc should be covered by legislation and should be consistently dealt with throughout the Bill.

13.229 Messrs Fick and Luyt of the Office of the Director of Public Prosecutions: Transvaal point out that it is difficult to appreciate what the prohibited acts described in clauses 10 to 12 have to do with terrorism. They say although it is appreciated that the international community requires protection of their officials abroad, clearly the prohibited acts have nothing to do with terrorism and these offences should be contained in a separate Act. They also consider that the acts against an internationally protected person prohibited in clause 10 are too wide. They explain that the these offences as presently set out, would mean that a normal assault upon such a person or, for instance, the tying down of such a person during a common criminal housebreaking will result in a sentence of a minimum of five years imprisonment. They consider that in many cases the perpetrator, when committing the act, will not even know that his victim is an internationally protected person. They suggest that prohibited acts should be limited to cases where the perpetration thereof can be linked to the fact that the victim is an internationally protected person. It is said in an extract of a statement by the United Ulama Council of SA and the Media Review Network

[1] See section 18(1) and (2) of the Riotous Assemblies Act.

issued on the Bill that the proposed legislation would allow for someone who intentionally scratches the car of a foreign diplomat, *to be ridiculously charged under the Terrorism Act,* and that *this would give prosecutors unfettered powers when sentencing minor offenders*.[2]

(c) Evaluation and recommendation

[2] Hundreds of respondents sent extracts from this statement to the Commission.

13.230 The project committee does not agree with Messrs Fick and Luyt on their difficulty to appreciate what the prohibited acts described in clauses 10 to 12 have to do with terrorism. The international community has identified the protection of internationally protected from harm and included these issues in international conventions as actions which constitute terrorism. The project committee agrees with this approach and considers that these issues should be included in the proposed Bill. The project committee agrees with Ms Schneeberger that clauses 10 and 11 deal with attacks on the liberty of an internationally protected person and that it can be questioned why different sentences apply to what seems to constitute the same offence. However, there are degrees of seriousness included in these offences which could be set out more appropriately. The project committee noted that the Australian *Crimes (Internationally Protected Persons) Act* 1976 provides in section 8 as follows:[1]

> (1) A person who murders or kidnaps an internationally protected person is guilty of an offence against this Act and is punishable on conviction by imprisonment for life.
> (2) A person who commits any other attack upon the person or liberty of an internationally protected person is guilty of an offence against this Act and is punishable on conviction:
> (a) where the attack causes death—by imprisonment for life;
> (b) where the attack causes grievous bodily harm—by imprisonment for a period not exceeding 20 years; or
> (c) in any other case—by imprisonment for a period not exceeding 10 years.
> (3) A person who intentionally destroys or damages (otherwise than by means of fire or explosive):
> (a) any official premises, private accommodation or means of transport, of an internationally protected person; or
> (b) any other premises or property in or upon which an internationally protected person is present, or is likely to be present;
> is guilty of an offence against this Act and is punishable upon conviction by imprisonment for a period not exceeding 10 years.
> (3A) A person who intentionally destroys or damages (otherwise than by means of fire or explosive):
> (a) any official premises, private accommodation or means of transport, of an internationally protected person; or
> (b) any other premises or property in or upon which an internationally protected person is present, or is likely to be present;

[1] The Canadian Criminal Code says in section 431: Every one who commits an attack on the official premises, private accommodation or means of transport of an internationally protected person that is likely to endanger the life or liberty of such person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

with intent to endanger the life of that internationally protected person by that destruction or damage is guilty of an offence against this Act and is punishable upon conviction by imprisonment for a period not exceeding 20 years.

(3B) A person who intentionally destroys or damages by means of fire or explosive:

(a) any official premises, private accommodation or means of transport, of an internationally protected person; or

(b) any other premises or property in or upon which an internationally protected person is present, or is likely to be present;

is guilty of an offence against this Act and is punishable upon conviction by imprisonment for a period not exceeding 15 years.

(3C) A person who intentionally destroys or damages by means of fire or explosive:

(a) any official premises, private accommodation or means of transport, of an internationally protected person; or

(b) any other premises or property in or upon which an internationally protected person is present, or is likely to be present;

with intent to endanger the life of that internationally protected person by that destruction or damage is guilty of an offence against this Act and is punishable upon conviction by imprisonment for a period not exceeding 25 years.

(4) A person who threatens to do anything that would constitute an offence against subsection (1), (2), (3), (3A), (3B) or (3C) is guilty of an offence against this Act and is punishable on conviction by imprisonment for a period not exceeding 7 years.

. . .

(7) For the purposes of this section:

(h) kidnapping a person consists of leading, taking or enticing the person away, or detaining the person, with intent to hold the person for ransom or as a hostage or otherwise for the purpose of inducing compliance with any demand or obtaining any advantage;

(i) murdering a person consists of causing the death of that person in circumstances in which the person causing the death would be guilty of murder according to the law in force in the Australian Capital Territory at the time of the conduct causing the death, whether or not the conduct took place in that Territory;

(j) a reference to an attack upon the person of an internationally protected person shall be read as including a reference to assaulting an internationally protected person or to administering or applying to an internationally protected person, or causing an internationally protected person to take, a poison, drug or other destructive or noxious substance or thing;

(k) a person who destroys or damages any official premises, private accommodation or means of transport or any other premises or property shall be taken to have done so intentionally if the person acted:

(ii) with intent to destroy or damage those premises or that property; or

(iii) in the knowledge or belief that the actions were likely to result in the destruction of, or damage to, those premises or that property; and

(l) a person who destroys or damages any official premises, private accommodation or means of transport or any other premises or property shall be taken to have intended to endanger the life of another person by that destruction or damage if the first-mentioned person acted:

(ii) with intent to endanger the life of that other person; or

(iii) in the knowledge or belief that the actions were likely to endanger the

life of that other person.

13.231 The project committee is of the view that the issue of attacks on and kidnapping of internationally protected persons is set out more appropriately in the Australian legislation than was provisionally proposed in the discussion paper. The project committee considers that it should therefore follow the wording contained in the Australian legislation. The Commission agrees with this recommendation. The project committee and the Commission recommend that the issue of attacks on and hijacking of internationally protected persons be dealt with in one clause and propose the following clause:

(1) A person who murders or kidnaps an internationally protected person is guilty of an offence and shall be liable on conviction to imprisonment for life.

(2) A person who commits any other attack upon the person or liberty of an internationally protected person is guilty of an offence and shall be liable on conviction:

(b) where the attack causes death — to imprisonment for life;

(c) where the attack causes grievous bodily harm — to imprisonment for a period not exceeding 20 years; or

(d) in any other case — to imprisonment for a period not exceeding 10 years.

(3) A person who intentionally destroys or damages (otherwise than by means of fire or explosive):

(a) any official premises, private accommodation or means of transport, of an internationally protected person; or

(b) any other premises or property in or upon which an internationally protected person is present, or is likely to be present;

is guilty of an offence and shall be liable on conviction to imprisonment for a period not exceeding 10 years.

(4) A person who intentionally destroys or damages (otherwise than by means of fire or explosive):

(a) any official premises, private accommodation or means of transport, of an internationally protected person; or

(b) any other premises or property in or upon which an internationally protected person is present, or is likely to be present;

with intent to endanger the life of that internationally protected person by that destruction or damage is guilty of an offence and shall be liable on conviction to imprisonment for a period not exceeding 20 years.

(5) A person who intentionally destroys or damages by means of fire or explosive:

(a) any official premises, private accommodation or means of transport, of an internationally protected person; or

(b) any other premises or property in or upon which an internationally protected person is present, or is likely to be present;

is guilty of an offence and shall be liable on conviction to imprisonment for a period not exceeding 15 years.

(6) A person who intentionally destroys or damages by means of fire or explosive:

(a) any official premises, private accommodation or means of transport, of an internationally protected person; or

(b) any other premises or property in or upon which an internationally protected person is present, or is likely to be present;

with intent to endanger the life of that internationally protected person by that destruction or damage is guilty of an offence and shall be liable on conviction to imprisonment for a period not exceeding 25 years.

(7) A person who threatens to do anything that would constitute an offence against subsection (1), (2), (3), (4), (5) or (6) is guilty of an offence and shall be liable on conviction to imprisonment for a period not exceeding 10 years.

(8) For the purposes of this section kidnapping a person consists of leading, taking or enticing the person away, or detaining the person, with intent to hold the person for ransom or as a hostage or otherwise for the purpose of inducing compliance with any demand or obtaining any advantage.

N. MURDER OR KIDNAPPING OF INTERNATIONALLY PROTECTED PERSONS

(a) Evaluation and recommendation

13.232 The original clause as presented by the SAPS contained two subclauses. Subclause (1) provided that any person who murders or attempts to murder or kidnaps or attempts to kidnap, an internationally protected person, is liable, in the case of a on conviction (a) of murder or kidnapping, to imprisonment for life; or (b) of attempted murder or kidnapping, to imprisonment for a period not exceeding 20 years, without the option of a fine. Subclause (2) provided that if the victim of an offence under subsection (1) is an internationally protected person, a court may exercise jurisdiction over the alleged offence if the alleged perpetrator of the offence is present in the Republic, irrespective of the place where the offence was committed or the nationality of the victim or offender. The project committee was of the view that there is no need for clause 11(2) as this issue is already covered under clause 15 which deals with the jurisdiction of courts of the Republic in respect of offences under the Bill.

13.233 Ms Schneeberger's comments on this clause was noted in the discussion of

clause 10. Messrs Fick and Luyt of the Office of the Director of Public Prosecutions: Transvaal note that in clause 11 reference is only made to "internationally protected persons" which is defined in clause 1. They pose the question whether their families should not also be included in this clause. They are of the view that there is also a striking anomaly in the prescribed sentences, and that both sub-clauses refer to kidnapping, but different sentences are prescribed. They suggest that kidnapping be deleted from sub-clause (a).

13.234 Messrs Fick and Luyt's suggestion that provision need to be made for the protection of members of staff and family of internationally protected persons is noted and the Bill was amended to provide accordingly. (See the discussion above under the heading definitions in respect of internationally protected persons.)

13.235 In view of the project committee's recommendation in the previous paragraph this clause was amended and became part of the previous clause.

O. PROTECTION OF PROPERTY OCCUPIED BY INTERNATIONALLY PROTECTED PERSONS

(a) Evaluation contained in discussion paper 92

13.236 The clause contained in the discussion paper provided that it constitutes an offence to damage or destroy, enter or refuse to depart from property occupied by internationally protected persons. The committee was of the view that there is no need in the light of sections 18(1) and (2) of the *Riotous Assemblies Act* to provide that an attempt to damage or destroy property within the Republic and belonging to or being utilised or occupied by any internationally protected person constitutes an offence. The committee further considered that the clause should be aimed at the damaging or destroying of such property but not the "injuring" of property. The committee was further of the view that it would be sufficient to refer to "property" instead of "real or personal" property. The committee also considered that the words "wilfully, with intent to intimidate, coerce, threaten or harass, enters or introduces any part of himself or herself or any object within that portion of any building or premises within the Republic, which portion is used or occupied for official business or for diplomatic, consular, or residential purposes by an internationally protected person" should be substituted for the words "wilfully, with intent to intimidate, coerces, threatens or harasses, forcibly thrusts any part of himself or herself or any object within or upon that portion of any building or premises within the Republic, ...". The committee also considered that clause 12 should make provision not only for a fine or imprisonment which may be imposed but also for imposing both such fine and imprisonment.

(b) Comment on discussion paper 92

13.237 The Chief: Military Legal Services suggests that the clause reads as follows: "Any person who unlawfully and intentionally damages and/or destroys any property belonging to or being utilised or occupied within the Republic by any internationally protected person . . ." They also suggest that the words "wilfully with the intent to" in clause 12(1)(b) be amended to read "unlawfully and intentionally intimidate" and that the words "within the Republic" be moved from the present position in the clause to the end of the clause. Messrs Fick and Luyt of the Office of the Director of Public Prosecutions: Transvaal remark in respect of clause 12(1)(a) that this broad prohibited act can also include instances of mere malicious damage to property for which a sentence of 5 years imprisonment would be too harsh. They note that a typical example in the South African situation would be so-called "road rage" where a person breaks the window of the car of an internationally protected person.

(a) **Evaluation and recommendation**

13.238 What remains to be considered in the context of property of internationally protected persons is those instances where someone enters such property or refuses to depart when requested to do so. The committee considers these aspects should be incorporated into the amended clause 10 it proposed above. The committee took the remarks into account that imprisonment for a period of five years might be harsh under certain circumstances. The committee considers that should someone be charged under these provisions the circumstances will be taken into account and an appropriate sentence fitting the seriousness of the offence be imposed. The project committee and Commission recommends the following clause:

Any person who -

(a) wilfully and unlawfully, with intent to intimidate, coerce, threaten or harass, enters or attempts to enter any building or premises which is used or occupied for official business or for diplomatic, consular, or residential purposes by an internationally protected person within the Republic; or

(b) refuses to depart from such building or premises after a request by an employee of a foreign government or an international organisation, if such employee is authorised to make such request,

commits an offence, and is liable on conviction to a fine or to imprisonment for a period not

exceeding five years or to both such fine and imprisonment.[1]

P. CLAUSE 10: OFFENCES RELATING TO FIXED PLATFORMS

(a) Evaluation contained in discussion paper 92

13.239 The project committee suggested in the discussion paper that the drafters be asked why this clause cannot also be incorporated into "terrorism act" as well. The drafters considered that very specific offences are involved under this heading at that in they should be dealt with separately and not as part of the definition of "terrorist act".

(a) Comment on discussion paper 92

13.240 Ms Schneeberger comments that the reference to "any fixed platform on the High Seas" creates the possibility of extra-territorial jurisdiction without any jurisdictional link to South Africa. She says that as this clause incorporates the offences referred to in Article 2 of the *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf* they advise that the jurisdictional basis provided for in Article 3 of that Convention be used as well. She suggests that clause 12(1)(a) would then read "seizes or exercises control over a fixed platform while it is located on the continental shelf of the Republic", and the other bases for jurisdiction are covered by section 15 of the Bill. She also points out that they wish to draw attention to the fact that the ancillary offence of attempts, threats etc are dealt with in this provision, and they have no objection to this formulation but it should be used consistently throughout the Bill.

13.241 The SAPS: Legal Component: Detective Service and Crime Intelligence refer to their observations made in respect of the two possible approaches, and the preference to include a wide definition of terrorist acts, as well as specific offences to give effect to the respective international instruments. The SAHRC considers that it is unnecessary to make special provision for the offences listed in this clause. The SAHRC notes that the definition of a terrorism act in clause 1 is sufficiently wide to incorporate this clause, and that its inclusion can also not be justified by reference to the evidentiary onus it creates when

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[1] See Article 2 of the *Convention on the Protection and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*,1979. Chapter 45, Title 18 *United States Code*, Article 970 *Protection of Property occupied by Foreign Governments*.

prosecuting this crime. The SAHRC remarks that clause 13 itself makes no provision any elements other than those listed in the definition of terrorism act to be proven to establish intent on the part of an accused and in the absence of additional compelling evidence that would justify its inclusion, the SAHRC recommends that this clause be deleted in its entirety. The Chief: Military Legal Services suggests that the words “and/or” should be substituted for the word “or” in clause 13(1)(b) and that the words “or causes to destroy” be inserted after the word “destroys” as the common purpose principles will be applicable.

(c) Evaluation and recommendation

13.242 The project committee considers that it should retain this provision which creates offences for interference with fixed platforms on the high seas and on the continental shelf. It agrees with Ms Schneeberger on clarifying the jurisdiction of the platform by inserting the words “while it is located on the continental shelf of the Republic”. The Commission agrees with the project committee.