COUNTER-TERRORISM POLICY IN SOUTH AFRICA: 1994-2004

BY

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Submitted in partial fulfilment of the requirements for the degree of

MASTER OF SECURITY STUDIES

in the

FACULTY OF HUMANITIES

at the

UNIVERSITY OF PRETORIA

JULY 2006

FOREWORD

This study was prompted by an unfounded perception within some sections of the South African Muslim community that the counter-terrorism policy introduced by the democratic government after 1994 was in reality targeting Muslims. This view became particularly pronounced in the aftermath of the 11 September 2001 terror attacks on the United States of America and the consequent global 'war on terror'. No amount of elucidation offered at public meetings by politicians could allay the fears in these quarters. Under these circumstances, I thought it appropriate to undertake an academic study on the topic.

I wish to thank Ignatius Jacobs, Member of the Executive Council for Transport in Gauteng, for insisting that I read for a Masters Degree in Security Studies at the University of Pretoria. I am also deeply indebted to my dear comrade, Laloo "Isu" Chiba, for his consistent encouragement and considered political mentorship since his release in 1981 from Robben Island Prison.

Professor M. Hough, my supervisor, gave me constant support and excellent advice throughout the five-year period of study. His academic rigour and intellectual creativity has certainly rubbed off on this project and I am extremely grateful for his assistance and academic guidance.

My very special thanks to my wife, Zerina, and children, Azhar, Tasneem, Anisa and Zaakirah, for their tolerance of my absence from home necessitated by my political responsibilities and for their regular forbearance of my being 'absent' from home, while being engaged in study within the house.

Finally, my happiest moments during this study were when my two-year old grandson, Muhammad, repeatedly insisted on the right to play on my laptop every time I tried to squeeze in some work. His persistence in tapping away at the keyboard and creating mumbo jumbo sentences that only he understood brought welcome relief to the strain that goes with any study on terrorism.

Ismail Vadi

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INTRODUCTION

1. RESEARCH OBJECTIVES

This dissertation focuses on South African counter-terrorism policy and legislation in the post-1994 period. It primarily investigates the objectives of, and underlying reasons for, the new counter-terror policy of the South African government as reflected in the Anti-Terrorism Bill (12B-2003) and the Protection of Constitutional Democracy against Terrorist and Related Activities Act (No. 33 of 2004). The main focus is on the highly controversial Anti-Terrorism Bill (12B-2003) as it became the centrepiece of public debate when the Portfolio Committee on Safety and Security had invited written and oral representations from the public after it was formally tabled in parliament. It discusses public criticisms to the Anti-Terrorism Bill (12B-2003) from selected organisations of civil society and highlights which of these criticisms were finally taken into account in the Protection of Constitutional Democracy against Terrorist and Related Activities Bill (12F-2003).

The dissertation attempts to formulate a working definition of terrorism and develops a theoretical perspective of terrorism domestically and internationally. It examines South Africa's attempts at countering terrorism historically and currently. It focuses on its international obligations to counter terrorism since its acceptance into the world community of nations in 1994, focusing specifically on its efforts to combat terrorism in the aftermath of the 11 September 2001 terror attacks in the United States of America (US).

An assessment is also made as to whether or not the South African counter-terrorism legislation is an appropriate policy response by the South African government to the emerging national security threats arising from terrorism between 1994 and 2004. These threats have assumed the form of domestic and international terror, allegedly carried out by groups such as People Against Gangsterism and Drugs (PAGAD) and the white rightwing. It locates the analysis within the new security paradigm that has assumed prominence in the post-Cold War era.

Finally, the dissertation discusses public responses to the new policy initiatives of the South African government with regard to counter-terrorism. It analyses the extent to which these policy proposals are consistent with the democratic values and the human rights culture enshrined in the South African Constitution. The dissertation discusses the tension between South Africa's rights-based Constitution and the need for effective counter-terrorism measures. It looks at the degree to which it is reasonable and defensible to introduce limitations to the Bill of Rights as the South African government develops and implements its counter- terrorism policy

1.2. RESEARCH PROBLEM

The concept of terrorism is politically elusive and problematic. This is the case as acts of terror have emanated from individuals and groups across the ideological spectrum, including some states and internationally recognised governments. There exists no agreement nationally and internationally on its definition and its theoretical conceptualisation. The research attempts to formulate a set of characteristics of terrorism.

Secondly, in developing counter-terrorist measures, democratic states have tended to criminalise terrorist activities, rather than also view terrorism as a socio-political phenomenon. This is so because of the difficulties in defining terrorism. The South African government has adopted a similar approach. The dissertation examines whether or not this is the best possible way of dealing with terrorism and assesses the implications of this approach for South Africa's national security.

The international efforts to counter terrorism have received renewed impetus in the aftermath of the 11 September 2001 terror attacks against the US. International and regional security regimes under the auspices of the United Nations Organisation (UN) and the African Union (AU) have adopted Resolutions, Protocols and Conventions calling upon member states to adopt counter-terror policies and legislation consistent with these international instruments. Critics of this approach – both in South Africa and abroad - argue that these measures are essentially designed under pressure from the US government. They are meant to advance the global 'war on terror' and the imperialist interests of the US. The South African government

has consistently denied that it is under pressure from the current US administration. It claims that its counter-terror measures are dutifully meeting its international obligations and responding to credible domestic security threats. These conflicting propositions are critically evaluated.

Internationally, political analysts have pointed to a fundamental tension in democratic societies between respect for human rights and the rule of law, and the prevention and combating of terrorism. Some have argued that counter-terror measures tend to corrode democratic values in society and infringe on civil liberties. South African critics of the new counter-terror measures have claimed that the government is re-introducing elements of repressive policies that were characteristic of the apartheid state. The South African government has argued that its counter-terror measures are compatible with democracy and its rights-based Constitution.

The dissertation is, therefore, based on the following propositions:

- the recent South African counter-terrorist initiatives are designed to outlaw terrorist activities, rather than also viewing terrorism as a socio-political phenomenon;
- these initiatives are the result of both international as well as domestic requirements and pressures; and
- that these counter-terrorist measures are compatible with its rights-based, constitutional order.

1.3. RESEARCH METHODOLOGY AND SOURCES

The dissertation uses primary as well as secondary sources, including international Conventions and Protocols acceded to by the South African government and the reports of the South African Law Commission (SALC). It also uses primary and secondary sources to describe insurgent activities and state responses prior to 1994, as well as the incidence of domestic and international terrorism in South Africa thereafter. Written and oral submissions by organisations of civil society - which are for and against the Anti-Terrorism Bill (12B-2003) - are compared and analysed. The recent South African counter-terrorist initiatives are

briefly compared with similar initiatives in selected democratic societies. Both description and analysis will be used in the research, as well as comparison, where South Africa's approach is evaluated against the background of broad counter-insurgency measures in selected democracies.

1.4. STRUCTURE OF THE RESEARCH

Following the introduction, which sets out the methodological basis and aims of the study, Chapter 1 provides a theoretical conception of terrorism at domestic, international and transnational levels, as well as crime-related terrorism. It also examines the problematic issue of counter-terrorism strategies in modern democracies and describes international initiatives to counter terrorism under UN and AU auspices. Chapter 2 provides a brief historical overview of the development of international terrorism. This is followed by a description of South African insurgent and terrorist activities since 1960 and South African state responses to these prior to 1994. It also examines the incidence of domestic and international terrorism in South Africa since 1994. Chapter 3 focuses on post-1994 counter-terrorism policy and strategies in South Africa with specific reference to legislative proposals such as the Anti-Terrorism Bill (12B-2003) and the Protection of Constitutional Democracy against Terrorism and Related Activities Bill (12F-2003). Chapter 4 examines public and civil society reactions to the Anti-Terrorism Bill (12B-2003). Chapter 5 provides a summary and evaluates the propositions listed above.

CHAPTER 1 – TERRORISM AND COUNTER-TERRORISM

1. INTRODUCTION

Terrorist attacks have been a facet of human life for centuries. Terrorism is a specific form of political violence and a means of struggle involving the use of premeditated, indiscriminate and arbitrary violence against civilians.[1] Since the 20th century, terrorist attacks have been on the increase and are becoming more lethal. In the post-Cold War era there has been an upsurge and a notable spread of the attacks, with Western states, former communist regimes and Third World states emerging as defined targets.[2] Terrorist attacks are sudden, unexpected and unpredictable

The attacks against the US on 11 September 2001 had dramatically highlighted the international character of the problem. It prompted the international community to take stock of the available measures to combat terrorism.[3] The consequent "war on terror" has generated renewed interest in the concept of terrorism and in combating the phenomenon globally.[4] It also marked a watershed in the international security system and served as a catalyst for its re-shaping.[5]

Terrorism is a distinctive form of political action which occurs under specific circumstances. Clapham states that an analysis of the phenomenon requires a "scrupulously neutral assessment of the nature of the activity itself, and the conditions that are liable to foster it."[6] Given the nature and impact of terrorism, it is understandable that such an assessment has been extremely difficult to achieve. Whilst popular anger in the wake of terror attacks, the grief of victims and their families and the expressions of moral outrage to the attacks have tended to dominate the discourse, these are not entirely helpful in developing a theoretical conceptualisation of the phenomenon.

This chapter begins by developing a working definition of the concept of terrorism and examines the purposeful nature of the phenomenon. It offers a classification of terrorism in terms of domestic, international, transnational, crime-related and state terrorism. It describes the varied motives of terrorist groups, particularly since the mid-20th century. It

also discusses briefly the current main trends in international terrorism by comparing it with its main development since 1970. Finally, it examines international efforts to counter terrorism under the auspices of the UN and regional security regimes, particularly the AU.

2. THE CONCEPT OF TERRORISM

Terrorism is a problematic concept. Whilst it has been relatively easy to describe terrorist acts, it has been extremely difficult to achieve an internationally acceptable legal and political definition of the concept. The reason for this is that the interpretation of the complex nature of a deed "loses clarity when placed within a particular historical, political, religious and ideological context."[7] This explains the popular adage that one person's terrorist is another person's freedom fighter. Consequently, international and regional security organs have tended to define specific manifestations of terrorist activity, rather than offer a politico-legal definition of the concept. This situation is further complicated by states adopting different approaches to terrorism. They have either classified terrorism as ordinary criminal acts or followed the international example by passing national legislation that criminalises specific manifestations of terrorist activity, thereby rendering international efforts at combating terrorism less effective. The demand for a comprehensive UN-sponsored convention on terrorism has intensified in recent years, and was reiterated in March 2005 at the International Summit on Democracy, Terrorism and Security held in Madrid.[8]

2.1. OFFICIAL DEFINITIONS

International and regional security organs, as well as sovereign states, have formulated widely differing definitions of terrorism. Whilst it is not possible to provide a comprehensive list of official definitions of terrorism, those developed over time by the UN, regional security organs such as the European Union (EU), the Organisation of African Unity (OAU) and the Organisation of the Islamic Conference (OIC) are discussed briefly. In addition, definitions from Western states such the US and the United Kingdom (UK) are compared with those from the Third World such as Algeria and India.

2.1.1. INTERNATIONAL ORGANS

A first attempt to arrive at an internationally acceptable definition of terrorism was made under the League of Nations, but the Convention drafted in 1937 never came into existence. The draft provided a general definition stating that terrorism involved "all criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public."[9] Since 1970, both the UN General Assembly and the Security Council have grappled with the question and eventually adopted 13 treaties and several resolutions to condemn and to define specific acts of international terrorism. UN Conventions have relied on an operational definition of terrorism in specific circumstances, rather than a political one. For example, the Convention for the Suppression of Unlawful Acts against the Safety of Civilian Aircraft (1971) states that any act of violence against a person on board an aircraft in flight or any attempt to endanger the safety of that aircraft through an explosive or other device is construed to be an act of terrorism.[10] In terms of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (1973) the intentional commission of:

a) a murder, kidnapping or attack upon the person or liberty of an internationally protected person;
b) a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty;
c) a threat to commit any such attack; and
d) an act constituting participation as an accomplice in any such attack, shall be made punishable by each State Party under its internal law.[11]

The International Convention against the Taking of Hostages (1979) creates an offence of hostage-taking if any person detains, threatens to kill or to injure another person in order to compel a state or an international intergovernmental organisation to do or abstain from doing an act as an explicit condition for the release of the hostage.[12]

The UN General Assembly's Declaration on Measures to Eliminate International Terrorism (1994) condemned all acts of terrorism stating that "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them."[13] The International Convention for the Suppression of Terrorist Bombings (1997) expands the definition by declaring that a person commits an offence if s/he 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 infrastructure facility, with the intent to cause death or serious bodily injury; or extensive destruction of such place, facility or system, where the destruction results in or is likely to result in major economic loss.[14] The Convention for the Suppression of the Financing of Terrorism (1999) criminalises the provision and collection of funds for "any act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act."[15]

While the UN has unequivocally condemned all forms of terrorism, it has not been successful in developing a general and internationally acceptable definition of terrorism. Instead, it has opted for an operational definition of terrorism and criminalised specific acts such as the hijacking and bombing of international aircrafts, the kidnapping or taking of hostage of internationally protected persons, and, the bombing of public and government facilities and infrastructure. It has also criminalised the provision and collection of funds for terrorist activities.

2.1.2. REGIONAL ORGANS

The most comprehensive, non-legal description of terrorism is contained in the EU's "Common Position" adopted in December 2001. This has drawn a distinction between a "terrorist act" and "terrorist persons, groups or entities", which helps to classify a deed as terrorist without necessarily classifying the perpetrators as terrorists. It also constrains its

understanding of what constitutes a terrorist act to international acts to avoid the difficulties associated with differing national legal systems. According to the "Common Position" a terrorist act shall mean one of the following international acts that may seriously damage a country or an international organisation:-

i) which is committed with the aim of seriously intimidating a population;
ii) or unduly compelling a government or an international organisation to perform or abstain from performing any act;
iii) or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation:
a) attacks on a person's life which may cause death;
b) attacks upon the physical integrity of a person;
c) kidnapping and hostage taking;
d) causing extensive destruction to a government facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;
e) seizure of aircraft, ships or other means of public or goods transport;
f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear or chemical weapons, as well as research into, and development of, biological and chemical weapons;
g) release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life;
h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life;
i) threatening to commit any of the acts listed under (a) to (h);
j) directing a terrorist group; and
k) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any

way, with the knowledge that such participation will contribute to the criminal activities of the group.[16]

The "Common Position" further defines a terrorist group as a structured group of more than two persons, established over a period of time and acting to commit terrorist acts.

The OAU Convention on the Prevention and Combating of Terrorism (Algiers Convention 1999) offers a definition of a terrorist act. According to Article 1 (3) a terrorist act means:

a) any act which is a violation of the criminal laws of a State Party and which may endanger life, physical integrity or freedom of, or cause serious injury or death to any person, any number of persons or causes or may cause damage to public or private property, natural resources, environment or cultural heritage and is calculated or intended to:

i) intimidate, put in fear, force, coerce or induce any government body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles;

ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or

iii) create general insurrection in a State.

b) any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organising, or procurement of any person, with intent to commit any act referred to in paragraph (a) (i) to (iii).[17]

In attempting to grant legitimacy to struggles for liberation or national self-determination, including armed struggles against colonialism, occupation, aggression and domination by foreign forces, the Algiers Convention has excluded these from its definition of terrorism.[18] As the 'successor' to the OAU, the AU has endorsed the Algiers Convention by calling on its member states to ratify the instrument. The Constitutive Act of the African Union (2000) specifically lists among its principles, the rejection of acts of terrorism. In addition, the Solemn Declaration on the Conference on Security, Stability,

Development and Co-operation in Africa, adopted by the Lomé Summit in July 2000, states that "terrorism, in all its manifestations, is inimical to stability," and the AU Plan of Action sets out concrete steps to be taken by member states to combat terrorism on the continent.[19]

The OIC Convention on Combating International Terrorism (1999) defined terrorism as:

> any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperilling their lives, honour, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States.[20]

Article 2 (a) of the above declares that: "Peoples' struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime," and, (b) that these "shall not be considered political crimes."[21]

2.1.3. SELECTED STATE DEFINITIONS

Western states such as the US and the UK have recently passed new anti-terror legislation. These have substantially expanded the definition of terrorism. For instance, the US Code, Title 22, defined terrorism as premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents, usually intended to influence an audience.[22] However, in the aftermath of 9/11, the US passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA Patriot Act, 2001). A federal crime of terrorism is now defined as an offence that is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct, and is a violation of a

number of crimes listed, for example, arson, bombings, hostage taking and destruction of aircraft facilities. An act of terrorism is an activity that:

a) involves a violent act or an act dangerous to human life that is a violation of the criminal laws of the US or of any State, or that would be a criminal violation if committed within the jurisdiction of the US or any State; and,
b) appears 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.[23]

The UK has a similar provision, but has contentiously included not just an act of terrorism in its definition, but also the "threat" of such an act. Section 1 of the Terrorism Act (2001) defines terrorism as the use or threat of action where:

a) the action falls within subsection (2),
b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
1 (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, creates a serious risk to the health or safety of the public or a section of the public; or
d) is designed seriously to interfere with or seriously to disrupt an electronic system.[24]

Likewise, the Australian Defence Force defines terrorism as the use or threatened use of violence for political ends, or any use or threatened use of violence for the purpose of putting the public or any section of the public in fear.[25] Article 205 of the Criminal Code

of the Russian Federation defines terrorism as causing an explosion or committing arson or other acts entailing risk of loss of human life, substantial damage to property or other consequences dangerous to society, if these are committed for the purpose of disrupting public safety, terrorising the population or influencing the adoption of decisions by the authorities.[26]

While definitions of terrorism in the Third World share commonalities with those referred to above, a greater emphasis is placed on preserving state security and the territorial integrity of the nation-state. For example, the Algerian Penal Code (1993) defines a terrorist act as an offence targeting state security, territorial integrity or the stability or normal functioning of institutions through any action seeking, *inter alia*, to spread panic among the public, attacking property or causing physical harm to people; damaging national or republican symbols, harm the environment, means of communication or means of transport; and, impede the free exercise of religion and public freedoms.[27] Likewise, the Indian Prevention of Terrorism Ordinance (2001) defined a terrorist act as "an act done by using weapons and explosive substances or other methods in a manner as to cause or likely to cause death and injuries to any person or persons or loss or damage to property or disruption of essential supplies and services or by any other means necessary with the intent to threaten the unity and integrity of India or to strike terror in any section of the people."[28]

In the post-Cold War era, several Western states and developing nations have significantly reviewed their anti-terror policies and have passed new legislation in this regard. These have expanded the definition of terrorism, and, following international examples, they have criminalised very specific forms of terrorist activity. Most definitions of terrorism share significant commonalities and are essentially aimed at protecting public safety. However, Third World states have tended to place equal emphasis on the preservation of state security and the territorial integrity of the nation-state. How do these statutory definitions of terrorism differ from those developed in the academic literature on the subject?

2.2. OTHER DEFINITIONS OF TERRORISM

The academic literature on terrorism distinguishes between acts of terror emanating from selfish motives and criminal intent and those that stem from socio-political causes. Jenkins states that terror attacks are ordinarily criminal acts, but which differ from murder and arson in that they are executed with the deliberate intention of causing panic, disorder and terror within a society in order to destroy social discipline, paralyse the forces of reaction of a society and increase the suffering of the community.[29] Schmid and Jongman state that:

> terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individual, group, or state actors, for idiosyncratic, criminal, or political response… The immediate human victims of violence are generally chosen randomly …. and serve as message generators. Threat- and violence-based communication processes between terrorists, victims, and main targets are used to manipulate the main target of attention (audience), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought.[30]

Alexander has defined terrorism as the deliberate employment of violence or the threat to use violence by sub-national groups and sovereign states to attain strategic advantage and political objectives.[31] Wilkinson sees terrorism as the systematic use of coercive intimidation, usually to serve political ends. It is used to exploit a climate of fear among a wider target group than the immediate victims of violence, and to publicise a cause, as well as to coerce a target to accede to the terrorists' aims.[32] Combs argues that terrorism is a "synthesis of war and theatre, a dramatisation of the most proscribed kind of violence – that which is perpetrated on innocent victims – played before an audience in the hope of creating a mood of fear, for political purposes."[33]

In spite of the multitude of official and academic definitions of terrorism, a set of common characteristics of the concept can be identified. These are that terrorism:

- is a premeditated, violent, criminal act;

- primarily targets defenceless civilians and a wider audience other than the immediate victims;
- instils extreme fear in the public;
- is committed with the aim of seriously intimidating a population or government;
- destroys public and/or private property and natural resources;
- disrupts a public service or essential services;
- attempts to coerce a government and/or an institution to act or not to act in a particular way; and
- threatens international security, state security and the territorial integrity of sovereign states.

Terrorism has assumed many different forms over the years. It is conducted by a variety of groups, individuals and states for widely differing motives and purposes. Therefore, the various forms of terrorism must be understood conceptually before an assessment can be made of international efforts to combat the phenomenon globally.

3. FORMS OF TERRORISM

An understanding of the different meanings of domestic, international, transnational, state and crime-related terrorism is important for conceptual clarity. However, the distinctions between these concepts have become increasingly difficult to draw in the post-Cold War era, as many acts of domestic terrorism have international consequences. Domestic groups targeting national targets only, receive some form of international support, or attempt to achieve international publicity.[34] In addition, terrorist groups can also be involved in both domestic and international terrorism, or can be predominantly or exclusively focused on one or the other form of terrorism.

3.1. DOMESTIC TERRORISM

Domestic terrorism occurs when the violence and terror linked to it are confined to the borders of a single country, sometimes within a particular locality only; and also does not involve foreign targets.[35] It targets the local government and citizens and is conducted with no foreign involvement. State terror forms an integral part of domestic terrorism. In

practice, however, it is difficult to identify a protracted terror campaign that is purely domestic in character. Invariably, terrorists look across their national borders for political, financial and logistical support and to a safe haven.[36] Hence, domestic terrorism often has spill-over effects into other countries.

3.2. INTERNATIONAL TERRORISM

International terrorism refers to acts of terror carried out across international borders and violence involving citizens of more than one country. Terrorists strike at citizens of another country while they are living or travelling abroad, or while at home in their own country. It has clear international consequences. Alexander and Gleason state that "terrorist activities may be regarded as international when the interests of more than one state are involved, for example, when the perpetrator or the victim is a foreigner in the country where the act is done or the perpetrator has fled to another country".[37] Some examples of international terrorism are: the kidnapping of diplomats, the hijacking of a foreign aeroplane, an attack on airliners in international flights and attacks against foreign nationals. Hough states that "political terrorism becomes international when it is directed at foreigners or foreign targets; concerted by the governments or factions of more than one state; or aimed at influencing the policies of a foreign government." He adds that international terrorism can be carried out by autonomous non-state actors; by person/s controlled by a sovereign state; and, by a state using its own agents for this purpose.[38] In the latter two cases, state-sponsored international terrorism is attractive as it is conducted secretly and, if exposed, plausibly denied.

In the 1990s, the US Department of State listed seven countries as sponsors of international terrorism, namely, Cuba, Iran, Iraq, Libya, North Korea, Sudan and Syria; and, it noted that international terrorism would not have flourished without the funding, training, safe-haven, weapons and logistic support provided by sovereign states.[39] In its 2004 listing, it had excluded Iraq as a state-sponsor of terrorism. It, however, noted that Libya and Sudan had co-operated to some extent in the global war on terror.[40] In 2006, the Bush administration restored diplomatic relations with Libya and removed it from the list of state sponsor of terrorism.[41]

3.3. TRANSNATIONAL TERRORISM

A theoretical distinction can be drawn between international and transnational terrorism. Transnational terrorism refers to non-state actors who operate internationally with the express long-term aim of global revolution or of establishing a revolutionary supra-national world order.[42] The Central Intelligence Agency (CIA) differentiates between international terrorism and transnational terrorism by stating that the latter is terrorism "carried out by basically autonomous non-state actors, whether or not they enjoy some degree of support from sympathetic states", and the former is terrorism carried out by individuals or groups controlled by a sovereign state.[43] Transnational terrorists are not structured hierarchically and operate in a decentralised manner. They are groups of individuals of various nationalities united under the banner of religion and/or ideology.[44]

3.4. CRIME-RELATED TERRORISM

Criminal terrorism can be defined as "the systematic use of terror for ends of material gain."[45] Targets are selected because of the potential for personal and material gain. It has taken the form of kidnapping, extortion, assassination, murder and bombings. Targets often include business leaders, politicians, civil servants, judicial officials and security personnel. Narco-terrorism – a sub-element of crime-related terrorism – refers to narcotics trafficking by terrorist groups in return for funds with which to conduct terror. It is used by drug lords to divert attention from anti-drug investigations and in some instances it is linked to political terrorism. In essence, it represents the use of extreme pressure and violence by drug barons or an organised crime syndicate to force a government to modify its policy with regard to curtailing the sale and distribution of illicit goods.[46]

4. THE MOTIVATIONS AND OBJECTIVES OF TERROR

Terrorism is often seen as senseless or irrational violence. This is seldom the case. Terrorism often has clear motives (reasons) and purposes (objectives). There is a theory of terrorism and it can be effectively applied in practice. Terrorism is "purposive action" and part of a "rational strategy from the point of view of the perpetrators."[47] It is a method of struggle.[48] It must, therefore, be conceptualised as part of a crafted strategy or tactic, or

both. It is important to understand that terrorism is a means to an end; not an end in itself. It has objectives, although these might be obscured as attacks occur and are directed at targets which do not appear to benefit the cause. It might aim simply at getting people to listen and to watch; to register a credible threat; or to demonstrate a capacity to strike at a target.

4.1. TYPOLOGY OF TERRORIST MOTIVATIONS

Wilkinson has developed an instructive typology of terrorism. In classifying the types of terrorist groups, he has classified them according to their underlying political and ideological orientation. Terrorist activity can be categorised under the following motivational factors: nationalism, separatism, racism, vigilantism, revolutionary ideology, religious extremism, millennialism, state and state-sponsored and single-issue campaigns.[49] Quite often the causes of terrorism overlap and could embody several motivational factors. Dingley and Kirk-Smith, for example, have pointed to the importance of "symbolism in ethnic nationalist terrorist acts" in Ireland and Spain, where political violence is a product of ethnicity, nationalism, religion, class divisions and the notion of sacrifice in struggle.[50] Terrorism could also be used for very specific purposes such as to secure concessions from a regime, to disrupt a financial system or to get ransom money.

The underlying motives for terrorism can also be linked to specific periods in history. The period between 1960 and 1979 was mainly one of revolutionary and nationalist terrorism with the goals being the creation of an alternative ideological (socialist) society or independent states free from colonial rule respectively. Between 1980 and 1989 state-sponsored terrorism was dominant as Western and Soviet states supported ideologically-aligned liberation and terrorist groups as foreign policy instruments during the Cold War. Since the 1990s, the upsurge in ethno-religious conflicts has spawned ethnic movements fighting separatist struggles. In addition, the post-Cold War era has also witnessed the emergence of transnational terrorism or "super terrorism" as reflected by al-Qaeda.[51]

4.1.1. NATIONALIST AND SEPARATIST MOTIVATIONS

In the 20th century, terrorism became the preserve of nationalist and separatist movements struggling for national self-determination or political autonomy respectively. Nationalist movements, such as the Palestinian Liberation Organisation (PLO), struggling for national self-determination were active domestically and internationally. They are deeply rooted in national popular culture and claim to be the authentic voice of the oppressed communities they represent. Political violence is an auxiliary weapon in national liberation and anti-colonial struggles.[52] Likewise, separatist terrorists groups, such as the Liberation Tigers of Tamil Eelam in Sri Lanka, representing ethnic minorities use violence to advance minority rights, to acquire political autonomy or to secede from multi-ethnic nation states.

4.1.2. IDEOLOGICAL MOTIVATIONS

Left-wing terrorist groups aim to change the entire political and economic system, particularly in Western capitalist societies. They advance a revolutionary, Marxist or Maoist ideology and have used armed attacks against political, military and economic symbols to weaken the imperialist and/or capitalist system.[53] Left-wing terror groups were popular during the bipolar Cold War era, and were actively supported by the Soviet Union. Today, Latin America remains the main continent where Marxist/Maoist groups such as the Sendero Luminoso (Shining Path) in Peru continue to operate, aiming to establish left-wing regimes and to weaken US influence on the continent.[54] On the other end of the ideological spectrum, right-wing terror groups are racist and fascist in character. For instance, neo-Nazi groups in Germany have used terror targeting immigrants, as have other ultra right-wing and white supremacist movements in Europe and in Russia.[55]

4.1.3. RELIGIO-POLITICAL MOTIVATIONS

Religiously-based terror groups are driven by deeply held religious beliefs and values. Religious terror has been a phenomenon of life since ancient times. However, since the 1980s there has been the dramatic emergence of Islamist movements engaged in armed actions in the Middle East, Far East, North Africa and Central Asia. Wilkinson warns against exaggerating the religious dimensions of these groups, as there is a “strong

political agenda" underlying their campaigns and demands.[56] Most have strong indigenous roots and are responding to national grievances, popular disillusionment with secular regimes, widespread poverty and the failure of Arab governments in particular to meet the popular needs of their citizenry. They propagate a strong anti-US and anti-Zionist/Israeli standpoint. Some examples of such movements are Islamic Jihad in Egypt, Hezbollah in Lebanon and the Islamic Movement of Uzbekistan.[57] Protestant, Christian and Jewish terror groups, such as Ulster Volunteer Force (Ireland), Phineas Priesthood (US) and Kahane Chai (Israel) respectively, are also motivated by extremist religious ideologies.[58]

4.1.4. ETHNIC MOTIVATIONS

There has been an unparalleled upsurge in the number and severity of ethnic conflicts in the post-Cold War period in which the use of mass terror against the designated 'enemy' civilian population has become a standard weapon. Rag-tag militias have unleashed mass terror campaigns against civilians, leading to large scale killings, destruction of property and damage to natural resources. The Army for the Liberation of Rwanda (ALiR) that carried out the Rwandan Hutu genocide in 1994 and the Revolutionary United Front (RUF) in Sierra Leone are but two examples of groups initiating mass terror, with the latter also being described as 'criminal' insurgency. Wilkinson has noted that over 90 percent of significant armed conflicts today are intra-state conflicts, the majority with an underlying ethnic or religious conflict at the root, such as in Central Africa, the Balkans and South East Asia.[59]

4.2. THE AIMS OF TERROR

Leurdijk asserts that acts of individual and collective terror have been known throughout history and have been used by those who felt themselves to be outside the established political system, but hitherto they have always had a clearly visible political and legal objective.[60] This distinguishes it from ordinary crime. World attention is often immediately drawn to dramatic terror attacks through the electronic and print media. Terrorism resembles an attempt to manipulate and to inspire fear to achieve a variety of purposes such as: wringing concessions from a regime; improving the bargaining position

of terrorist groups; coercing governments to meet their demands; and, to gain publicity for a cause.[61]

Harmon has drawn attention to the use of terrorism to advance five inter-related strategies. These are the creation of societal dislocation or chaos; the discrediting or destroying of a particular government; rendering economic and property damage; 'bleeding' state security forces and doing other military damage; and, spreading fear for international effects.[62] Jenkins states that "terrorism is violence for effect" and is "theatre".[63] Fear is the intended effect, not a by-product of terrorism. Terrorist movements primarily target civilians to advance their interests and political agendas, and the victims maybe totally unrelated to the terrorists' cause.

The goals of terrorists could vary from the specific to the general. Terrorism could be a strategic tool to obtain some concessions from a regime without aiming to overthrow a government; overthrow a particular regime; promote worldwide revolution; destroy all forms of government; achieve self-rule for particular ethnic or separatist groups; acquire political self-determination for oppressed nationalities; establish a new social order based on an ideological worldview; advance a militant religious philosophy to establish a theocratic state; promote an issue-based environmental or moral campaign; wreak revenge; conduct criminal activities; or, to extort money.[64] It could also serve short-term, tactical purposes as part of a broader insurgency, or be a movement of "pure" terror emanating from nihilistic or anarchic conduct.

5. CURRENT MAIN TRENDS IN INTERNATIONAL TERRORISM

In tracing the current main trends of international terrorism, Gueli refers to four phases in the development of the phenomenon since 1970. In the first phase, national liberation groups such as the PLO principally employed the tactics of kidnapping prominent figures for ransom and to score political propaganda points; the hijacking of international planes; and, the use of small bombs and firearms. The motives in this phase were essentially political - struggling for national self-determination or minority rights. The majority of cases fell into one of two categories: national separatists or social revolutionary.[65]

In the second phase, the 1979 Islamic revolution in Iran and the defeat of the Soviet Union in Afghanistan introduced religion as a critical motivating factor in political struggles, particularly in the Middle East. Terrorist attacks were less discriminating in this phase and targeted political symbols of the US and its allies. The main tactic used was 'suicide bombings'.[66]

During the third phase beginning in 1990, transnational terrorists, driven by extremist religious views across faiths, directed attacks at the general population as well as at symbols of Western power, such as financial systems and transport and energy infrastructures. The organisational structures of terrorist groups changed from pyramidal, hierarchical, cellular forms to more amorphous, indistinct and looser organisations.[67] The use of truck bombs and the Sarin gas attack in the Tokyo Underground in 1995 by Aum Shinrikyo signalled a shift to a new trend – mass casualty attacks.[68]

The scenario of catastrophic terrorism in the fourth phase was actualised by the 11 September 2001 attacks on the World Trade Centre and Pentagon in the US, and by the more recent train bombings in Madrid and London.[69] The loss of 3000 lives and the extensive economic and military damage of the 9/11 attacks projected terrorism onto an entirely new level of political and strategic importance.[70]

Five major trends of international terrorism can be identified in the 21st century. These are the use of huge bomb attacks on city centres; the trend towards mass lethality attacks; attacks designed to inflict significant damage on national economies, either by bombing key financial, commercial or tourist targets; an escalation in hostage-taking for the purpose of extorting rich families, companies, media groups and governments; and, a closer collaboration between terrorist groups and international organised crime syndicates.[71] Hough adds that further features of international terrorism in this phase are the emergence of individuals acting independently of established terrorist groups or states, or loosely organised, international networks, which receive private funding or use the proceeds of crime; the growing use of information technology for purposes of communication, co-ordination and propaganda and the hacking of internet sites and "cyber terror" attacks; and, the launching of attacks on the territory of third parties that have little or no connection to

the disputes.[72] Because of the violent and destructive capacity of international terrorism, international organisations and governments worldwide have taken active measures to counter the phenomenon. The approaches and specific measures to counter terrorism vary from country to country. These are discussed below.

6. APPROACHES AND MEASURES TO COUNTER TERRORISM

It is abundantly clear that domestic and international terrorism produce credible threats to the security and stability of nations and to international peace and security. Yet the responses of the international community in countering terrorism have not been uniform. International and regional security communities are still grappling with the task of developing a coherent and effective counter-terrorism strategy. It is not surprising then that in the wake of the 11 September 2001 attacks on the US, UN Secretary-General, Kofi Annan, said that the "urgent business of the UN was to develop a long-term strategy, in order to ensure global legitimacy for the struggle ahead … (so) that the greatest number of states are able and willing to take the difficult and necessary steps – diplomatic, legal and political – that are needed to defeat terrorism."[73]

6.1. THE CONCEPT OF COUNTER-TERRORISM

Counter-terrorism refers to multi-pronged strategies developed by governments and regional and international organisations to combat terrorism. In general, international terrorist groups can be countered by eliminating their sanctuaries; arresting, prosecuting and convicting their leaders; cutting off their financial resources; and, disrupting their control, command and communication capabilities. In addition, the international community must assist in resolving the underlying socio-economic, political and cultural causes of conflicts in nation-states that give rise to political violence. Countering international terrorism effectively demands a high degree of diplomatic co-operation among the nations of the world.[74] International Conventions and Protocols, overarching national government policies, legal and judicial instruments, and operational and tactical plans to combat terrorism as already referred to at the beginning of this chapter reflect in tangible form the steps that can be taken to counter terrorism.

Wilkinson argues that the first principle in countering terrorism is that prevention is better than cure. In attempting to counter terrorism, it would be advisable for national governments and multilateral security organs to address the underlying causes, grievances, alleged injustices and mutual fears within and between societies that may become the cause of terror attacks. He adds that history has shown that liberal democracies - whilst not an ultimate solution - are better suited and more resilient in combating terrorism. Popular legitimacy of democratic institutions and transparent governance act as a safeguard against terrorism as "citizens will rally in support of their democratic institutions against those who seek to impose on democracy by the gun and the bomb what they are unable to win at the ballot box."[75]

Secondly, since one of the principal sources of conflict in the contemporary era is ethnic and religious alienation within societies globally, both the international community and national states must make concerted efforts in affording greater participation for ethnic and religious minorities within their respective governance systems. Perceived deprivation of civil and political rights of ethnic and religious communities - coupled with socio-economic deprivation - can emerge as powerful motivators for violent conflicts in a society. This means that governments should open channels of communication for resolving legitimate ethnic, religious and socio-economic concerns of minority communities and give full recognition to minority rights. In addition, governments must create opportunities for people to express themselves freely and peacefully. Governments should also avoid brutal over-reactions by their security forces, as brutality and repression by themselves tend to generate and sustain campaigns of insurgency, guerrilla warfare and terrorism more rapidly than any other factor.[76]

At an operational level within states, Kun-Jong and Hyun-Ji have identified three stages in the responses of sovereign states to terrorism. The first is to deter acts of terrorism before they occur by tightening security measures, gathering intelligence and analysing the cause/s of terrorist activity. The second stage involves such strategies as improving hostage negotiation skills and the use of special, counter-terrorist military or police squads to prevent and to manage a terrorist incident by providing quick reaction to hijacking, kidnapping, bombing and assassination. Finally, after the act of terrorism is completed,

law enforcement agencies must apprehend, prosecute and convict terrorists. This stage requires appropriate domestic legislation and the ratification of international instruments to counter terrorism.[77]

These stages assume the existence of professionally trained police and military personnel to combat terrorism; the existence of a high-quality intelligence gathering capability which is at the heart of a proactive counter-terrorism strategy; the need for a culture of democratic control and accountability regarding the security services; effective border control; aviation security; and, obstructing and preventing the financing of terrorism.[78] Finally, in an age of globalisation and greater interdependence among the nations of the world, the need for greater international and regional co-operation among states in combating terrorism is essential. This needs to go beyond the ratification of international Conventions, and must be translated into practical measures of co-operation.[79]

6.2. INTERNATIONAL MEASURES TO COUNTER TERRORISM

Thomashausen states that currently there are well over 1000 "special enactments worldwide, attempting to regulate the combating of terrorism."[80] One of the first international responses to terrorism can be traced to the League of Nations. At its Geneva Conference in 1937, the League adopted two conventions against terrorism in reaction to the assassinations of King Alexander of Yugoslavia and the French Foreign Minister. These established the International Criminal Court to indict international terrorists and it specifically proscribed acts of terrorism, including assassinations of key political figures, attacks on property, persons and property of another state.[81] Due to the outbreak of the World War II, only 13 states were able to ratify these instruments. Eventually, the League was dissolved and the UN emerged as its successor.

Acts commonly described as terrorism have been banned since 1949 by several UN treaties on international humanitarian law, notably the Fourth Geneva Convention.[82] However, it was in response to the escalation of specific forms of international terrorism since the late 1960s that the UN adopted several Conventions to combat the growing threat of international terrorism. But the absence of agreement on the definition of terrorism

among member states of the UN, and their ambivalence on the question of politically-motivated violence, resulted in the UN reaching consensus only on narrowly defined aspects of terrorism. Consequently, its Conventions have criminalised only such acts as the hijacking of aircrafts and ships, the taking of hostages and the kidnapping of diplomats.

6.2.1. MULTILATERAL CONVENTIONS

Currently, there are 13 multilateral Conventions relating to the responsibilities of member states for combating terrorism. Initially, these included three Conventions ratified under the direction of the International Aviation Organisation, namely the:

- Convention on Offenses and Certain Acts Committed on Board Aircraft (Tokyo Convention, 1963) applying to acts affecting in-flight aviation safety;
- Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague Convention, 1970) prohibiting the hijacking of aircrafts; and
- the Convention for the Suppression of Unlawful Acts against the Safety of Civilian Aircraft (Montreal Convention, 1971) to counter aviation sabotage.[83]

In December 1973, the UN adopted the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and later the International Convention against the Taking of Hostages (West Germany, 1979), outlawing attacks on senior government officials and diplomats. To counter the growing possibility of nuclear attacks, the UN adopted the Convention on the Physical Protection of Nuclear Material (International Atomic Energy Commission, 1980). This Convention criminalises the unlawful use and transfer of nuclear material, the theft of nuclear material, and, threats to use nuclear material to cause death or serious injury to persons and damage to property.[84]

The Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988) extends the Montreal Convention to encompass terrorist acts at international airports. Similarly, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988) establishes a legal regime

applicable to international terrorist attacks on ships. The Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf (1988) applies to terrorist attacks on fixed offshore platforms. The Convention on the Marking of Plastic Explosives for the Purpose of Identification (1991) provides for chemical marking to facilitate the detection of plastic explosives so as to combat aviation and maritime sabotage.[85]

The International Convention for the Suppression of Terrorist Bombings (1997) expands the legal framework for international co-operation in the investigation, prosecution and extradition of persons who engage in terrorist bombings.[86] It creates a "regime of universal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into, or against various defined public places with the intent to kill or cause serious bodily injury, or with the intent to cause extensive destruction of public places."[87] In some ways, this Convention reflects a unified determination to eradicate terrorism globally, as it binds each member state to adopt effective domestic punitive measures against terrorists.

The Convention for the Suppression of the Financing of Terrorism (New York, 1999) introduces measures aimed at curbing the funding of terrorist organisations and groups. It requires member states to counteract the financing of terrorists through groups claiming to have charitable, social or cultural goals or which engage in illicit activities such as drug trafficking. It commits states to hold those who finance terrorism criminally, civilly or administratively liable for such acts, and provides for the identification, freezing and seizure of funds allocated for terrorist activities.[88]

These Conventions, and others subsequently adopted such as the Convention for the Suppression of Acts of Nuclear Terrorism (April 2006), establish a formalised framework for international co-operation among nations to prevent and to combat international terrorism. In general, they represent statements of good intent. As they are entirely dependent on ratification and implementation by member states, there is no guarantee of effective counter-terrorism action in any specific situation by any member state. However, it needs to be noted that in 1996, the UN General Assembly appointed an Ad Hoc Committee to develop, *inter alia*, a Comprehensive International Convention on

Terrorism. Negotiations on the draft text of the Convention submitted by India had begun early in 2000. This 'umbrella' Convention seeks to define terrorism, to urge domestic legislation and the establishment of jurisdiction, and to ensure that states do not grant asylum to any person involved in a terrorist act. It also deals with questions of liability, extradition and custody.[89] To date, the Ad Hoc Committee has not completed its report to the UN General Assembly. Work has stalled largely over political differences relating to the definition of terrorism, prompting UN Secretary-General, Kofi Annan to lament at the International Summit on Democracy, Terrorism and Security that "for too long the moral authority of the UN in confronting terrorism has been weakened by the spectacle of protracted negotiations" on defining the concept.[90]

A number of important UN Security Council Resolutions on international terrorism have also been adopted. These have condemned all forms of terrorism whatever the underlying motives. Most notable in this category are Resolutions 1368 and 1373, adopted on 12 and 28 September 2001 respectively, following the terrorist attacks on New York and Washington DC. Both resolutions unequivocally condemned the terrorist attacks on the US and called on the international community to intensify its efforts to prevent and to suppress terrorist acts. The former resolution recognised the inherent right of individual or collective self-defense in accordance with Article 51 of the UN Charter. The latter resolution, issued under Chapter VII of the UN Charter, ordered member states to carry out measures decided upon by the Security Council.[91]

Resolution 1373 is wide-ranging, comprehensive and mandatory.[92] It regards any act of international terrorism as a threat to international peace and security. The resolution established a Counter-Terrorism Committee (CTC) of the Security Council to monitor its implementation. It called on member states to report on actions they had taken to implement the provisions of the resolution within 90 days. These actions include the:

- steps taken to suppress the financing of terrorism;
- criminalisation of the wilful provision and collection of funds for terrorist activities;
- freezing of assets of entities suspected of supporting terrorism;
- introduction of effective border controls;

- adoption of domestic legislation to counter terrorism;
- co-operation of member states in criminal investigations;
- exchange of intelligence on possible terrorist attacks; and
- the sharing of best practice in countering terrorism.[93]

The efforts of the CTC are aimed at creating the broadest possible legislative and executive defence against terrorism in every member state. The resolution has placed an onerous burden on member states, particularly from the developing world. The CTC is there to upgrade the UN's capability to deny space, money and support to terrorism, as well as to establish a network of information sharing and co-operative action to counter terrorism globally. Finally, the resolution noted the close connection between international terrorism and transnational organised crime, illicit drug trafficking, money-laundering, illegal arms trafficking and the illegal movement of nuclear, chemical and biological materials.[94]

Resolution 1373 appears to have drawn from the recent experiences of the G8 nations, which have hosted several counter-terrorism conferences since the late 1980s. These meetings have called for greater co-operation in sharing intelligence on terrorist groups and organisations; the easing of extradition procedures; a clampdown on charitable organisations used to fund terrorist networks; the monitoring and control of the internet; and, the designing of a directory of counter-terrorism skills. These discussions have been translated into regional counter-terrorism initiatives and agreements.[95]

6.3. REGIONAL AND AFRICAN UNION INITIATIVES TO COUNTER TERRORISM

There are also several noteworthy regional measures to deal with the problem of international terrorism. For example, at the 1986 Tokyo Summit attended by representatives of the US, Britain, France, West Germany, Italy, Canada and Japan, the following six measures to combat international terrorism were set out: a refusal to export arms to terrorist states; strict limits on diplomatic and consular missions; denial of entry to suspected people expelled from another summit country; improved extradition procedures; stricter immigration and visa requirements; and, closest possible police and security co-

operation.[96] Conventions with a regional scope have also been adopted by security communities so as to enhance co-operation in countering terrorism regionally such as the Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance (OAS Convention, 1971); European Convention on the Suppression of Terrorism (European Convention, 1978); Agreement on the Application of the European Convention for the Suppression of Terrorism (Dublin Agreement, 1980); Arab Convention for the Suppression of Terrorism (League of Arab States, 1998); the Organisation of the Islamic Conference Convention on Combating International Terrorism (1999); and, the SSARC Regional Convention on Suppression of Terrorism (South Asian Association for Regional Co-operation, 1987).[97]

In the post-Cold War period, African governments have been quick to respond to the growing incidence of international terrorist attacks and threats facing the continent. This is driven by pressure from the UN, the prospect of material benefits arising from support for the US 'war on terror' and as a reaction to an increase in domestic and international terrorism in several African states. As early as 1992, the OAU Heads of State and Government adopted a resolution in Dakar aimed at enhancing co-operation and co-ordination between member states in order to fight the "phenomenon of extremism". Then in 1994 in Tunis, the OAU Assembly adopted a Declaration on the Code of Conduct for Inter-African Relations, which "rejected fanaticism and extremism, whatever their nature, origin and form, particularly based on religion and terrorist acts."[98]

The Algiers Convention advances a clear view that the promotion and protection of human rights is central to an effective strategy to counter terrorism.[99] It calls upon member states to criminalise terrorist acts in their domestic laws. State Parties undertook to refrain from activities aimed at organising, supporting, financing, committing or inciting to commit terrorist acts; providing havens for terrorists; providing weapons and their stockpiling in their countries; and issuing visas and travel documents to suspected terrorists. States are also required to exchange information, assist with regard to procedures for the investigation and arrest of suspected terrorists, share research into the combating of terrorism, and to provide technical assistance to improve their operational capabilities. Borders, customs and immigration controls are to be improved and developed to pre-empt

any infiltration by terrorists. States must ensure that asylum seekers are not involved in any terrorist activities.[100]

Following on the work of the OAU, the Constitutive Act of the African Union (2000) calls for "respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities."[101] There was obviously a renewed urgency to the collective African response to terrorism after the 9/11 attacks, resulting in a meeting of 27 Heads of State and Governments on 17 October 2001 where the Dakar Declaration against Terrorism was adopted. In a symbolic commemoration of the events of 9/11 on the 11 September 2002 in Algiers, the AU adopted a Plan of Action on the Prevention and Combating of Terrorism. Member states undertook to sign, ratify and fully implement all relevant international instruments concerning terrorism and where necessary, amend national legislation so as to comply with the provisions of these instruments. The Plan of Action commits member states to specific measures to suppress terrorist financing such as:

- passing national legislation to criminalise the financing of terrorism and money laundering;
- establishing financial intelligence units;
- training personnel to prevent and combat money laundering;
- co-operating with international financial institutions for the development of a global, comprehensive, anti-money laundering measures and combating the financing of terrorism methodology and assessment process;
- improving border control and policing; and,
- establishing a Terrorist Activity Reporting schedule as a data collecting instrument on names of identified organisations, persons, places and resources that shall provide timely exchange of information and experiences relating to counter-terrorism by member states.[102]

The AU's Peace and Security Council has been entrusted with the responsibility of implementing the Algiers Convention. Algeria's proposal for the creation of an African Centre for Study and Research on Terrorism was also agreed upon, suggesting that the AU

is capable of providing political cohesion and a sense of purpose to African attempts at countering terrorism.[103] Finally, an Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) had been set up in 1999 to develop capacity in the sub-region to fight organised crime, terrorism and money-laundering.[104] Whilst these are all commendable initiatives, it must be stressed that much greater efforts need to be exerted to deal with the underlying conditions on the continent which foster terrorism.

7. CONCLUSION

Terrorism is not a facet of human life that can be tolerated. It targets civilians, public and private property, public officials and business leaders and natural resources. It is premeditated and violent criminal action. It is intended to cause death or serious bodily harm to civilians and non-combatants, with the purpose of intimidating a population and compelling a government or international institution to do or abstain from doing any act. No one can confidently claim that s/he is immune from the consequences of terrorism, as a terrorist can strike anywhere at any time, and anybody could easily become an innocent victim.

Terrorism has taken many forms such as domestic, international, transnational and crime-related terrorism. It is conducted either by a state and state-sponsored or sub-state actors. Occasionally, it is perpetrated by a single individual driven by a particular philosophy or ideology. Otherwise, it is generally inspired by political, ideological, religious, racial and ethnic conflicts in societies or by criminal syndicates who employ terror for ill-gotten material gain. In the 21st century, there appears to be a greater degree of linkages between terrorist groups and organised crime syndicates.[105]

Terrorism stands out as a global and domestic threat that no state can counter on its own. This imposes the need for greater international co-operation and cohesion in countering it. While the UN and regional security organs have taken notable steps to counter international and transnational terrorism, particularly since the 9/11 attacks on the US, a co-ordinated and collective response which deals with both the underlying socio-economic and political causes of terrorism is necessary. Equally important is for the UN to finalise

its definition of terrorism and to adopt a comprehensive international convention on terrorism. Unfortunately, the international community has not responded in a united manner to this challenge. The strong sense of common international responsibility in combating terrorism has not translated into new norms, principles, procedures, forms and operating mechanisms for global security, even though most states support the counter terrorism campaign.[106]

South Africa has not been immune from the threats of domestic and international terrorism. Its unique political history under apartheid had forced it to respond to wars of national liberation both internally and in Southern Africa. During and even immediately after its transition to a constitutional democracy, it had to counter terrorist attacks and threats that threatened the new social order. In doing so it has emerged as an active participant in the global campaign against terrorism and has drawn from other international experiences. Equally important is that it has offered its own unique experiences in countering terrorism to the world community. The next chapter provides an overview of current main trends in international terrorism and the development of terrorism in South Africa between 1960 and 2004, and the measures adopted to counter the changing threats of terrorism.

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CHAPTER 2 – AN OVERVIEW OF TERRORISM IN SOUTH AFRICA: 1960-2004

1. INTRODUCTION

Revolutionary warfare and terrorism in South Africa has been a recurrent feature of political life since 1961. With the formation of *Umkhonto we Sizwe* (MK) and Poqo, later named as the Azanian People's Liberation Army (APLA), the armed wings of the ANC and the PAC respectively, armed struggle represented a strategic shift in black resistance politics in South Africa. As the struggle for liberation intensified, there was a concomitant increase in state repression. With the peaceful resolution of the political conflict and the transition to a democratic order in 1994, armed resistance to the apartheid state was suspended and finally terminated. This, together with the abating terror attacks by the Afrikaner white right wing opposed to democratic reforms, ushered in the prospect of lasting peace.

However, social peace was to be elusive. From 1996 to 2000, there was a wave of urban terror in the Western Cape, allegedly conducted by People Against Gangsterism and Drugs (PAGAD) - a civil society organ waging a popular campaign against drugs and criminal gangs - and by gangs themselves. This resulted in over 600 terror attacks against gangs and between gangs as they struggled for supremacy in the drug trade in the province.[1] As popular support for PAGAD waned in the wake of the arrests and prosecution of a number of PAGAD members, the terror attacks were brought to a halt.

Shortly thereafter, *Die Boeremag* (The Boer Force), representing the militant faction of the Afrikaner right wing that was disaffected with the democratisation of South African society, launched its armed campaign against the new government. In October 2002, it bombed transport infrastructure and places of worship in Soweto and Bronkhorstpruit. This proved to be a short-lived campaign as the security services quickly arrested and prosecuted the perpetrators of the attacks.

No sooner had this national security threat been neutralised then the possibility of an international terror network operating inside South Africa had became apparent to the South African Police Services (SAPS). This resulted in the deportation in 2004 of seven foreigners, who allegedly had been connected to al-Qaeda. This was followed by the arrests of two South Africans in Pakistan in July 2004 in the company of Ahmed Khalfan Ghailani, a wanted al-Qaeda operative. These developments strongly raise the spectre of an al-Qaeda network being based in South Africa.

This chapter briefly examines the development of armed struggle under the rubric of the liberation struggle. This is followed by an analysis of urban terrorism in the post-1994 democratic order allegedly perpetrated by PAGAD and the *Boeremag*. Finally, it explores the possible emergence of international terrorist networks in South Africa in the 21st century.

2. LIBERATION STRUGGLES AND REVOLUTIONARY WARFARE

In Africa, liberation from white rule, either by colonial governments or by settler regimes, had in the past spawned wars of liberation, including acts of terrorism as part of a broader insurgency. Liberation movements in South Africa, as elsewhere on the continent, were labelled terrorist organisations by the white minority regime. The ANC had existed since 1912 and followed an overall strategy of peaceful resistance to white minority rule. Following the Sharpeville massacre of 21 March 1960, the ANC, the South Africa Communist Party (SACP) and the PAC adopted the strategy of armed struggle to overthrow the apartheid state by revolutionary force. The ANC and the SACP combined their military efforts under the banner of MK, and the PAC under Poqo.[2] A third group composed mainly of whites also had begun sabotage attacks in October 1961 in Cape Town and Johannesburg, calling itself the National Committee of Liberation. It later re-styled itself as the African Resistance Movement.[3]

2.1. *UMKHONTO WE SIZWE* (MK)

The ANC's armed struggle can be divided into four phases. In its first stage, sabotage of economic installations and targets of symbolic political significance were the hallmark of MK operations. In the second phase from 1965 to 1976, MK attempted to develop underground

structures and train guerrillas abroad, with very little military attacks inside the country. During the third phase from 1976 to 1984, there was an upswing in attacks on strategic targets based on the concept of armed propaganda. The fourth phase stressed the prospects of a general insurrection and people's war, aiming to make South Africa ungovernable.[4]

Following on the mantle of a classic revolutionary paradigm, MK began its military campaign on 16 December 1961 with bombings of post offices, the Resettlement Board Headquarters, the Bantu Commissioners' offices and electrical transformers countrywide.[5] These were the first in the series of over 200 attacks over the next 18 months. MK took a principled decision to avoid civilian casualties. Armed struggle was to be coupled with mass political action, underground political work and the campaign for the international isolation of the apartheid state.[6] By the mid-1960s, MK was severely incapacitated due to the arrests of its First and Second National High Commands, the severity of state repression and the general climate of fear instilled in the black population. The apartheid government had effectively rendered ANC and MK structures inside South Africa ineffectual for the next decade, and the ANC in exile had to reassess its overall strategic approach.[7]

It was only in the early 1980s that MK stepped up its campaign of sabotage. In 1982, for instance, 29 acts of sabotage and two assassinations could be attributed to MK. These attacks were directed at four types of targets, namely, government buildings and military facilities, industrial installations, railway lines and electricity cables, and, municipal water pipelines. The most dramatic was the attack at the Koeberg nuclear power station in December 1982. The official ANC policy of minimising the number of civilian victims remained unchanged, although there were incidents which indicated that less care was being taken to avoid civilian casualties.[8] In 1983, police attributed 31 bomb attacks to the ANC on railway lines, electrical installations, government offices, court buildings, an oil depot and military premises. Rocket attacks missed the Secunda SASOL III refinery by three kilometres. The most spectacular attack was a car bomb which exploded outside the South African Air Force headquarters in Pretoria, which resulted in 19 deaths and 215 injuries and the rocket attacks on Defence Force headquarters at Voortrekkerhoogte, Pretoria.[9]

With the formation of the United Democratic Front (UDF) in 1983 to oppose the Tri-cameral parliamentary elections, mass popular opposition to apartheid intensified inside South Africa. The ANC believed that "people's war" was now at hand. At its Kabwe Conference in 1985, the ANC to some extent blurred the distinction between "hard" (military/government) and "soft" (civilian) targets, resulting in the 14 June 1986 car-bomb attacks on the Magoo and Why Not bars, killing three civilians and injuring 69.[10] This in fact reflected a distinction between "legitimate" and "less legitimate" targets.[11] Over the years, the ANC also assassinated individuals who had betrayed the revolutionary struggle or collaborated with the apartheid regime, such as Bartholomew Hlapane, a former ANC/SACP national leader and black local authority councillors. The declaration of the state of emergency and the intensity of state repression and counter-insurgency measures in the mid-1980s severely restricted the ANC's ability to launch a people's war. This, coupled with the changing of international relations with the collapse of the Soviet Union, resulted in a political stalemate, prompting the ANC's leadership in prison and in exile to enter secretly into exploratory talks on a negotiated settlement with the South African government.[12] The end product was the unbanning of the ANC, SACP and the PAC, the release of political prisoners and the ANC's suspension of the armed struggle in August 1990.

2.2. POQO/APLA

Poqo's military campaigns in the Western Cape and Transvaal were considerably more violent than MK's as it explicitly adopted a strategy of killing people, particularly whites. In 1964, the Minister of Justice stated that 202 Poqo members had been convicted for murder, 12 for attempted murder, 395 for sabotage and 820 for offences relating to membership of an illegal organisation. It also called for the forceful occupation of white farms.[13] Lodge states that Poqo's violence fell into four categories: defensive murders of suspected informers; terrorist attacks on whites; assassination attempts on the lives of Transkeian chiefs that were collaborating with the apartheid state; and, preparing for a general uprising. The planning for such an armed uprising was pathetic and the South African security forces were able to nip it in the bud in 1963 by arresting thousands of PAC members.[14] The PAC in exile and Poqo were never able to recover from this setback and the latter was reduced to a spent military force until the 1990s, when members of the APLA launched several attacks against white

civilians, such as those against the Heidelberg Tavern, St. John Church and the King Williamstown Golf Club.[15]

2.3. THE WHITE RIGHT WING

The white right wing in South Africa, as represented by the Conservative Party (CP), was caught unprepared by F W de Klerk's famous speech in 1990, which formally declared the willingness of the NP government to enter into negotiations with the black liberation movements. The CP split into two factions; one favouring negotiations aimed at securing an Afrikaner homeland, partitioned within South Africa, and the other refusing in principle to negotiate with terrorists and communists. By the end of 1990, there were more than 50 acts of terror carried out by a range of white extremists groups, such as the *Boere Krisisaksie* (BKA), demanding self-determination for Afrikaners. Between December 1991 and January 1992, there were 14 further incidents of sabotage. In April 1993, the leader of the SACP, Chris Hani, was assassinated by white extremists. In January 1994, there were 30 acts of sabotage and in February that year there were a further 41 bombs attacks in the Western Transvaal. The *Afrikaner Weerstandsbeweging* (AWB), led by Eugene Terblanche, had stormed the World Trade Centre in Kempton Park, the seat of the political negotiations, and attempted to 'invade' Bophuthatswana, where it was rebuffed by the homeland's defence force.[16] In the run-up to the democratic elections in April 1994, AWB members also set off a series of bomb blasts, targeting mainly taxi ranks and bus terminuses where black people usually congregated, polling stations, ANC and National Party offices, and the Johannesburg International Airport, killing about two-dozen people and injuring some 200. Some of the bombs used were the largest that had ever exploded in South Africa's history. Ultimately, it was General Constand Viljoen of the Freedom Front that took the lead in signing an accord with the ANC on 23 April 2004, opening the way for the white right wing's participation in the first democratic general elections on April 27.[17]

Political violence emanating from the liberation movements, the white right wing and the apartheid state has been an endemic feature of South African society for the better part of the 20th century. In the case of the ANC, it took the form an armed struggle with some unwarranted attacks on the civilian population. In the case of Poqo, its violence was more

indiscriminate and terrorist in nature. The white right wing launched terror attacks as the prospect of a democratic order became real in the 1990s and in the hope of securing an independent Afrikaner homeland.[18]

3. DOMESTIC TERRORISM IN SOUTH AFRICA SINCE 1994

Following the 1994 democratic elections, it was generally accepted that the incidents of terror, which had characterised the period of armed struggle discussed earlier would cease. However, between 1996 and 2000, an unexpected wave of urban terror swept through the Western Cape, coupled with a crime wave and increased gang warfare.[19] In late 2002, the white right wing group, *Die Boeremag* (The Boer Force) allegedly went on a bombing spree. Quite unexpectedly, South Africa's national security had been threatened by both religious and right-wing extremism. Terror attacks occurred in the context of vigilante action against criminal gangs and suspected drug dealers and internecine gang warfare in the Western Cape. After mid-1996 an increasing number of bombings and assassinations were motivated by the desire to create a climate of fear among citizens of Cape Town.[20]

The South African Law Commission reported that between January 1994 and December 1999, 414 criminal detonations of explosives occurred, targeting railway lines, offices of political parties, power lines, schools, taxi ranks, police stations, post offices, houses, mosques, mine hostels, shebeens, restaurants and vehicles. The following types of explosives were used: improvised explosive devices (42), commercial explosives (61), pipe bombs (117), hand grenades (59), rifle grenades (2), car bombs (4), landmines (1) and petrol bombs (16).[21] While no group ever claimed responsibility for the bombing spree in Cape Town, the government laid the blame on PAGAD.[22]

3.1. PEOPLE AGAINST GANGSTERISM AND DRUGS

PAGAD was established in 1995. It initially engaged in peaceful processes of lobbying, hoping to persuade the newly-elected democratic government to take action against rampant criminal elements and drug lords in the Western Cape.[23] It gained prominence in February 1996 when PAGAD members invaded the Rylands home of the late Minister of Justice, Abdullah Omar, demanding that he act against drug lords and gangsters. Further demands

included the reintroduction of the death penalty; the confiscation of assets of drug dealers; R10 000 bail for drug users; no bail to drug dealers; more severe sentences to first time drug offenders; and, greater controls at airports and harbours.[24] In May 1996, it led a popularly supported march to parliament to petition the government, giving it a 60-day ultimatum to act against gangsters. It then stepped up its campaign delivering ultimatums to drug lords and marching on their homes. On 4 July 1996, the organisation gained media prominence after about 2000 armed PAGAD supporters converged at the home of Hard Living gang leader, Rashaad Staggie, in Salt River, Cape Town, shot him and doused him with petrol. The horrific, public death of Staggie captured popular imagination, and henceforth, PAGAD marches drew several thousand supporters at a time.[25]

Haefele argues that despite PAGAD's insistence that it is not a Muslim organisation, it is undeniably a South African Muslim phenomenon.[26] It emerged out of the inability of state structures to deal with crime, violence and the drug trade on the Cape Flats. It relied on an Islamic discourse with marches beginning at the Gatesville Mosque, after prayers and lectures. Police estimates place gang membership in the Western Cape at 80 000, belonging to 137 gangs. Rape, drugs, physical abuse and crime are the daily experiences of South Africans living in these townships.[27] In reaction to this reality, PAGAD aimed to eradicate the gangs and drug dealers so as to free the community from their violent and socially destructive activities.[28]

During October and November 1996, there was a split in the PAGAD leadership between moderates such as Nathmie Edries, Muhammed Ali Parker, Ismail Effendi and Farouk Jaffer, and more radical elements associated with Qibla. Qibla, a militant Muslim organisation was founded in the early 1980s by Achmat Cassiem and promoted the concept of an Islamic revolution in South Africa.[29] A year later, PAGAD's "Chief Commander", Aslam Toefy, also announced his resignation. The underlying ideological differences and personality clashes relate to sharp differences in strategy and tactics. The former opposed the drift towards violent militancy and the anti-democratic state stance of the more radical elements associated with Qibla. This split had a negative impact on the organisation with a slow down of marches and popular activities.[30]

The SAPS has linked PAGAD to a number of incidents of urban terrorism. In 1996, police claimed that it had carried out 38 acts of urban terror, including drive-by shootings and petrol-bomb and hand grenade attacks against drug dealers. The first six months of 1997 saw 71 such attacks. During 1998, a total of 138 bomb blasts took place, although no convictions were secured. Police estimate that a total of 667 acts of urban terrorism were carried out in that year alone in the Cape Peninsula, perpetrated by PAGAD and rival gangs.[31] However, from June 1998, in addition to attacks on drug dealers, Muslim-owned businesses, Muslim clerics and academics critical of the tactics of PAGAD, places of entertainment and personnel and facilities of the state's security and intelligence community were attacked.[32] The attack on the Planet Hollywood Restaurant in August 1998 represented an incident of international terrorism, although no organisation has been positively linked to this. Two people were killed and 30 injured, including nine British citizens. It was speculated that the bombing was in retaliation against the US attacks on Sudan and Afghanistan, following the bomb blasts at the embassies in Nairobi and Dar-es-Salaam. Subsequently, five police stations and a magistrate's court were attacked, and a key police investigator in urban terror attacks was ambushed and killed.[33]

Pipe bombs were the most common form of explosives used in these attacks. Bombs have, however, also been used in gang warfare in the Western Cape, which points to criminal terrorism. However, during 1999, car bombs, as well as cell-phones utilised as remote-controlled detonators for explosive devices, were also used, suggesting a new level of sophistication in the bombing campaign.[34] Explanations vary regarding the underlying causes of these attacks. Some Muslim commentators saw it as an attempt to render the country ungovernable and creating an Islamic revolution in South Africa; disrupting the 1999 general election; demonstrating dissatisfaction with the failure of the police to control crime, drug dealing and gangsterism; and, intimidating the police and hampering criminal investigations. The indiscriminate nature of some attacks, where civilians were among the victims, point to the broader aim of creating public panic and a loss of trust in the authorities.[35]

Initially, the government did not perceive PAGAD as posing an internal security threat. Haefele claimed in 1998 that there is "no evidence that PAGAD's agenda goes beyond its founding principle, which is ridding the community of drug barons and gangsters."[36] But

shortly thereafter, urban terror in the Cape Peninsula had caused major security concerns, leading to speculation about the banning of PAGAD. A leaked Cabinet memorandum stated that Muslim militants linked to Qibla and the Islamic Unity Convention (IUC) were key to the popular mobilisation against drugs and gangs in Cape Town, encouraging vigilante actions, training youth in the use of firearms and forging links with Iran and Sudan.[37] As part of its counter-terrorism initiative, which is discussed more fully in the next chapter, a total of 117 PAGAD members and supporters were charged with urban terror and related crimes such as murder, attempted murder, illegal possession of firearms and ammunition and public violence.[38] Its leader Abdus-Salaam Ebrahim, together with Salie Abadar (PAGAD security chief), Moegsien Mohamed and Abdur Ebrahim, were charged with the 4 July 1996 public lynching of Hard Livings gang leader, Rashaad Staggie.[39] They were all acquitted in March 2002 due to insufficient evidence.[40] Nevertheless, several PAGAD members were convicted for various crimes such as murder and attempted murder. For example, Ebrahim Jeneker and Abdullah Maansdorp received triple life sentences after being convicted on various charges, including murder, attempted murder, armed robbery and the illegal possession of firearms.[41] Likewise, N. Abrahams, M. Kamaldien and S Bester were sentenced to five years for the possession of an explosive device. Nasieg Pieterson was convicted on charges of attempted murder after a pipe bomb attack and sentenced to eight years' imprisonment, three of which were suspended. Ismail Edwards was sentenced to 25 years for armed robbery and attempted murder.[42] In 1999, the US Department of State listed Qibla and PAGAD as terrorist groups, and speculated that the latter may have, *inter alia*, been linked to the Planet Hollywood bombing. In its 2004 report on patterns of global terrorism, the US listed PAGAD as an international terrorist group.[43]

The new wave of urban terror in the Western Cape has been described as being motivated by a "mixture of religion, politics and gangsterism, with no individual organisation directly claiming responsibility."[44] This implies the absence of a political message and the possibility of a Third Force at work; or, terrorism for its own sake. As some of it can be linked directly to anti-drug vigilantes and turf battles for control over the drug trade, it represents a form of criminal terrorism. But the targeting of courts, police stations and damage to tourist restaurants and the economy is a clear sign of a violent, anti-state campaign, resulting in innocent civilian casualties.[45] The full extent to which PAGAD was directly involved in these

acts of terror remains unclear to this day, but the conviction of a number of PAGAD members for various crimes suggests that its covert structure - the G-Force - was partly behind the campaign of urban terror in the Western Cape.[46] This did not preclude the former Minister of Safety and Security, the late Steve Tshwete, to declare that "PAGAD is a small minority who have terrorised Muslim business people, religious leaders, politicians and academics. They are not idealists - they are terrorists, pure and simple."[47]

3.2. AFRIKANER RIGHT WING ACTIVITY

As discussed earlier, most of the violence committed by the Afrikaner right wing in the pre-1994 period, which was organised and had a political purpose in mind was perpetrated by members of the AWB, Afrikaner Volksfront (AVF) and the BKA. The violence was primarily in the form of bombings. Many other right wing groups threatened and planned acts of violence, but in the end did not actually commit them. There were, however, white right wing groups and individuals outside of the three organisations which remained committed to acts of violence to further their cause.[48] Hence, on the 30 October 2002, nine bomb blasts rocked Soweto, South Africa's largest black township. The blasts destroyed commuter railway lines running through the township inconveniencing more than 200 000 commuters, damaged the Soweto Mosque, and, killed Claudia Makone and injured her husband.[49] Ironically, the tenth blast occurred at the Nan Hua Buddhist Temple in Bronkhorstspruit, where about 150 worshippers from South Africa, Australia, Taiwan, Malaysia and the US were observing the 49th day of prayer for world peace.[50] The *Boeremag* claimed responsibility for the attacks. These terrorist attacks brought home the realisation that the South African white right did not disappear after the 1994 democratic elections.[51]

The white right-wing is a by-product of the rise of Afrikaner nationalism in the 20th century. Afrikaner nationalists believed that the only way to protect their status and identity was to prevent the group from being dominated by other racial groups and to exercise self determination in an ethnically homogenous territory. The Afrikaans language, Calvinist Christianity and Afrikaner history are politically important for Afrikaners. This needs expression in an Afrikaner *volkstaat* (people's state).[52]

After 1994, most right-wing whites, disillusioned by the political impotence of their organisations and leaders, withdrew from political activity by moving into 'gated communities'. More recently, a Group of 63 Afrikaner academics and writers launched a civil society initiative to lobby for the protection and promotion of minority rights under international conventions.[53] But a small group, calling itself the *Boeremag*, had committed itself to violent struggle against the democratic government and the new social order. It is politically and philosophically rooted in religion and conservative politics. It subscribes to extreme nationalist views and a God-given purpose – "a lethal cocktail, given the damage religiously-inspired terrorism has caused in other parts of the world."[54]

Between 2000 and 2002, the group is alleged to have developed a plan known as "Document 12" to wage an armed struggle in its quest for an Afrikaner state.[55] A group of 4066 people were to take over military bases and radio stations; free selected high-profile prisoners such as former Vlakplaas security policeman, Eugene de Kock; destroy the state's computer network; assassinate Nelson Mandela, traitors, Cabinet members and selected parliamentarians; destroy public infrastructure such as transport systems; and, create racial strife. Members were recruited and food, medical supplies, weapons and explosives were collected and stored. The planned *coup* was to begin with the bombing of the World Summit on Sustainable Development in August 2002, but this was foiled when the police arrested seven *Boeremag* members.[56] Prior to that, in April 2002, the police had arrested three *Boeremag* members, including kingpin Michael du Toit. In September 2002, police raided selected farms in the Limpopo province, seized a truck with computer equipment and weapons in Lichtenberg and arrested Dr Johan Pretorius, the owner of the vehicle, and six others.[57] After the arrests of two further members on the 20 September, the *Boeremag* allegedly launched its bombing campaign in Soweto and Bronkhorspruit.[58] Four days later, the alleged *Boeremag* leader and former army officer, Tom Vorster, was arrested.[59] This was followed by the bombings of the Grand Central Airport (near Johannesburg) and the M C Mitchell Bridge on the border of the Eastern Cape and KwaZulu-Natal.

By February 2003, 23 of the alleged bombers were arrested and charged with terrorism-related offences, sabotage and high treason. The men are current and former members of the South African National Defence Force (SANDF), the SAPS, professionals and farmers.[60]

These arrests seriously disrupted the plans of the *Boeremag*. After uncovering a weapons cache, Jackie Selebi, the South African National Commissioner of Police revealed that there were about 100 key *Boeremag* members in the country, many of whom were young and had access to defence force weapons.[61] It is also quite possible, therefore, that some dormant cells of the *Boeremag* might not have been identified by the security services.[62]

Presently, the number of right-wingers who are prepared to use violence to achieve their aims is likely to be small, with little mass political support. In documents seized during police raids on suspects, the alleged saboteurs cite the high levels of crime, unjust affirmative action policies and the perceived marginalisation of the Afrikaans language as reasons why an independent Afrikaner state is necessary. Such arguments could possibly increase the levels of popular support for armed attacks against the state.[63] However, Schonteich argues that with every passing year since 1994, the extreme white right's chances of violently taking power or establishing an independent Afrikaner state has diminished.[64] Similarly, Williams argues that the necessary preconditions for a successful *coup d'etat* – a high level of political will, appropriate levels of mass mobilisation, significant support within the officer corps and political legitimacy for armed struggle – do not exist currently within the Afrikaner community in South Africa.[65] The quick arrests by the security services of the alleged bombers and their associates do indicate that the *Boeremag* was penetrated by state security operatives and that the counter-terrorism operations were largely intelligence driven. Whether or not those arrested will be guilty of terrorism remains to be seen as the lengthy trial has not been concluded as yet.

In assessing the spate of terror attacks in South Africa between 1994 and 2000, Hough states that global terrorist trends are also to some extent visible in South Africa, specifically the following:

- incidents seem to be becoming more violent, with the initial use of pipe bombs being replaced by car bombs;
- attacks on judicial targets;
- foreign support which is not necessarily linked to state sponsorship, but private sponsorship, should the allegations of links with Usama bin Laden be correct;

- absence of any claiming of responsibility for attacks;
- a blurring of criminally-inspired and politically-motivated terrorism;
- use of more sophisticated technology;
- looser networks of individuals, with possible tactical independence for target selection;
- use of home fertiliser bombs; and
- more random targeting in addition to some selective targeting.[66]

4. INTERNATIONAL TERRORISM IN SOUTH AFRICA

South Africa has been relatively unaffected by international terrorism, although domestic insurgencies and resistance campaigns have included acts which amount to terrorism.[67] South Africa's relative isolation from the world community during the apartheid era explains the absence of any real incidents of international terrorism in the country, with the possible exception of the bombing of the Jan Smuts Airport just prior to the April 1994 democratic elections.[68] Since 1994, terrorism in South Africa as discussed earlier has been in the main linked to acts of criminality, with the exception of the Planet Hollywood and Buddhist Temple bombings, which targeted a foreign business symbol and persons respectively.[69] However, South African security services have increasingly become aware of the possibility of acts of international terrorism occurring, or of foreign international terror groups attempting to use the country as a base for their operations.

There are a number of reasons for the above possibility. South Africa's international acceptance after the democratic elections in 1994 and the resulting increase in the number of foreign embassies in South Africa; an increase in tourism; the proliferation of foreign airlines operating to and from South Africa, coupled with the problems associated with weak border controls are factors which make South Africa more susceptible to potential acts of international terrorism. The large number of illegal aliens from African and Middle Eastern countries in particular, and the increase in crime and the drug trade could also facilitate international terrorism.[70] In addition, sympathy in the Muslim community with Palestine, Afghanistan, Iran and Iraq contributes to the US, Israel and Britain being seen as aggressors.

What follows is a resume of incidents in South Africa that in some way suggest that international terrorist networks are attempting to establish an organisational presence in the country, and possibly carry out attacks.

4.1. SOUTH AFRICAN HIZBULLAH

By the turn of the century, foreign diplomatic sources claimed that South Africa was coming under increasing pressure to take action against Muslim extremists who were moving to the country because of security crackdowns in other parts of the world.[71] Western intelligence officials in particular have expressed concerns about the growing Iranian presence in the country since 1994, and its influence over specific Muslim organisations such as Qibla and elements within APLA, some of whose members received training in Libya and Iran and who subscribe to Islam.[72] The British-based publication, Foreign Report, claimed that the South African branch of Hizbullah had been formed with Iranian backing, from a breakaway faction of Qibla. This latter claim was scoffed at by Muslim organisations, stating that it originated from Israeli intelligence.[73]

4.2. TALAAI EL FATEH

The first official sign of government concern relating to international terrorism emerged in 1997, when Anthony Mongalo, the Deputy Director-General for Africa at the Department of Foreign Affairs, told the Portfolio Committee on Foreign Affairs that his department had reports of South Africans receiving military training in Sudan, a country that is on the US list of states sponsoring terrorism.[74] This briefing sparked off an angry retort from Muslim organisations, notably the Islamic Research Centre and the Islamic Council of South Africa.[75] Rumours that South Africans were receiving military training in Sudan continued to abound and were linked to the existence of a grouping in the Eastern Cape, Talaai el Fateh, which is associated with the exiled Egyptian organisation Gama al Islamiyah.[76]

4.3. FOREIGN NATIONALS LINKED TO AL-QAEDA

The presence of possible foreign al-Qaeda operatives being in South Africa became apparent with the arrest of Khalfan Khamis Mohamed by the South African security services and his ‘deportation’ to the US. Mohamed, one of the al-Qaeda bombers convicted in his absence in

the US for the 7 August 1998 bombing of the US Embassy in Dar-es-Salaam, Tanzania, found his way to South Africa shortly after the twin terror attacks in East Africa. He apparently obtained a visitor's visa from the South African High Commission in Dar es Salaam under a pseudonym, and entered South Africa on a false passport. He subsequently applied for asylum. Pending the outcome of his asylum application, he was issued with a temporary residence permit. Meanwhile, in December 1998 he was charged with conspiracy and murder in the US and a warrant of arrest was issued for Mohamed. Later, a Federal Bureau of Investigation (FBI) agent identified Mohamed while searching through the records of asylum-seekers with the permission of the Department of Home Affairs. Mohamed was arrested in October 1999 with the cooperation of immigration and intelligence officials, and handed over to FBI agents who interrogated him for two days before flying him to New York to stand trial. Upon his arrival in New York, the trial judge notified Mohamed that he would face the death penalty if convicted. Mohammed's lawyers then filed a Constitutional Court challenge against his 'transfer' to the US. In its judgement, the Constitutional Court declared that the South African government's handing over of Mohamed to the FBI was unlawful as it violated both the Constitution and the Aliens Control Act. Because he had entered the country illegally and under false pretences, Mohamed was eligible for deportation to Tanzania under the Act, but not to the US. The court said that the government should have protected his rights, by first obtaining an undertaking from the US that the death penalty would not be imposed. In its defence, the government argued that Mohamed had consented to being handed over. The Constitutional Court expressed doubt about this, especially as Mohamed did not have access to a lawyer to advise him of his rights.[77] The Mohamed case demonstrated the fact that an al-Qaeda operative was successful in finding refuge in South Africa, and was able to live in the country undetected for over one year.

In July 2003, the South African Minister of Defence, Mosiuoa Lekota, stated at a parliamentary briefing on international affairs and security that one of the five men arrested in Malawi on suspicion of channelling funds to al-Qaeda, had spent some time in South Africa. Sheikh Khalifa Abdi Hassan, a Kenyan national of Sudanese origin, was deported together with two Turks, a Sudanese and a Saudi national from Malawi, and released in Sudan.[78] They were abducted in a dawn raid by the Central Intelligence Agency (CIA), working in

conjunction with the Malawian National Intelligence Bureau, interrogated and held in Zimbabwe, Uganda, Sudan, and Djibouti, before being released without being charged.[79]

In October 2003, The Washington Times reported that a "large number of Islamic extremists from Pakistan are entering the country (South Africa) illegally to join religious schools or 'madrassahs', some of which may have links to international terrorism". It argued that as the Pakistani government was closing down the more "extreme madrassahs" as part of its programme to combat terrorism, students were heading abroad to continue their studies. South Africa is seen an attractive destination, in part because of its use of English and the country's modern communication infrastructure.[80] The National Intelligence Agency (NIA) denied claims in The Washington Times that the South African government was worried that large numbers of "Islamic extremists from Pakistan are entering South Africa illegally through the Mozambican border".[81]

In April 2004, a Libyan national Ibrahim Ali Abubaker Tantoush, appeared in the Pretoria Magistrate's Court, on charges of possessing an illegal South African passport. He was initially arrested by Indonesian authorities on suspicion of being in that country illegally, and was later deported to South Africa. He was listed on Interpol's wanted list for gold theft and terrorist activities. Tantoush argued in his affidavit that the gold and terror charges laid against him by Libyan authorities were false, and that he feared going back to Libya as he would be persecuted for his dissident beliefs and opposition to the Gaddafi regime.[82] Tantoush was released on bail and appeared in the Pretoria Magistrate Court on the 28 November 2005, where extradition proceedings against him were struck off the roll as the "state had not yet received presidential consent to process Libya's request for extradition".[83]

In May 2004, National Police Commissioner Jackie Selebi told the Portfolio Committee on Safety and Security that seven foreign nationals from Egypt, Jordan and UK were arrested and deported to their respective countries as they had planned to disrupt the national elections scheduled for the 14 April 2004. Abeda Bhamjee, a human rights lawyer at the Wits Law Clinic, has identified one of the men deported as Suleiman Damra, a long-time associate of Abu Musab al-Zarqawi. Another suspect arrested and resisting deportation is Muhammad Hendi.[84] The swoop sparked arrests of alleged al-Qaeda operatives in Jordan, Syria and

Britain. In a dawn raid on 19 April 2004 in Manchester (England), British police arrested 10 people and recovered a large quantity of false South African passports.[85] The SAPS later claimed that the men – believed to be part of an al-Qaeda cell in the country – were planning to attack the luxury British liner, the QE2, as it sailed along the South African coastline either in Durban or Cape Town. Their arrest led to the discovery of encrypted CDs carrying al-Qaeda training information.[86] In September 2005, the Minister of Safety and Security, Charles Nqakula, informed a parliamentary media briefing that British police had again found "stacks" of authentic South African documents in swoops connected to international terror organisations, prompting the Minister of Home Affairs, Nosiviwe Mapisa-Nqakula, to meet with her British counterpart to try to find a solution to the problem.[87]

On the 28 July 2005, the Los Angeles Times reported that the suspected mastermind of the 7 July 2005 bombings in London, a British-born Pakistani Haroon Rashid Aswat, was arrested in Zambia. US intelligence sources claimed that Aswat was under surveillance in the predominantly Muslim-suburb of Mayfair in Johannesburg, where he stayed for some time before leaving for Zambia.[88] Zambian security officials alleged that Aswat confirmed under interrogation that he was once a personal body guard to bin Laden and that he had frequently travelled to Mozambique and Botswana.[89] Aswat was handed over to British authorities, who did an about-turn by stating that they had never regarded him as the mastermind in the London bombings.[90]

On 31 October 2005, an Indian national, cleric Mohammed Moosa Jeebhai – a teacher at a private Muslim school in Escourt – and a Pakistani national, Khalid Mehmood Rashid, were allegedly abducted by 15 heavily armed men. They were detained at the Cullinan Police Station for about a week, and the former was finally taken to the Lindela Repatriation Centre in Krugersdorp for deportation. He was eventually released in November 2005. His legal representative claimed in the media that the pair was abducted by "foreign intelligence agents".[91] The exact location of Rashid, however, remains unclear, although an affidavit submitted by a Lt-Col. Imran Yaqub of Pakistan's Ministry of Interior to the Pretoria High Court confirmed that Rashid arrived in Pakistan subsequent to his deportation on 6 November 2005.[92] In June 2006, Joel Netshitenzhe, South African government spokesperson claimed

that the government was aware that Rashid was alleged to have connections with international terrorists cells.[93]

These developments prompted the CIA to name South Africa as one of the countries where a "new tier" of al-Qaeda leaders is hiding. This was part of a "second and third tier" in the organisation's hierarchy globally. The CIA report claimed that the foreign al-Qaeda operatives based in the country reported to the Jordanian/Iraqi al-Qaeda leader, Abu Musab al-Zarqawi, and were active in Cape Town, Durban, Eastern Cape and Gauteng. They drew support from local and immigrant Muslim communities. It also claimed that several local militants were known to have contact with bin Laden and the al-Qaeda network and to have received military training in Afghanistan in the 1990s.[94]

4.4. 'HOME-GROWN' RECRUITS LINKED TO AL-QAEDA?

On 25 July 2004, two South Africans, a Johannesburg-based doctor, Feroz Abubaker Ganchi, and Zubair Ismail from Laudium, were arrested after a gun battle at the Faisal Hotel in Gujrat, Pakistan. During the raid, Pakistan's Inter Services Intelligence and its Intelligence Bureau "recovered AK-47s, hand grenades, ammunition, computers, maps and several vests containing an estimated 10kg of plastic explosives and several unknown chemical liquids in vials strapped to the devices".[95] Ganchi and Ismail were allegedly in the company of the Tanzanian, Ahmed Khalfan Ghailani, who was on the FBI's most wanted terrorist list. Ghailani had a $25 million reward on his head and was indicted in New York in 1998 for the synchronised blasts that destroyed the US embassies in Nairobi (Kenya) and Dar-es-Salaam (Tanzania), killing 224 people and injuring 4574. These arrests were followed by the arrest of two others in Pakistan, namely, those of Musaab Aruchi and Mohammed Naeem Noor Khan (alias Abu Talha) on 12 June and 12 July 2004 respectively, also suspected of being al-Qaeda operatives. Media reports citing Pakistani security sources claimed that the two were being trained by Ghailani to carry out terror attacks on tourist sites in Pretoria, Johannesburg and Cape Town.[96] Later reports claimed that they were suspected of being members of an al-Qaeda "logistics and communications cell" operating out of a rented house in Gujrat.[97] Ganchi and Ismail were eventually released on 15 December 2004 without being charged

after spending almost five months in detention in Pakistan. No charges were laid against them in South Africa either.[98]

Several key questions remain unanswered about al-Qaeda in South Africa. Firstly, is there an al-Qaeda presence in the country? Secondly, what form, if any, has this presence taken? Thirdly, what is the possibility of an international terror attack in South Africa?

Mainstream Muslim organisations have vociferously challenged the veracity and accuracy of reports suggesting that al-Qaeda operatives are active in South Africa. For example, the Muslim Judicial Council, the Muslim Youth Movement, the United *Ulama* (Theologians) Council of South Africa and the Muslim-based Media Review Network - while distancing themselves from the alleged activities of the Ganchi and Ismail – have all argued that media and Western intelligence reports about al-Qaeda connections are "vastly exaggerated".[99] In response to the growing media allegations described earlier, 30 leading representatives of the South African Muslim community met in October 2004 with a government delegation comprising of the Minister in the Presidency, Essop Pahad, the Minister of Intelligence, Ronnie Kasrils, the Minister of Safety and Security, Charles Nqakula, and the Deputy Ministers of Foreign Affairs and Education, Aziz Pahad and Enver Surty respectively, to discuss the allegations and national security. The government delegation confirmed that several foreign diplomats had raised questions about the sudden influx of Malaysian, Saudi Arabian and Pakistani students into Muslim theological seminaries in South Africa. The Muslim representatives rejected these claims, committed themselves to the constitutional order and agreed to keep open the channels of communication with the government on national security and related matters.[100]

In reaction to the arrests of Ganchi and Ismail, Vusi Mavimbela, the former head of the NIA stated that he had no official information that any particular installation had been targeted by al-Qaeda or any other terrorist organisation.[101] Government spokesperson, Joel Netshitenzhe, criticised media reports for publishing unsubstantiated reports from Pakistan, while the Minister of Intelligence, Ronnie Kasrils, stated that the media reports relating to al-Qaeda targets and the notion of a "third tier of al-Qaeda leaders and cells stretching out from Pakistan to South Africa" were a "gross exaggeration".[102] However, citing the case of

Khalfan Khamis Mohammed, he acknowledged that an element of the al-Qaeda network is using South Africa as a "form of sanctuary" and a safe haven. Furthermore, he did not rule out the possibility of the network attacking a symbol of an enemy country inside South Africa.[103]

Sources within the NIA have confirmed that it and the SAPS were investigating alleged al-Qaeda operatives said to be functioning in the country, but they were not certain whether these people were indeed top ranking al-Qaeda figures. These were mainly identified as foreigners, who drew some support and sympathy from the local and immigrant Muslim communities. They also relied on corrupt Home Affairs officials for securing false identity documents. The NIA asserted that the initial al-Qaeda penetration into the country was disrupted by the SAPS when it deported the seven foreign nationals to their respective countries.[104] In August 2005, the Minister of Safety and Security, Charles Nqakula, confirmed in a reply to a question in the National Council of Provinces (NCOP) that investigations were underway by the security services into the possibility that South Africans were being recruited by terror networks and were "training for global terror attacks".[105] However, National Police Commissioner, Jackie Selebi, stated that "South Africa was not a staging platform or a conduit for al-Qaeda terror attacks", although the country had "received" people associated with al-Qaeda and might very well have a few individuals who sympathised with the organisation.[106]

In October 2005, the principal of the Darus-Salaam Islamic College in Laudium, Farhaad Dockrat and his son, Muaaz, together with a Senegalese student, Omar Saiko Wally, studying at the said institution, were detained by the Gambian security services. The three claimed that they were on a week-long tour to Gambia's Islamic educational institutions. They were released without being charged after being held at a Gambian detention centre for more than two weeks. Zubair Ismail was a student who had graduated from the theological college run by Dockrat.[107]

Political and security analysts appear to be divided on the threat posed by al-Qaeda or any other international terrorist group in South Africa. For instance, in examining international terrorism in Africa, Botha states that although several attacks have been organised by al-Qaeda or associated groups, African Muslims on the continent, including the vast majority of

South African Muslims, practice their faith with moderation and do not necessarily agree with the aims and modus operandi of international terror groups.[108] Still, Botha was able to paint a portrait of what she called the African "new terrorist". He is usually in his 20s, married and a good person with no previous criminal record. He is school-educated and unskilled, and overwhelmingly drawn into activity by the radicalism of his friends, and to a lesser extent, that of his family. She added that the Internet had enabled the "new terrorist" to develop decentralised, informal command and control structures that were home-grown, in the sense of being self-trained and self-financed.[109]

Mills and Shillinger argue that South Africa can be classified as an African state that offers "logistical and financial support – directly or as a conduit – for terrorists" and to al-Qaeda. In addition, they have raised concerns about the use of South African travel documents and the related use of the country as a sanctuary for terror suspects.[110] Cilliers asserts that international terrorism in Africa is awakening and that it has links in a number of African countries from South Africa through to Algeria in the north. It is only a matter of time before it is fully awakened.[111] Similarly, Schonteich claimed that while the white right wing was too divided and demoralised to constitute a threat, Muslim resentment against the US and Israel constituted a great danger to South Africa. He argued that "the threat of Islamic terrorism is directly linked to the rising fundamentalist sympathy in the Muslim community" and predicted that "polarisation will see more radical sections within that community come to the fore, with even traditionally moderate Muslim leaders becoming outspoken."[112] In contrast, Muslim academics, such as Vahed and Jeppie, argue that there is little to support the typecasting of Muslims as 'extremists', 'fundamentalists' and 'terrorists' in the South African context. They argue that religious commitment of Muslims is ever deepening, and that Islamic resurgence is not a movement of political emancipation, but one aimed at preserving and deepening religious-cultural identity.[113]

4.5. CURRENT NATURE OF AL-QAEDA

At the heart of the matter is the conceptualisation of the nature of al-Qaeda currently. A number of security analysts have questioned the past notion of al-Qaeda being a cohesive, internationally co-ordinated and centrally-commanded organisation. In fact, the opposite

seems to be true. As al-Qaeda leaders are being captured or killed, the organisation has assumed new shapes and forms. From being a militant vanguard, organising the armed struggle against the Soviet Union in the 1980s, it has changed in the 1990s into a base for thousands of Muslim militants from all parts of the world wanting military training. After the 9/11 attacks, it underwent a further mutation into a "maxim, precept (and) formula".[114] It has become a multi-headed network of localised groups that is increasingly responsive to grassroots and national Muslim grievances.[115] It is seen as an evolving movement; more a brand than a tight-knit group; a mindset rather than an organisation. This shift from "headquarters planned conspiracies to diffuse ideological incitement and tactical support is consistent with bin Laden's long-stated goal for the organisation he founded on an Afghan ridge in the summer of 1988."[116] In this context, it does not matter whether an attack is al-Qaeda directed or al-Qaeda inspired. What tends to occur is that key individuals move around the world, drawing together the elements of terrorist attacks, motivating local volunteers, providing expertise and access to funding and advising on targets and timing against a background of a more radicalised and politically conscious Muslim world population.[117]

From the pattern of events described above, it is possible to arrive at two tentative conclusions. Firstly, a small core of foreign nationals with militant tendencies and possible links to the al-Qaeda network, who might be fleeing from their own security services, has come into South Africa using false South African travel documents and exploiting poor border controls. These individuals had established themselves inside the country and attempted to integrate themselves into the local Muslim community, either through marriage or through participation in Muslim religious activities. If the reports of the SAPS are anything to go by, then some of these foreign nationals were investigating attacks on foreign enemy targets inside the country. Secondly, media reports on the arrests and subsequent detention of Ganchi and Ismail in Pakistan seem to suggest that they had contact with some of these foreign nationals and were possibly being recruited and trained as 'home grown' al-Qaeda operatives. Alternatively, they could have taken individual decisions to travel to Pakistan to establish independent contact with either the al-Qaeda network or humanitarian groups there, and were arrested in the process. In the absence of due legal process and the secrecy surrounding their release from custody, it is quite possible that their families' claims - that

Ganchi was on hiking holiday and Ismail was interested in furthering his religious studies - could well be true.[118]

5. CONCLUSION

Revolutionary warfare and terrorism have been an inseparable part of the South African political landscape since the early 1960s, when the liberation movements launched the armed struggle. In the period between 1961 and 1994, it assumed the form of an insurgency launched by MK and Poqo/APLA. While the former attempted to discriminate between legitimate (hard) and less legitimate (soft) targets, the latter accepted as policy the use of political violence against white civilians, who were all seen as oppressors. Poqo/APLA actions can, therefore, be classified as overt terrorism. This does not mean that some MK attacks, particularly after its Kabwe Conference, did not target civilians in the course of its armed actions.

There were two main bursts of Afrikaner right wing terror in recent South African history; the first in the months preceding the democratic elections of 1994 and shortly thereafter, and the second in 2002. Both campaigns were relatively short-lived. The former was largely neutralised through political negotiations, while the latter was defeated through intelligence-driven, counter-terrorism operations. In contrast, the wave of urban, criminal-cum-political terrorism allegedly spearheaded by PAGAD and criminal gangs that swept through the Western Cape between 1996 and 2000 caught the South African security services off guard. In some instances, such as the attack on Planet Hollywood, the attacks assumed the form of international terrorism. It was only through the penetration of PAGAD structures and high visibility security operations, which are discussed in the next chapter, that the government was able to neutralise this national security threat.

International and transnational terrorism emerge as key national security threats to South Africa. While there is evidence to suggest that the white right wing is politically linked to white supremacist groups internationally, attacks from its quarters have primarily assumed the character of domestic terrorism. In contrast, it does appear that international terror networks are attempting to establish an organisational presence in South Africa. This is to secure a safe

haven for operatives seeking refuge from security agencies elsewhere in the world. They are exploiting weaknesses in South Africa's border controls and the Department of Home Affairs. They might also be recruiting local Muslim militants. Given the opportunity, these groups might well attack foreign enemy targets in the country. To date, the South African security agencies have taken pre-emptive administrative actions to deport known al-Qaeda suspects, either to their countries of origin or to foreign security agencies such as the FBI as was the case with Khalfan Khamis Mohamed. While these measures have proven to be effective thus far, it does not reveal the full extent of South Africa's counter-terrorism strategy, which is more fully discussed in the next chapter.

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CHAPTER 3 – SOUTH AFRICAN GOVERNMENT POLICY RESPONSES TO TERRORISM SINCE 1994

1. INTRODUCTION

Since 1994, the South African government adopted a twofold strategic response to urban terrorism and the possible threat of international terrorism. Firstly, it drew on elements of security legislation of the previous era to combat acts of terrorism allegedly conducted by PAGAD and the *Boeremag*. Secondly, it spelt out a new official policy on terrorism, undertook an overall review of security legislation, and promulgated a comprehensive, counter-terrorism law entitled, the Protection of Constitutional Democracy against Terrorist and Related Activities Act (No. 33 of 2004).

The review and legislative processes relating to terrorism took almost an entire decade to conclude. It was fraught with difficulties and was met with stiff opposition from human rights and civil society groupings. The process had begun in November 1995, when the Minister of Safety and Security, Steve Tshwete, requested the South African Law Commission (SALC) to undertake a comprehensive review and rationalisation of security legislation. He stated that in view of the contentious history of security legislation and the changed political climate in South Africa since the advent of democracy, all existing legislation, such as the Internal Security Act (No. 74 of 1982), should be repealed.[1] Consequently, the SALC appointed the Project 105 Committee to undertake this task. The Committee started its work rather belatedly in October 1998.[2]

By this time, however, the SAPS had conducted initial research on the matter, and had already prepared a draft Anti-Terrorism Bill. This became the basis of the SALC's Discussion Paper 92 which was released on the 8 August 2000 for public comment.[3] This was followed by the release of the two volumes of the SALC's Report on the Review of Security Legislation - Terrorism: Section 54 of the Internal Security Act, 1982 (Act No.74 of 1982). Subsequently, the Anti-Terrorism Bill (12-2003) was introduced in parliament. After an unduly lengthy parliamentary procedure, the Protection of Constitutional Democracy against Terrorist and

Related Activities Bill was adopted by parliament in 2004. The President finally assented to the Act in March 2005.

This chapter begins with a broad outline of the official policy on terrorism of the democratic government in South Africa. It then briefly describes security legislation of the previous era that remained on the statute books after 1994, which could be utilised to counter terrorism. It examines in detail the official steps taken by the South African government to develop and to formulate a new law on terrorism. In this regard, it highlights the SALC's review of security legislation and legislative proposals relating to terrorism and the role of the parliamentary committee in the National Assembly in processing the Anti-Terrorism Bill (12-2003). Since its focus is on official policy responses to terrorism, this chapter does not examine operational responses to domestic terrorism during the past decade. This, however, has been adequately analysed by others.[4]

2. POST-1994 OFFICIAL POLICY ON TERRORISM

Confronted with the spate of terrorist bombings in the Western Cape in the late 1990s, the South African government adopted a new policy on terrorism. It condemns all forms of terrorism. Furthermore, it would take all lawful measures to prevent acts of terror and to bring to justice those who are involved in terrorism.[5] In countering terrorism it is committed to upholding the rule of law; never resorting to any form of general and indiscriminate repression; defending and upholding the freedom and security of all its citizens; and acknowledging and respecting its international obligations in respect of combating terrorism.[6] It declared its intention to introduce new legislation to counter terrorism.[7] The government undertook to protect foreign citizens from acts of terror in South Africa. In the event of a terrorist incident occurring in a foreign country and involving a South African citizen, it would co-operate with the host government to investigate the incident. It is emphatic about not making any concessions that could encourage extortion by terrorists and not to allow its territory to be used as a haven to plan, direct or support acts of terror. It declared its willingness to support and to co-operate with the international community in its efforts to prevent and combat acts of terror; use all appropriate measures to combat terrorism; and support its citizens who are victims of terrorism.[8] This policy is based on the fundamental

principle that terrorism should be countered without sacrificing or unduly impinging on the civil liberties of its citizens.

In the aftermath of the 11 September 2001 attacks in the US, the South African President reiterated the government's policy on terrorism in parliament. He emphasised that South Africa condemned terrorism without equivocation since attacks against civilians cannot be justified. This principled view is inspired by the South African struggle for national liberation and the core values of the country's Constitution. Mbeki pledged South Africa's co-operation in the fight against international terrorism, but rejected acts of vengeance directed against individuals, communities or nations, simply because of their faith, language or colour.[9] This view was reaffirmed by South Africa's permanent representative at the UN who argued that any counter-terrorism policy must understand the root causes of the phenomenon, attempt to resolve conflicts in the world, particularly in the Middle East, and eradicate poverty and under-development.[10]

In September 2003, the Minister of Safety and Security, Charles Nqakula, stated that South Africa was aware of the threat of international terrorism and took cognisance of terrorist acts perpetrated in the region. He argued that South Africa was actively participating in all international and regional endeavours to prevent and combat terrorism.[11] He cited South Africa's ratification of nine of the 12 international Conventions to counter terrorism, namely, the:

- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;
- Convention on Offences and Certain Other Acts Committed on Board Aircraft;
- Convention for the Suppression of Unlawful Seizure of Aircraft;
- International Convention against the Taking of Hostages;
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents;
- Convention on the Marking of Plastic Explosives for the Purpose of Detection;
- Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation;
- International Convention for the Suppression of Terrorist Bombings; and

- the International Convention on the Suppression of the Financing of Terrorism.

In addition, the following instruments were approved by Cabinet and submitted to parliament for ratification at that stage: Convention on the Physical Protection of Nuclear Material, Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf. South Africa had also ratified the OAU Convention on the Combating and Suppression of Terrorism.[12] Nqakula also pointed out that South Africa participated in the AU High Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism held in Algiers in September 2002. South Africa had facilitated a workshop hosted by the Commonwealth Secretariat in Gaborone, Botswana, in November 2002 on legislative measures to combat terrorism and implement UN Security Council Resolution 1373. He confirmed that South Africa has adopted EDIFACT, an international standard for central bank reporting on cross-border financial flows, and supported the creation of the Cross-Border Foreign Exchange Transaction Reporting System.[13]

South Africa submitted its first National Report on the implementation of Resolution 1373 to the Security Council's Counter-Terrorism Committee (CTC) on 24 December 2001. In response to the feedback of the CTC, South Africa submitted two supplementary reports on 8 July 2002 and 30 January 2003. South Africa had also imposed financial, visa and entry restrictions and an arms embargo against the Taliban and terrorist organisations, entities and individuals identified by the UN as being associated with terrorist acts and terrorist organisations. However, the Minister of Foreign Affairs, Nkosazana Dlamini-Zuma, emphasised that South Africa firmly supported the Non-Aligned Movement's position on terrorism. This position rejected attempts to "equate the legitimate struggle of peoples under colonial and alien domination and foreign occupation, for self-determination and national liberation, with terrorism in order to prolong occupation and oppression of innocent people with impunity". [14]

In 2004, the Minister of Intelligence, Ronnie Kasrils, announced that the government was setting up a national counter-terrorism centre to bring together the work of all those from the intelligence and security services who were fighting terrorism. He said the centre would

include staff from the NIA, the SAPS Crime Intelligence Division, Defence Intelligence and the Financial Intelligence Centre. The purpose of the new centre was to "collate and co-ordinate information on terrorism and look at all aspects of the global phenomenon from trends to actual facts."[15] It was hoped that this centre would eventually link up with the continental anti-terrorism centre planned by Interpol.

In giving practical effect to this new policy direction on terrorism, the South African government initially either amended or repealed security legislation of the previous era. Subsequently, it acceded to several international Conventions relating to the combating of terrorism. It also commissioned an extensive review of security legislation and finally promulgated a holistic law on terrorism.

3. RATIONALISATION OF INTERNAL SECURITY LEGISLATION

The pre-1994 government had developed an arsenal of security legislation to combat the armed and political activities of the national liberation movements. In its attempt to curb legitimate political opposition, it had promulgated laws which ultimately eroded the rule of law.[16] The new democratic government initially sought to rationalise these laws and to amend those provisions that were overtly unconstitutional. In 1996, parliament passed the Safety Matters Rationalisation Act, which repealed a total of 34 previous era security laws, including those of the former homelands. As a transitional measure, it kept on the statute books certain provisions of legislation that could be used to combat terrorism and related crimes. It allowed for the restriction of gatherings and demonstrations, the collection of information on terrorist activities and criminal syndicates, and controlling the flow of funds to terrorist groups.[17] The Act extended the validity of the Riotous Assembly Act (1956), the Explosives Act (1956) and the Intimidation Act (1982) throughout South Africa. The Intimidation Act was targeted at persons who intend to frighten, demoralise or incite the public to do or abstain from doing any act. Any person who did any of these things and threatened or committed an act of violence, was guilty of an offence and could on conviction be imposed with a discretionary fine by the court and/or imprisoned for a maximum of 25 years.[18] The Explosives Act regulates the manufacture, storage, transporting, importing, exporting and the use of explosives. An

amendment effected in 1997 made it mandatory for explosives to be marked with a detection agent.[19]

Similarly, the Internal Security Act (1982) was also not entirely repealed. In terms of this Act, a person was guilty of terrorism if he/she committed or threatened to commit an act of violence; or incited, aided, advised or encouraged an act of violence with the intent to overthrow or endanger state authority; achieve or bring about constitutional, political, industrial, social or economic change in the country; induce the government to do or to abstain from an act or abandon a particular standpoint.[20] This provision related specifically to terrorism aimed at the South African government or population, and excluded international terrorism.

The offence of sabotage was defined in the Internal Security Act as any act that would:

- endanger the safety and health of the public;
- destroy, pollute or contaminate any water supply intended for public use;
- interrupt or disrupt the supply, manufacture, storage, distribution of fuel, power, water, or of medical health, educational, police, fire-fighting, ambulance, postal, radio or television services, or any other public service;
- cripple or interrupt any industry, or the production, supply or distribution of commodities or foodstuffs; or
- impede or endanger the free movement of traffic on land, sea or air.[21]

Upon conviction, a person may be sentenced to 20 years imprisonment. It was also a criminal offence to harbour, conceal or fail to report to the police any person who had committed, or intends to commit, an act of terrorism or sabotage.[22]

The Criminal Law Second Amendment Act (1992) prohibited the organisation of military, paramilitary and other similar operations with the aim of usurping the functions of the SAPS and the SANDF. Contravention of this provision led to a fine or to imprisonment for a period of up to ten year.[23] The Regulation of Gatherings Act (1993) provided that organisers of demonstrations and marches should give seven days' notice to a magisterial district officer

and secure permission for the event. Participants in these events may not "incite hatred of other persons on account of differences in culture, race, sex, language or religion" or engage in actions calculated to encourage violence.[24]

The Interception and Monitoring Prohibition Act (1992) permitted a judge to direct for a period of three months at a time that postal articles, communications and conversations between persons can be intercepted or monitored. It also empowered the SAPS to enter into premises to install a monitoring device or to intercept a postal article and communication, including electronic mail and facsimile communication. Telecommunication service providers were obliged by law to acquire at their own expense equipment permitting the monitoring and interception of communications on their systems, and to ensure all systems were capable of being monitored.[25] In terms of the Criminal Procedure Second Amendment Act (1996) police officers or other authorised persons may use a trap or engage in undercover operations to detect, investigate or uncover the commission of an offence, or to prevent the commission of an offence. Evidence collected through such means was admissible in court.[26]

In addition to the above-mentioned legislation a number of other laws remained on the statute books that could be used to combat terrorist related activities. For example, the Armaments Development and Production Act (1968), the Explosives Act (1956), the Arms and Ammunition Act (1969), and the Non-Proliferation of Weapons of Mass Destruction Act (1993) could be used to target the tools of terrorism.[27] Similarly, the National Key Points Act (1980), the Control of Access to Public Premises and Vehicles Act (1985), and the Diplomatic Immunities and Privileges Act (1989) were aimed at protecting specific places and persons.[28] The above laws, *inter alia*, indicate that on the eve of a democratic dispensation, the new government had an armoury of legislative tools to combat terrorism. These, however, were reflected in an array of legislation, some of whose provisions were open to future constitutional challenges; and, which did not cover incidents relating to international terrorism and the financing of terrorism. In addition, South Africa's ratification of certain international Conventions obliged it to review security legislation of the previous era. Hence, the request by the Minister of Safety and Security, Steve Tshwete, to the SALC to undertake a comprehensive review of all security related legislation.

4. INVESTIGATION OF THE SOUTH AFRICAN LAW COMMISION INTO SECURITY LEGISLATION

The SALC's Project 105 Committee on security legislation was appointed in October 1998 to conduct a wide ranging review of security legislation. It focused on terrorism and sabotage legislation; South Africa's obligations to the international community; and the protection of classified information in the possession of the state. It reviewed the Interception and Monitoring Prohibition Act with a view to granting the state wider powers in intercepting and monitoring. It also examined issues relating to economic espionage that pose a national security threat; the protection of property and personnel of foreign governments and international organisations, including protection from intimidation, obstruction, coercion and acts of violence committed against foreign dignitaries and officials and their family members; and, hostage taking, which seeks to compel any government to do, or abstain from doing any act.[29]

The Project 105 Committee noted that the SAPS had conducted initial research into terrorism and had drafted an Anti-Terrorism Bill. The SAPS had also hosted a workshop attended by a number of government departments to obtain their comments on the draft Bill. At that stage, the document did not include the highly contentious Clause 16 on detention for interrogation purposes and special offences, which was only added late in 1999 in the wake of the spate of bombings in the Western Cape. The Project 105 Committee utilised the SAPS draft Bill for its deliberations and research into the matter, and finally approved on 8 June 2000 a Discussion Paper 92, including an amended draft Anti-Terrorism Bill for public comment. This was released publicly on 8 August 2000.[30]

4.1. DISCUSSION PAPER 92

Discussion Paper 92 noted that any act of terrorism in South Africa could be prosecuted in terms of existing law. Such an act would constitute an offence under common law. However, the offence of terrorism as it existed in the legislation was deemed to be inadequate as it did not cover the threat of international terrorism that "often targeted foreign officials, guests, embassies and the interests of foreign states."[31] It argued that the worldwide trend is to create

specific legislation based on international instruments relating to terrorism. It advocated that terrorist acts should under no circumstances be justifiable, "whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them."[32]

It recommended that the South African government signs, ratifies or accedes to the respective international instruments relating to terrorism. Furthermore, it should promulgate specific legislation on terrorism which would: (i) broaden the normal jurisdiction of the courts to deal with all forms of terrorism, especially those committed outside South Africa, and (ii) prescribe stiff sentences in respect of terrorist acts. It offered two options for consideration by the South African government and the public; namely, that the former amends existing legislation pertaining to, *inter alia*, nuclear energy, civil aviation and the marking of explosives on the basis of the relevant international instruments; or, that it drafts an omnibus Act addressing domestic and international terrorism. The Project 105 Committee advocated the second option. Consequently, it published a revised Anti-Terrorism Bill for public comment.[33]

4.2. THE SOUTH AFRICAN LAW COMMISSION'S ANTI-TERRORISM BILL (2000)

The Project 105 Committee proposed that on a substantive level the crime of terrorism should be redefined to include international terrorism. On a procedural level, it proposed that the jurisdiction of the courts should be broadened in order for them to be able to impose more severe sentences that befit the crimes committed both domestically and internationally.[34] Section 1 of the Bill, defined a terrorist act as:

> a) any act which does or may endanger the life, physical integrity or freedom of any person or persons, or causes or may cause damage to property and is calculated or intended to:
> i) intimidate, coerce or induce any government or persons, the general public or any section thereof, or
> ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
> iii) create unrest or general insurrection in any State.[35]

A terrorist organisation was defined as an organisation which had carried out, was carrying out or had planned to carry out terrorist acts.[36] Membership of a terrorist organisation was criminalised and any person who provided material, organisational and/or logistical support to a terrorist organisation committed an offence.[37] The Bill controversially enabled the state to use pre-trial detention of 14 days authorised by a judge. The detainee could have access to a lawyer, spouse, religious counsellor and doctor. The detainee was deprived of the right to apply for bail.[38]

The Bill criminalised violations of UN Conventions dealing with international terrorism listed earlier in Chapter 1, such as the hijacking of an aircraft, the endangering of maritime navigation, the taking of hostage of internationally protected persons, nuclear terrorism, terrorist bombings and the financing of terrorism.[39] It imposed a duty on people possessing information which may be essential for investigating any terrorist act to report such information, and it empowered the Director of Public Prosecution to indemnify such persons from being prosecuted.[40] Finally, the Bill empowered the police to stop and search vehicles and persons where it appears that there are reasonable grounds to do so to prevent acts of terrorism.[41]

4.3. THE SOUTH AFRICAN LAW COMMISSION'S REVIEW REPORT

After considering a total of 62 written representations on Discussion Paper 92 and the Anti-Terrorism Bill (2000) from human rights groups, government departments, religious organisations, representatives from law societies and individuals, the SALC published an extensive, final report in August 2002 on its review of security legislation. It concluded that a new law on terrorism should be adopted by the South African government. It argued that:

> effective legislation for combating 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. The South African legislation on combating terrorism should be brought in line with the international conventions dealing with terrorism, our law should provide for extra-territorial jurisdiction, the present terrorism offence is too narrow and the financing of terrorism must be addressed. There is therefore a need for legislation dealing with terrorism.[42]

The revised Anti-Terrorism Bill (2002) which the SALC proposed differed in several fundamental respects from the one proposed earlier. The clause allowing for detention for interrogation purposes was omitted and in its place provision was made for investigative hearings which resembled the procedure contained in Section 205 of the Criminal Procedure Act. This would allow a police officer to obtain information from a person suspected of being in possession of information on terrorist acts. Provision was also made for preventive measures. This entails that a person suspected of committing or intending to carry out a terrorist act can be brought before a court to enter into an undertaking to refrain from certain activities and the court may impose certain conditions to ensure compliance.[43]

The Bill provided a radically altered and expanded definition of a terrorist act. It defined a terrorist act as an act that is committed:

(a)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 organisation to do or to refrain from doing any act, whether the person, government or organisation 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 sub-paragraphs (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 telecommunication system; or a financial system; or a system used for 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 sub-paragraphs (i) to (iii), but, for greater certainty, does not include conventional military action in accordance with customary international law or conventional international law.[44]

The Bill clarified what constituted support for a terrorist organisation and incorporated the question of the financing of terrorism as required by UN Security Council Resolution 1373. In terms of the Bill, support for a terrorist organisation included:

- facilitating, collecting, providing or making available funds and property or inviting a person to make available property or financial or other services on behalf of a terrorist organisation;
- providing, receiving or recruiting a person to receive military training;
- providing or offering to provide a skill or expertise for the benefit of a terrorist organisation;
- recruiting a person in order to commit a terrorist act inside or outside South Africa;
- entering in or remaining in any country for the benefit of a terrorist organisation; and
- making oneself available to a terrorist organisation to commit a terrorist act.

Furthermore, the Bill stated that it was an offence to conceal or harbour a person who had carried out or was likely to carry out a terrorist act. The Bill explicitly provided that it was not an offence to provide or collect funds intended for the purpose of advocating democratic government or the protection of human rights.[45] In order to comply with requirements imposed by UN Conventions to combat international terrorism, the Bill provided for extra-territorial jurisdiction.[46] Finally, it established a procedure for the forfeiture of property of persons convicted of terrorist acts, and for preservation orders in respect of property earmarked for seizure by the state.[47] The SAPS and the Minister of Safety and Security used this Bill as a basis for drafting an Anti-Terrorism Bill (12B-2003), which was tabled in parliament a year later.

5. THE ANTI-TERRORISM BILL (12B-2003)

Early in 2003, the government tabled the Anti-Terrorism Bill (12B-2003) in parliament. In motivating the Bill, the State Law Advisor argued that the OAU and the AU had adopted policies to combat terrorism; had called on member states to ratify all international instruments on terrorism; and, to review legislation on terrorism within one year. In addition, UN Conventions and Resolutions required that states create specific offences such as the hijacking of international aircraft and terrorist bombings, and placed an obligation on all member states to adopt and apply measures in respect of terrorist financing. Such legislation must indicate not only willingness, but also an ability to comply in all respects with international instruments and should provide for extended extra-territorial jurisdiction.[48] Hence, the Preamble to the Bill stated that legislation was necessary to "prevent and combat terrorism, to criminalise terrorist acts, the financing of terrorist acts and the giving of support to terrorists, and to ensure that the jurisdiction of South African courts enables it to bring to trial the perpetrators of terrorist acts."[49]

The Bill generated widespread comment and opposition which is more fully discussed in the next chapter. However, the most controversial aspect of the Bill was its surprisingly cryptic and vague definition of a terrorist act, particularly when considered against the background of the detailed report and proposal of the SALC. It simply defined a terrorist act as "an unlawful act, committed in or outside the Republic - (a) which is a convention offence; or (b) which is likely to intimidate the public or a segment of the public."[50] The very wide application of sub-section (b) meant that any unlawful act, whether violent or not, that served to intimidate the public could be construed as a terrorist act. This meant, for example, that persons engaged in an unlawful protest march in which hawkers' goods are rampaged can be charged with terrorism.

The Bill enabled the Minister of Safety and Security to ban or declare an organisation as a terrorist organisation by a notice in the *Gazette*, if that organisation was listed as an international terrorist entity in terms of a resolution of the UN Security Council. It also empowered the Minister to classify any other organisation as a terrorist organisation if that organisation or its members had committed a terrorist act, claimed responsibility for such an

act or endangered the security and territorial integrity of South Africa or any other country. It further set out a procedure by which the Minister could issue a declaration of a terrorist organisation. The Minister had to publish a notice in the *Gazette* stating that he/she intended to declare a said organisation as a terrorist entity and the grounds for the proposed decision. The listed organisation or any of its members had the right to apply within 60 days to the High Court for an interdict prohibiting the proposed declaration. If the Court granted the interdict, the Minister may, on notice to the person who obtained the interdict, apply to the High Court for an order revoking the interdict so as to empower the Minister to declare an organisation as a terrorist organisation.[51]

In terms of the Bill, any person who conspired, threatened, incited, commanded, aided, advised, encouraged or recruited to commit a terrorist act; or, who committed a terrorist act was guilty of an offence and liable on conviction to imprisonment, which may include life imprisonment. Continued membership of an organisation after it was declared as a terrorist organisation was also an offence carrying a jail sentence of 15 years. It broadened the offence relating to harbouring and concealment of a suspected terrorist, by including furnishing weapons, food, drink, transport or clothing to a member of a terrorist organisation, including receiving any benefit from and carrying out an instruction or request by a terrorist organisation.[52]

The Bill provided for investigative hearings. On the order of a judge, any person may be questioned to gather information relating to a terrorist act. Such a person was obliged to answer all questions, even where the answers were self-incriminatory. There was, however, a safeguard provided; the answers to such questions, and the evidence derived from such answers, could not be used in criminal proceedings against such a person.[53]

In respect of the funding of a terrorist organisation, the Bill invoked provisions of the Financial Intelligence Centre Act (No. 38 of 2001) and the Prevention of Organised Crime Act (No. 121 of 1998). It imposed an obligation on an “accountable institution” - such as a bank - to determine whether or not it is in possession or control of property on behalf of a declared terrorist organisation and report the fact to the Financial Intelligence Centre, including the submission of regular reports on the matter as determined by the Director of the

Centre. No action, whether criminal or civil, lies against an "accountable institution" or any other person complying in good faith regarding such reporting.[54] The Bill provided for the seizure of assets of a terrorist organisation in terms of the Prevention of Organised Crime Act.[55]

In view of extensive public interest in the Bill, the Portfolio Committee on Safety and Security scheduled public hearings on the proposed legislation. By June 2003, it had received a total of 39 written submissions and requests for oral presentation before the Committee from individuals, religious organisations, human rights groups, established organisations representing the legal fraternity, media groups and trade unions.[56] The substance of the views of these organs of civil society and the basis for their objections to the proposed legislation is discussed in the next chapter.

6. THE PROTECTION OF CONSTITUTIONAL DEMOCRACY AGAINST TERRORIST AND RELATED ACTIVITIES BILL (12F - 2003)

In their final deliberations, both the Portfolio Committee on Safety and Security and the Select Committee on Safety and Security in the NCOP effected significant amendments to the Protection of Constitutional Democracy against Terrorist and Related Activities Bill (12F-2003). These were largely derived from submissions received from various organs of civil society during the public hearings on the Bill, which is discussed more fully in the next chapter. Importantly, the Bill was 'renamed' the Protection of Constitutional Democracy against Terrorist and Related Activities Bill, suggesting a significant shift in political thinking from an approach preoccupied with the 'war on terror' to one aimed at defending human rights and a constitutional and democratic social order born out of the liberation struggle.[57]

This was aptly captured in the Preamble to the Bill. It noted that South Africa is a constitutional democracy wherein fundamental human rights, such as the right to life and free political activity, are guaranteed, and that terrorist activities are intended to achieve political and other aims in a violent and unconstitutional manner, thereby undermining democracy. In addition to explicit references to South Africa's international obligations in giving effect to UN Conventions on terrorism, the Bill recognised that "acts committed in accordance with …

international (humanitarian) law during a struggle waged by peoples, including any action during armed struggle, in the exercise or furtherance of their legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces, as being excluded from terrorist activities."[58]

The Portfolio Committee on Safety and Security amended the cryptic definition of terrorist activity as it appeared in the original Bill by introducing detailed specifications of such activity relating to chemical, biological or radioactive materials aimed at harming the public and the environment; the destruction of public and private property; the damage or destruction of natural resources or cultural heritage; the damage and destruction of public infrastructure; and the destabilisation of an economic system either inside or outside South Africa. The Bill did not define terrorism, but defined terrorist activity. It created an offence of terrorism, excluding the said struggles listed above, and required proof of a specific motive as well as specific intent.[59]

Terrorist activity was defined in the Bill as:

(a) any act committed in or outside South Africa, which -

(i) involves the systematic, repeated or arbitrary use of violence by any means or method;

(ii) involves the systematic, repeated or arbitrary release into the environment or any part of it or distributing or exposing the public or any part of it to-

(aa) any dangerous, hazardous, radioactive or harmful substance or organism;

(bb) any toxic chemical; or

(cc) any microbial or other biological agent or toxin;

(iii) endangers the life or violates the physical integrity or physical freedom of, or causes serious bodily injury to or the death of, any person, or any number of persons;

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

(v) causes the destruction of or substantial damage to any property, natural resource, or the environment or cultural heritage, whether private or public;

(vi) is designed or calculated to cause serious interference with or serious disruption of an essential service, facility or system, or the delivery of any such service, facility or system, whether public or private, including, but not limited to -

(aa) a system used for, or by, an electronic system, including an information system;

(bb) a telecommunication service or system;

(cc) a banking or financial service or financial system;

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

(ee) a system used for, or by, an essential public utility or transport provider;

(ff) an essential infrastructure facility; or

(gg) any essential emergency services, such as police, medical or civil defence services;

(vii) causes any major economic loss or extensive destabilisation of an economic system or substantial devastation of the national economy of a country; or

(viii) creates a serious public emergency situation or a general insurrection in the Republic, whether the harm contemplated in paragraphs (a) (i) to (vii) is or may be suffered in or outside the Republic, and whether the activity referred to in subparagraphs (ii) to (viii) was committed by way of any means or method; and

(b) which is intended, or by its nature and context, can reasonably be regarded as being intended, in whole or in part, directly or indirectly, to-

(i) threaten the unity and territorial integrity of the Republic;

(ii) intimidate, or to induce or cause feelings of insecurity within the public, or a segment of the public, with regard to its security, including its economic security, or to induce, cause or spread feelings of terror, fear or panic in a civilian population;

(iii) unduly compel, intimidate, force, coerce, induce or cause a person, a government, the general public or a segment of the public, or a domestic or international body, organisation or intergovernmental organisation or institution, to do or to abstain or refrain from doing any act, or to adopt or abandon a particular standpoint, or to act in accordance with certain principles, whether the public or the person, government, body, organisation or institution referred to in subparagraphs (ii) or (iii), as the case may be, is inside or outside the Republic; and

(c) which is committed, directly or indirectly, in whole or in part, for the purpose of the advancement of an individual or collective political, religious, ideological or philosophical motive, objective, cause or undertaking.[60]

Any person who engaged in terrorist activity or does anything which is likely to enhance the ability of a terrorist entity was guilty of an offence.[61] Offences associated with the financing of terrorist activity are listed as the acquisition, collection, use, possession and ownership of property, and, the acquisition, collection and provision of financial and economic support. A person who entered into transactional arrangements aimed at retaining, concealing, transferring or disguising the nature, source, location, disposition or movement of property for the use of terrorist activity was also guilty of an offence.[62] The collection and provision of funds for the purpose of advocating democratic government or the protection of human rights was excluded from the category of offences listed above.[63]

The Bill classified Convention offences such as terrorist bombings; the hijacking, destroying or endangering of fixed platforms; the taking as hostage, kidnapping and murdering of internationally protected persons; and the hijacking of an aircraft and the hijacking of a ship or endangering the safety of maritime navigation as specific offences.[64] The harbouring or

concealment of a person who had committed a "specified offence" - an offence related to terrorist activities, an offence in terms of a UN Convention relating to terrorism or an offence under a law of another state and which would have constituted an offence under South African law – is an offence.[65] Failure to report the presence of a person suspected of intending to commit or having committed a terrorist act is an offence. The person making such a report to a police official must be issued with a written acknowledgement of receipt of such a report.[66] An act constituting a hoax relating to noxious substances and/or a lethal device is explicitly criminalised.[67] This is the case irrespective of whether or not the person carrying out the hoax has any particular person in mind as the person in whom s/he intends to induce the false belief in question.[68] Any person who threatens, attempts, conspires with another person or aids, abets, induces, incites, instigates, instructs or commands, counsels or procures another person to carry out the offences listed above is guilty of an offence.[69]

The Bill introduced stiff and severe penalties for terrorist and related activities. It provided for extended extra-territorial jurisdiction in respect of terrorist and related activities. It amended the Extradition Act (1962) by removing the political exception in cases of terrorist bombings and the financing of terrorist and related activities. A person convicted for terrorist activities or Convention offences could face life imprisonment or a period not exceeding 18 years, depending on whether the High Court or regional court respectively imposes the sanction. A person found guilty of aiding or harbouring a suspected terrorist could face a maximum sentence of 15 years if convicted by a High Court. A person who contravened the financial provisions of the legislation was liable in the case of a sentence imposed by a High Court or Regional Court, to a fine not exceeding R100 million or imprisonment not exceeding 15 years, and in the case decided by the magistrate's court, to a fine not exceeding R250 000 or a maximum prison sentence of five years. For hoaxes, the penalty is a maximum of 10 years.[70]

In addition to the above, it is mandatory upon the court to declare any property used in the commission of the offence or which was in the possession or control of the convicted person to be forfeited to the state.[71] The Bill provided for investigation and freezing orders in terms of the National Prosecuting Act (1998).[72] Finally, the President must notify by Proclamation in the *Gazette* specific entities that have been identified by the UN Security Council as entities which commit, attempt to commit or facilitate the commission of terrorist or related activities,

and specify the necessary action to be instituted against these entities in order to combat or to prevent terrorist activities. Such Proclamation must be tabled in parliament for its consideration of the matter and decision.[73] Finally, the promulgation of the Protection of Constitutional Democracy against Terrorist and Related Activities Act (No.33 of 2004) resulted in the repeal of the Internal Security Act of the previous era, and introduced a new legal regime to combat and counter terrorism.

7. CONCLUSION

South Africa learnt very quickly that in a constitutional democracy it is not an easy task to effectively counter a sustained terrorist threat. The wave of urban terrorism allegedly perpetrated by PAGAD and the *Boeremag* so early in its democratic history, the dramatic changes in the will of the international community to combat terrorism in the wake of the 9/11 terror attacks, and South Africa's own commitment to fighting terrorism emerging from its constitutional values and liberation history, resulted in the formulation of a new official policy on terrorism. The process by which this new policy was translated into new legislation on terrorism proved to be cumbersome and arduous. It seemed that initially the government was torn between amending existing security legislation and introducing a new legal regime relating to terrorism. This was the case as several security analysts had argued in the past that numerous pieces of legislation designed to combat terrorism, uphold national security and strengthen the hands of the security forces against terror groups, were already on the statute books. Therefore, there was no need for the promulgation of a specific law to counter terrorism. What was needed instead was for the security services to use the existing security legislation more effectively and for the government to address operational weaknesses in the criminal justice system and the state's intelligence agencies.[74]

In the end, the South African government opted for new and holistic legislation on terrorist and related activities. The process had begun in a contradictory and uncoordinated fashion. Even as the Minister of Safety and Security had requested the SALC to conduct a full review of security legislation as early as 1995, the SAPS, which falls under the said Minister's political authority, had leapt ahead and produced a highly controversial draft Anti-Terrorism Bill. The SALC responded creatively to this development by releasing an amended draft Bill

together with the Discussion Paper 92 so as to facilitate wider public debate and interest in the matter. Its point of departure was that it advocated the ratification and accession to the respective international instruments relating to terrorism and the promulgation of specific legislation on terrorism. It called for broadening the normal jurisdiction of the courts to deal with all forms of terrorism, especially those committed outside South Africa. It prescribed stiff penalties in respect of terrorist acts. In its final report on security legislation, it advocated, *inter alia*, the incorporation of measures to suppress the financing of terrorism both domestically and internationally, and proffered a more extensive definition of terrorist activities. It deleted the proposal for detention without trial and proposed investigative hearings against suspected terrorists.

The streamlined Anti-Terrorism Bill (12B-2003) tabled in parliament by the Minister of Safety and Security confounded both parliamentarians and civil society. Coming in the wake of the extensive research report of the SALC and the global controversy relating to the 'war on terror', the brevity and unacceptably wide scope of the definition of terrorist activity confused, rather than legally clarified, what was the essential purpose and objective of the draft legislation. The provision empowering the Minister of Safety and Security to ban organisations was vociferously opposed by organs of civil society as it brought back memories of the apartheid era. In the end, it was the parliamentary committees that were left with the difficult and unenviable task of amending the Bill, and entitling it the Protection of Constitutional Democracy against Terrorist and Related Activities Bill (12F-2003).

The Protection of Constitutional Democracy against Terrorist and Related Activities Bill (12F-2003) was enacted into law early in 2005, after it was signed by the President. It entrenches a firm principle in the rubric of South African society that terrorist activity which is committed for the purpose of advancing political, religious, ideological or philosophical goals is wholly unacceptable. It offers a detailed definition of terrorist and related activities, excludes from its ambit just armed struggles for national self-determination and freedom from oppression and occupation, proposes stiff penalties on conviction of terrorist and related offences and extends the court's jurisdiction beyond South Africa's borders. It is noteworthy that the process by which this law was enacted was inclusive. It allowed for extensive public consultations and input, thereby enabling civil society to contribute positively to the final

legislative product. The next chapter examines the public reactions and responses to the parliamentary process and the submissions made for inclusion in the Anti-Terrorism Bill (12B-2003).

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CHAPTER 4 - PUBLIC REACTIONS TO STATE COUNTER-TERRORISM POLICY

1. INTRODUCTION

South African civil society organisations - responding to an invitation to the public by the Portfolio Committee on Safety and Security to comment on the Anti-Terrorism Bill (12B-2003) - had reacted vigorously and vociferously to the draft legislation. These ranged from organisations across the racial and religious spectrum and included law societies and human rights groups, labour and business organisations, academic and research institutes, media networks and religious councils. This chapter examines selected oral submissions by civil society organisations to the Portfolio Committee on Safety and Security. These include the Legal Resources Centre (LRC), Cape Bar Council, Muslim Lawyers' Association (MLA), Congress of South African Trade Unions (COSATU), Banking Council (BC), Transvaal Agricultural Union (TAU), Freedom of Expression Institute (FXI), South African National Editors' Forum (SANEF), Media Institute of Southern Africa (MISA), Media Review Network (MRN), Institute for Democracy in South Africa (IDASA), Institute of Security Studies (ISS), South African Council of Churches (SACC), Southern African Catholic Bishops' Conference (SACBC), United *Ulama* (Theological) Council of South Africa (UUCSA) and the Islamic Forum (IF). Also included for comparative purposes are the responses of two statutory organs, namely, the South African Human Rights Commission (SAHRC) and the Law Society of the Cape of Good Hope.

There was widespread opposition to the promulgation of an omnibus counter-terrorism law. Opponents of the Bill charged that it was "anathema to human rights, threatened press freedom and harked back to apartheid legislation".[1] They argued that it failed to properly define the very thing it was supposed to guard against, namely, terrorism. Critics warned that the Bill impinged on constitutional freedoms, criminalised recklessly, and negatively affected human rights and fundamental freedoms of citizens.[2] They also contended that since it effectively sought to limit constitutionally enshrined rights in order to counter the

threat of terrorism, it should also protect against state abuse.[3] These criticisms were coupled with recommendations on various sections of the Bill.

The submissions can be classified into three broad categories: namely, the 'rejectionists', the 'reservationists' and the 'supporters'. The 'rejectionists' argued that the Bill would seriously impact on individual civil and political liberties; that South Africa had a successful history of using existing legislation to counter urban terrorism; and, that the Bill was part of the global 'war on Islam'. The 'reservationists' were not convinced that there was a need for counter-terrorism legislation. They believed that the Bill did not conform to international human rights standards and could lead to the violation of individual human rights. Furthermore, they advocated that in countering terrorism within the framework of international instruments, South Africa should not ignore its own historical and socio-political context. Lastly, the 'supporters', while endorsing the proposed counter-terror legislation, recommended specific amendments to the definition of a terrorist act and to the financial provisions of the Bill so that it complied with the demands of the Financial Action Task Force, an international standards-setting body on countering money laundering and terrorist financing.[4] This chapter classifies these responses in terms of the three categories listed above. In the case of each representation, an effort is made to allow for the 'voice' of the respondent to emerge on the proposed counter-terrorism policy. It also indicates briefly the impact these submissions had on the parliamentary proceedings.

2. LEGAL ORGANISATIONS

Three organisations, representing the legal fraternity and human rights activists, made oral representations on the Bill, namely, the Cape Bar Council, the LRC and the MLA. All three were sharply critical of the Bill and highlighted the limitations that were likely to be imposed on individual human rights if the Bill was adopted by parliament.

2.1. THE CAPE BAR COUNCIL

The Cape Bar Council was scathing in its criticisms of the Bill. It asserted that Convention offences in the Bill are no more than desultory examples of prohibited components of terror listed in various UN Conventions.[5] It proposed that for the purpose of South Africa's

compliance with international obligations, a terrorist act should mean what is expressly defined in various UN Conventions relating to the combating of international terrorism.[6] The Cape Bar Council described the definition of a terrorist act as unconstitutional and invalid and the definition of a terrorist organisation as simply nonsensical.[7] It pointed out that the offence of furnishing food, drink and clothing to a member of a terrorist organisation is so draconian that it does not even receive the recognition of the Israeli High Court of Justice in relation to 'terrorism' in Israeli-occupied territories.[8] It stated that Section 11, which obliges a person to answer questions and produce things during an investigative hearing, offended against the sense of justice of any legal practitioner in a constitutional democracy.[9] It indicated that the procedure to be followed by the Minister when declaring an organisation a terrorist organisation was unsatisfactory, and recommended the holding of an expeditious enquiry with *vive voce* evidence presented by both parties to the court.[10]

In spite of the harshness of its criticisms of the Bill, the Cape Bar Council did not reject the Bill in its entirety. It expressed grave reservations on specific sections of the Bill and called for the substantial re-drafting of the Bill. Its recommendations, relating to the specific listing of UN Conventions in the revised Bill, were fully accepted.[11] The LRC also adopted a similar position.

2.2. LEGAL RESOURCES CENTRE

The LRC argued that the limitation of fundamental rights in the Bill was not reasonable and justifiable in a democracy. It noted that the acts of terrorism which the Bill purported to deal with were previously foreseen, were already punishable under existing criminal legislation and did not warrant any further limitation of the rights contained in the Bill of Rights.[12] The definition of a terrorist act was so unclear that it was difficult to ascertain exactly what activities were prohibited, and it could realistically apply to legitimate protest. Such vagueness and ambiguity in legislation was an invitation to abuse.[13] It proposed that parliament re-visit the definition proposed by the SALC, but it should explicitly exclude legitimate protest, dissent or stoppage of work that was not intended to result in death or

serious bodily harm, or endanger a person's life or cause a serious risk to the health and safety of the public.[14]

The provision to convict a person who "knowingly facilitates the commission of a terrorist act" broadened the scope of who could be convicted for an unlawful act, as a person who "knowingly facilitates" does not necessarily have hostile intent. Similarly, the provisions relating to the supply of food, drink and clothes should be excluded from the Bill as it would lead to the proscription of humanitarian support to oppressed people.[15] The LRC expressed reservations about the procedures set out to conduct investigative hearings, as they infringed on the fundamental rights of a person who was not being arrested for criminal prosecution, but solely for gathering information.[16] Similarly, the power of the Minister to proscribe an organisation was too wide in two respects. Firstly, the Bill provided for an almost automatic declaration of an organisation as a terrorist organisation in South Africa upon a decision of the UN Security Council. It did not require the Minister to be satisfied on reasonable grounds, but was merely permissive. Secondly, it effectively shifted the onus to the potentially proscribed organisation and called upon it to defend itself after it had already been found guilty, which was not logical.[17]

The LRC can be placed in the 'reservationist' category. It argued that current legislation was adequate to counter any security threat to South Africa and that parliament should simply amend existing legislation to close legal loopholes. As seen from all the submissions discussed below, the definition of terrorist activity emerged as a highly contentious issue and was raised by every organisation that led evidence before the Portfolio Committee on Safety and Security. Consequently, the definition was substantially amended, drawing largely, but not exclusively from the proposal of the SALC. The provisions relating to the proscription of an organisation and the supply of food and drink to a suspected terrorist were deleted from the final Bill. In contrast to the submissions of the Cape Bar Council and the LRC, the MLA rejected the Bill altogether.

2.3. MUSLIM LAWYERS' ASSOCIATION

The MLA concentrated on the substantive provisions of the Bill. It argued that the reach of the Bill was far wider than tackling the perpetrators of terrorist acts. It included conspirers, accessories, those with a common purpose and in broad terms those who assist or support terrorists or terrorist organisations.[18] It opposed the definition of a terrorist act on the grounds that it included any unlawful act of intimidation for whatever purpose, political or non-political.[19] The MLA contended that Minister's power to declare an organisation a terrorist organisation was far-reaching as this power was not restricted to organisations that threatened the security of South Africa, but extended to any organisation jeopardising the territorial integrity of any other country.[20] The attempts to ensure *audi alteram partem* in instances where the Minister declared an organisation a terrorist organisation was wholly impractical as the reach of the Minister's power extended both to domestic and international organisations. It recommended that before the Minister declared an organisation as a terrorist organisation, s/he should be obliged to convene a formal hearing where evidence could be led. The state must have the onus of showing that the organisation was a terrorist organisation and this burden had to be discharged beyond reasonable doubt.[21] It further argued that while the Bill protected against terrorist acts emanating from non-state actors, it failed to protect civilians against state terrorism.[22] The MLA highlighted that the Bill was a matter of deep concern for charitable organisations, which might hold views that the funding of a liberation movement was morally praiseworthy because the government that it opposed committed acts of terrorism against its citizens and was oppressive. This activity could now be criminalised.[23]

The MLA did not support the Bill, contending that it was generally designed to make the state's case easier against its opponents, and that it could be used to target the South African Muslim community unfairly. It therefore rejected the Bill. Its recommendation relating to the right to provide financial aid to liberation movements fighting for national self-determination, were included in the Preamble to the Bill.

The three legal organisations listed above responded to the Bill in different ways. While all three were extremely harsh in their criticisms of the Bill, they arrived at different

conclusions about its necessity. The MLA rejected the Bill and called for its total withdrawal. This foreshadowed the responses of all Muslim organisations in South Africa, as discussed later in this chapter. In contrast, the Cape Bar Council and the LRC, while expressing serious reservations about the content of the Bill, recommended that it should be significantly re-drafted in order for it to pass the constitutional muster. Business and labour groups again, addressed issues relating to the right to strike and the proper regulation of the financial sector to limit the scope for terrorist financing.

3. LABOUR, BUSINESS AND MEDIA NETWORKS

COSATU was the only labour union to comment on the Bill. It expressed serious reservations over specific sections of the Bill, but supported its passage through parliament. The BC and the TAU commented on the Bill from the business sector. While the former supported the Bill, the latter rejected it.

3.1. COSATU

COSATU had initially submitted a written submission to the Portfolio Committee on Safety and Security, highlighting its concerns about the broad definition of a terrorist act and its implications for undermining hard-fought for labour rights. Subsequently, it objected persistently to the Bill, arguing that the definition of a terrorist act effectively included unprotected strikes and ordinary criminal offences occurring during strike action. It further raised concerns about the implications of the Bill for extending the definition of "essential services" in respect of which strikes are prohibited under the Labour Relations Act (1995).[24]

COSATU's engagement with the Bill must be seen against the background of the struggle for the right to strike. The former National Party (NP) government suppressed labour actions, including imposing restrictions on the right to strike and declaring unprocedural strikes as unlawful. The constitutional protection of the right to strike was an important labour victory, which the Bill tended to limit.

COSATU intervened directly during the processing of the Bill by the Select Committee on Safety and Security in the NCOP and secured support for its amendments. These were later rejected by the Portfolio Committee on Safety and Security when the Bill was returned to the National Assembly for assent. In reaction, COSATU resolved in February 2004 to embark on a programme of action against the Bill, including a general strike; initiating a Constitutional Court challenge; and, lodging a complaint with the International Labour Organisation. In response to this action and the failure to conclude discussions between the ANC Study Group on Safety and Security and COSATU before the end of the parliamentary term in April 2004, the Bill was withdrawn by Parliament.

It was later re-introduced after the general elections of 2004. Following a series of engagements with the Minister of Safety and Security and the ANC Study Group on Safety and Security, COSATU's amendments removing provisions that allowed unprotected strikes, industrial action and illegal protest action to be classified within the ambit of terrorist acts were eventually incorporated in the Protection of Constitutional Democracy against Terrorist and Related Activities Bill. Hence, the definition of terrorist activity excluded any act committed in pursuance of any advocacy, protest, dissent or industrial action and which did not intend physical harm or death to any person and serious damage to private or public property, natural resources or environmental or cultural heritage.[25]COSATU viewed this amendment as a "massive gain for workers and the protection of hard won constitutional rights".[26]

While COSATU supported the Bill in principle, its determined objection to specific sections of the Bill was ultimately successful. Unlike many of the other respondents to the Bill, COSATU tactfully lobbied the ANC Study Group and the Minister of Safety and Security, highlighting the value of informal lobby tactics in the parliamentary process.

3.2. THE BANKING COUNCIL

The BC stated that the 9/11 terror attacks in the US had changed the international focus regarding the combating of terrorism and that a number of international norms applied to the financial sector to identify and to restrict the financing of terrorism. As South Africa

was a signatory to the International Convention on the Suppression of the Financing of Terrorism, it was critical that the Bill be passed speedily, so that the financial sector could comply with international requirements. It suggested that South Africa was in a particularly sensitive situation as it had formal diplomatic and trade relationships with many countries which the US deemed to be 'terrorist states'.[27] Hence, local banks with international branches required legal certainty in the legislation in respect of the financing of terrorism.

The BC considered the Bill to be oversimplified, vague and subject to conflicting interpretations. The definition of terrorist activity was seriously defective and the definition of "property" was inconsistent with the Prevention of Organised Crime Act (1998). It recommended that in addition to the power of a Minister to declare an organisation as a terrorist organisation, the Bill should also enable the Minister to declare specified members of the organisation or individuals as terrorists.[28] It pointed out that the reporting duty on financial institutions was limited to that of terrorist organisations. In this regard, one of the difficulties in combating the financing of terrorism was that monies were raised legitimately from public sources for future use by individuals and/or terrorist organisations. As such, this money was not the proceeds of crime or an unlawful act. As the Bill failed to deal with this practical complexity, it would be difficult to prosecute specified individuals.

The BC supported the Bill and called for amendments which would empower 'accountable institutions' to meet the international expectations relating to the combating of the financing of terrorism.[29] Consequently, new sections relating to court declarations of forfeiture on conviction and freezing orders were included in the final Bill.[30]

3.3. TRANSVAAL AGRICULTURAL UNION

The TAU lamented the fact that Bill was not published in Afrikaans. It proclaimed that recent developments such as the 9/11 terror attacks, the conflicting interpretations of member states of the General Assembly of the UN on the war against Iraq, and, the arrests of *Boeremag* members on charges of terrorism, compelled it to respond to the Bill. It argued that the definition of terrorist acts was vague in that any unlawful act could be

deemed a terrorist act. It stated that the Minister should not have the prerogative to declare an organisation as a terrorist organisation; instead, the matter should be subjected to a judicial process in the High Court wherein the Minister must lodge an application to proscribe an organisation, and the said organisation must enjoy the right to defend itself. It called for the scrapping of Sections 17 and 18, which respectively dealt with the applicability of rules relating to confidentiality when reporting to the Financial Intelligence Centre and the protection of the person making the report.

The three labour and business organisations that responded to the Bill adopted vastly differing positions. While supporting the Bill in principle, COSATU had reservations largely about the definition of a terrorist act which tended to include spontaneous strike activity. The BC supported the Bill and called for the inclusion of a section dealing specifically with measures to counter the financing of terrorism. The TAU rejected the Bill in principle, but also suggested specific amendments relating to the declaration of an organisation as a terrorist organisation. As indicated earlier, Section 14 relating to a declaration of a terrorist organisation was deleted in the final Bill. In a similar vein as the TAU, media groups rejected the Bill.

3.4. MEDIA NETWORKS

The responses to the Bill from media groupings were wholly negative. The FXI, SANEF, MISA and the MRN collectively rejected the Bill. They declared that it limited the rights to the freedom of the press and the freedom of expression. The Bill also threatened media independence and jeopardised the professional integrity of journalists.

Collectively, media networks in South Africa presented a well-co-ordinated, critical response to the Bill. All four groups rejected the Bill and argued that current legislation was adequate to deal with the threat of terrorism in South Africa. While the rationale for rejecting the Bill varied from group to group, all four defended the principles of the freedom and independence of the press and the freedom of expression. They also objected to the possible limitation of these freedoms if the Bill became law. The concerns raised in respect of investigative hearings were well-heeded and that section of the Bill was

substantially amended. The judiciary was excluded from the proceedings and the power was vested in the National Director of Public Prosecutions to authorise an investigation in terms of Chapter 5 of the National Prosecuting Authority Act (No.32 of 1998).[31]

4. RESEARCH INSTITUTIONS

Two research institutions, namely, IDASA and the ISS, responded to the Bill. Both supported the intention and purpose of the Bill, but expressed serious reservations regarding a wide range of its provisions. The ISS proposed an alternative "Counter-Terrorism Bill" altogether, indicating its dissatisfaction with the overall structure of the Bill.

4.1. THE INSTITUTE FOR DEMOCRACY IN SOUTH AFRICA

IDASA supported the Bill as it aimed to give effect to relevant international instruments relating to terrorism as well as prevent South Africa from becoming a stage for planning, organising and the execution of terrorism. It acknowledged the increased necessity for legislation to deal with terrorism domestically and globally. However, it stated that certain provisions of the Bill might contravene the Constitution.[32] IDASA argued that the definition of a terrorist act was extremely broad and failed to clarify which acts constituted terrorism. It was so wide that any unlawful act could be construed as a terrorist act. This lack of certainty could be used by a future government to crack down on those it viewed as opponents.[33]

IDASA argued that the Bill contravened Section 18 of the Constitution by severely limiting the right to freedom of association. It viewed freedom of association as essential in that it made participatory politics meaningful and genuinely representative politics possible.[34] The Bill unjustifiably restricted the freedom of association and placed at risk individuals who joined an organisation in the interest of advancing their religious, social or political ideas, but who were not aware of, and did not support, any of its criminal and unlawful activities. Section 11 violated the right to silence. IDASA emphasised that the right to remain silent is a fundamental right as an accused person may be emotional, inarticulate, easily influenced or confused when arrested or detained. It was, therefore,

well-advised and reasonable that people faced with the accusation that they committed a terrorist act consider their situation carefully before making any disclosure. Failure to remain silent may lead to self-incrimination even if a person was innocent, purely because of the emotions evoked by being accused and questioned by police.[35] IDASA insisted that the Bill should strike a balance between combating the threat of national and international terrorism and the hard-won rights enshrined in the Constitution.[36]

IDASA supported the Bill. It called for specific amendments to the Bill so that it would not limit the right to free association. Likewise, the ISS supported the Bill in principle, but proposed an entirely new version to the Portfolio Committee on Safety and Security.

4.2. INSTITUTE OF SECURITY STUDIES

The ISS indicated that in the aftermath of 9/11 attacks in the US pressure grew on the South African government to counteract global terrorism. UN Security Council Resolution 1373 compelled member states to implement the resolution's operative provisions. This included the criminalisation of the financing of terrorism, the freezing of bank accounts, the introduction of effective border controls, and measures to fast-track the exchange of operational information.[37] The ISS recognised the threat of transnational and domestic terrorism to the internal stability of South Africa, the African continent and against foreign interests in the country, and called for a regional holistic approach to countering these threats.[38] It noted that the Bill honoured international obligations by adopting the necessary domestic legislation, but it cautioned against an overzealous approach that did not assure legal certainty.[39] It offered an extensively detailed critique of the Bill, all of which cannot be discussed in this chapter. Suffice to say that the ISS proposed a re-conceptualised "Counter-Terrorism Bill" with a definition of a terrorist act that included the detailed offences listed in UN counter-terrorism instruments. Its "Counter-Terrorism Bill" also had provisions on:

- standard bail applications in terms of the Criminal Procedure Act (1977);
- powers to stop and search vehicles and persons;

- investigative hearings, including detention or release on bail or warning by a judge, and the right to legal representation at any stage of the investigative proceedings;
- the intention by the Minister to list an organisation as a terrorist entity with a 30-day period within which the organisation could apply for a High Court interdict against the Minister;
- the duty to report to accountable institutions;
- mutual assistance and exchange of information on terrorist entities and terrorist acts;
- the preservation and forfeiture of property of terrorist entities in terms of the Prevention of Organised Crime Act (1998); and
- the refusal by the Minister of Finance of applications for registration and the revocation of the registration of charities linked to terrorist entities.[40]

Finally, the ISS called for a strategic balance between the perceived security threat and legislation. It warned against promulgating tough counter-terrorism legislation as it had the dual effect of driving terrorist groups and terrorists underground and encouraging them to find alternative methods of operating. Experiences in other countries have shown that extensive measures and a 'hard approach' to combating terrorism, foster rather than prevent insecurity, acts of political violence and terrorism.[41]

Interestingly, while IDASA and the ISS supported the Bill in principle, both cautioned parliament neither to diminish fundamental human rights enshrined in the Constitution nor to adopt an overtly aggressive strategy to combat terrorism. Both emphasised the need to maintain a careful balance between the actual nature of the security threat and the legislation to counter it. It does appear that by suggesting an extensive revision of the Bill, both signalled a considered disapproval of the underlying counter-terrorism policy suggested by the government. It must be emphasised that several of the key recommendations in the "Counter-Terrorism Bill" proposed by the ISS were ultimately incorporated in slightly revised form in the final Bill. These included the definition of a terrorist act, Convention offences and jurisdiction in respect of offences. In stark contrast to the above, the religious sector broadly rejected the Bill.

5. RELIGIOUS SECTOR

A large number of religious formations from the Christian and Muslim faiths reacted to the Bill. The most strident opposition to the Bill came from this sector and they were unanimous in their rejection of the Bill. A noticeable silence, however, was evident from the Jewish and Hindu/Tamil communities, particularly in view of the Israeli-Palestinian conflict and the communal and terror attacks in India and Sri Lanka.

5.1. CHRISTIAN GROUPS

Three Christian organisations made submissions to the Portfolio Committee on Safety and Security. These were the SACC, the SACBC and the Religious Society of Friends (Quakers). In this chapter, however, only the first two submissions are discussed.

5.1.1. SOUTH AFRICAN COUNCIL OF CHURCHES

The SACC expressed its concern with the way in which the US and its allies had overpowered the UN in the wake of threats to their national security, and the manner in which counter-terrorist measures had been abused by some nations. Its greatest concern, however, stemmed from the basic inadequacies in the Bill.[42] It believed that the definition of a terrorist act was vague and sinister to the extreme, and levelled the criticism that such vagueness would lead to the stereotyping of people of Arabic and/or Eastern descent, as was the case in the US. It saw investigative hearings as being similar to detention without trial and a violation of the constitutional rights of arrested, detained and accused persons.[43] It objected to the limitations on association imposed upon persons suspected of terrorist acts and possibly linked to a terrorist organisation.

Its harshest criticisms of the Bill were reserved for the possible breach of confidentiality between priest and lay person, and the limits this placed on freedom of association and on freedom of expression. The SACC declared that:

> while the limits on confidentiality do not apply between attorney and client, the religious profession to whom people in conflict with the law normally turn for

> spiritual guidance, is covered with the same limits on confidentiality. From a religious perspective, counselling a suspect would need to be prefaced with the warning that anything s/he shares with a religious counsellor/religious worker would be at stake while the political and legal determinants would seriously infringe upon the religious rights, if any, of the suspect.[44]

In recommending that parliament should amend existing legislation so as to incorporate terrorist acts simply as criminal acts, the SACC rejected the proposed legislation.

5.1.2. SOUTHERN AFRICAN CATHOLIC BISHOPS' CONFERENCE

The SACBC accepted that government had a duty to ensure the safety of all, but it questioned the reasons why extraordinary measures were needed to combat terrorism. It viewed acts of terror as pre-existing criminal acts with political motives and held the view that existing legislation could be amended to combat terrorism.[45] It argued that the definition of terrorist activity offended the requirements of legal certainty, since it was possible to conceive of any number of acts, which, while being unlawful and intimidated at least a segment of the public, would not ordinarily be considered as terrorist acts. Such a definition could stifle political dissent, protest, illegal strikes and civil disobedience campaigns. It objected to investigative hearings on the grounds that it forced whistle-blowing.[46] It rejected the Bill on the grounds that sections of it were unconstitutional, that it posed a threat to fundamental rights, and that it was unnecessary in view of existing legislation.[47]

Christian organisations adopted a principled stance of opposition to the government's counter-terrorism policy and rejected the Bill, arguing that existing legislation was adequate to deal with terrorism. They objected to the perceived limitations of human rights. They found the possibility that priests could be turned into informers morally repulsive and unconscionable. Their central objections relating to the definition of a terrorist act and investigative hearings were accommodated in the final version of the Bill. Muslim organisations displayed a similar opposition to the Bill, but for reasons that were very different.

5.2. MUSLIM GROUPS

Muslim opposition to the proposed anti-terror legislation had begun prior to the publication of the Bill. For instance, the MRN and the UUCSA had distributed a pamphlet in September 2000 objecting to the proposed legislation.[48] Likewise, Muslim radio stations such as Radio Islam, Radio 786 and Channel Islam International launched a concerted campaign to raise awareness in the community on the issue, and reported extensively on the passage of the Bill through parliament.[49] This partly explains the large number of Muslim representations - individual and organisational - made to the Portfolio Committee on Safety and Security. However, due to the limitations of space and the duplicitous nature of most submissions, only two are discussed below, namely, that of UUCSA and the Islamic Forum.

5.2.1. UNITED *ULAMA* COUNCIL OF SOUTH AFRICA

UUCSA stated that the Bill required a single response of unmitigated rejection. The proposed legislation would result in the erosion of civil liberties, arbitrary property seizures, imprisonment without trial and guilt by association. It further served to indict all liberation movements, particularly in Palestine, and was designed to subdue freedom of speech and freedom of association.[50] UUCSA argued that the enactment of the Bill would foster the seeds of unfair discrimination against the Muslim population. Muslims would be targeted and prejudiced by the security services. It stated that the definition of a terrorist act was extremely broad and at odds with the Constitution.

The provisions relating to searches invaded the right to privacy, and investigative hearings contravened the right to remain silent. UUCSA objected to the absence of an administrative procedure before an organisation was declared a terrorist organisation. It rejected the view that UN Security Council Resolution 1373 obliged member state to pass specific anti-terror legislation. UUCSA argued that Resolution 1373 simply urged member states to co-operate in such a manner that they had appropriate domestic legislation in place in order to prevent criminal acts, and refrained from using the term ‘terrorist act’, as it did not know what its definition entailed. UUCSA believed that there was no deficiency

in the country's criminal, legal or penal code to counter terrorism, and called on the government not to pass the Bill in its present or any other form.[51]

UUCSA noted that while the Bill did not state that it was directed at Muslims, it made reference to an international terrorist list, presumably released by the US Department of State. It pointed out that more than 80 per cent of the organisations in that list consisted of Muslim organisations. Therefore, it would be engagingly naïve of Muslims to think that the core target group of the Bill was some other group of persons.[52]

As the national co-ordinating structure of Muslim theologians in South Africa, UUCSA took an early lead in mobilising Muslim political opposition to what it called the 'Anti-Terror Bill'. In this instance, it was a rare display of collective leadership from Muslim theologians on a political policy matter. Historically, UUCSA has tended to shy away from explicitly political questions, leaving South African Muslims to make individual political choices. This departure from the norm was in part a response to international developments in the aftermath of the 9/11 terror attacks, which tended to place Muslims on a defensive in the global 'war on terror'.

5.2.2. ISLAMIC FORUM

The IF argued that the Bill needed to draw the distinction between a terrorist and a terrorist organisation on the one hand, and legitimate freedom fighters and liberation movements on the other. In its current form, the Bill would deem every person or organisation that participated in the liberation struggle in South Africa a terrorist. Hence, the adoption of a Bill that purported such a position was certainly against the founding values upon which the South African nation achieved its liberation. At the same time, the IF emphasised that South Africa's need for compliance with international instruments to counter terrorism must not compromise its principles and values.

The IF believed that the Bill conferred an unjust balance of power between the state and its organs, and the accused terrorist or terrorist organisation. It failed to balance the burden of the proof of innocence by the accused with a corresponding burden of proof of guilt by the

state.[53] It further called for an official policy on counter-terrorism that would reflect uniformity, and be applicable to all forms of terrorism, including state terrorism. It believed that existing security legislation should be amended by parliament to meet new needs.[54]

Muslim organisations generally saw the Bill through the prism of the global 'war on terror'. Much of their commentary focussed on international developments in the post-9/11 era, and expressed their fears that Muslims would be unfairly victimised if the new counter-terrorism policy was approved by government. Hence, on 11 November 2003, 18 Muslim organisations in South Africa petitioned President Mbeki to scrap the Bill, arguing that many countries that had passed anti-terrorism legislation, especially the US and Britain, had used it to trample on the civil liberties of innocent people, most of them Muslims. It urged the government not to take the country back to the "dark days of fear, suspicion and injustice".[55]

These views were not dissimilar to those articulated by their Christian counterparts. Although the views of religious organisations tended to be oppositional and polemical in nature, with very little in the way of recommendations, their objections with regard to the definition of terrorist activity, the possible limitation on the right to support liberation movements, investigative hearings and the declaration of an organisation as a terrorist organisation, did not go unnoticed. As already indicated above, significant amendments on these issues were introduced in the final Bill.

6. STATUTORY STRUCTURES

This section discusses submissions made by statutory organisations, namely, the SAHRC and the Law Society of the Cape of Good Hope. Although these are not organs of civil society, their representations are dealt with briefly so as to compare them with those of civil society. Interestingly, both statutory organs rejected the Bill and called for amending existing security legislation.

6.1. SOUTH AFRICAN HUMAN RIGHTS COMMISSION

The SAHRC stated that there was no need for the Bill as it did not appear that current laws were inadequate to respond to security threats to the country. It proposed that parliament should amend existing legislation to deal with loopholes in the law, so as to meet its international obligations. It cautioned against a hasty attempt to pass an omnibus anti-terror law.[56] The SAHRC noted that the Bill adopted a 'minimalist position' in defining terrorist acts. In doing so, it opened itself up to harsh criticism as the definition was vague, wide and offended against legal certainty. Consequently, it would not pass the test of constitutional scrutiny. It failed to include many of the common elements of a definition of terrorism such as the motivational factors (political, religious, socio-economic or other belief systems); the objectives of terrorism; the act or threat of violence; the emotional reaction of the victims; and the social effects that follow.[57]

The SAHRC further believed that the Bill impinged on the right set out in Section 35 (1) (f) of the Bill of Rights which states that everyone who is arrested has the right to be released from detention if the interests of justice permit, subject to reasonable conditions.[58] The proposed powers of police to stop and search vehicles and persons could potentially be abused and used to target groups within society, including vulnerable groups and minorities. It could also impact negatively on the right to privacy. The provisions on investigative hearings effectively constituted a waver on the pre-trial right to silence, non-incrimination and presumption of innocence that are fundamental rights protected in the Constitution.[59] The sections empowering a Minister to declare an organisation a terrorist organisation could potentially compromise the right to freedom of association and of expression. It had unfairly placed an onus on an organisation to prove that it was not a terrorist entity. Finally, it strongly recommended that any proposed regulations issued by the Minister be placed before parliament to exercise its oversight function.[60]

The SAHRC took a surprisingly strong view against the Bill. It came out in full defence of fundamental human rights and civil and political liberties enshrined in the Constitution. The fact that it rejected the Bill and called for limited amendments to existing security

legislation suggests that as a statutory organ, it was not fully consulted by the drafters of the Bill.

6.2. THE LAW SOCIETY OF THE CAPE OF GOOD HOPE

The Law Society of the Cape of Good Hope stated that its greatest concern was the wide definition of a terrorist act. It noted that the European Union was finding its legislation difficult to implement because of its similarly broad definition of a terrorist act. The Bill undermined South Africa's commitment to the Bill of Rights. It would also shift the focus of any investigation into terrorist activities from the commission of an offence to a mere suspicion, which was open to abuse.[61] It levelled the accusation that while parliament was overtly responding to international pressure, it was potentially turning members of communities against each other. It called upon parliament to take special relationships into account and to protect attorney-client, priest-parishioner and community relationships.[62] It recommended that parliament should avoid designing catch-all legislation to deal with every conceivable act of terrorism and should rather consolidate existing legislation. It held the view that Bill was unconstitutional. Therefore, it had to be withdrawn.[63] Finally, it cautioned as an ostensible safeguard that the judiciary should not be involved in investigative hearings. "In this respect, history will show that the involvement of the judiciary in the investigation of terrorism leads to the degradation of the judiciary and a low image of it."[64]

It is noteworthy that more independent statutory organs of the government, such as the SAHRC and the Law Society of the Cape of Good Hope, adopted an approach that rejected the very idea of new counter-terrorism legislation. Instead, they both argued for the consolidation of existing security legislation. However, the strong warning sounded by the Law Society of the Cape of Good Hope against the use of the judiciary in investigative hearings ultimately led to the removal of that entire section in the final Bill.

7. CONCLUSION

The proposed counter-terrorism policy of the South African government in the form of the Anti-Terrorism Bill (12B-2003) was highly controversial and evoked strong negative

reactions from a variety of organs of civil society. Public opposition to its provisions were certainly extensive and widespread. Supporters of the Bill were few and far between, while the 'rejectionists' held sway at the parliamentary public hearings. From the range of groups that participated in the process, human rights groups, media organisations and religious formations, including important law societies and statutory organisations, expressed outright rejection of the proposed policy. Instead, they called upon government not to be overly hasty in promulgating new counter-terrorism legislation, but to amend existing legislation to ensure its greater efficacy domestically, and to meet South Africa's international obligations. Even those groups that supported the principle of an omnibus counter-terrorism law expressed disquiet about a significant number of sections of the Bill, and proposed amendments. On the one hand, this revealed the complexity of the task at hand. On the other, it exposed the oversight of the drafters of the Bill, who failed to adequately take into account the research of the SALC and the depth of public opposition to earlier versions of the Bill.

There was almost 'universal' rejection of the crux of the Bill, namely, the definition of terrorist activity. The Bill threatened a person's right to privacy and free association. It potentially imposed unjustifiable limitations to the freedom of expression and to the freedom of the media. In this respect it jeopardised the professional integrity of journalists. It tended to unfairly curb the democratic rights of an accused person. It raised profound ethical questions for religious leaders and lay persons about their roles in combating the threat of domestic and international terrorism in a democratic society. It proposed an awkward administrative procedure when the Minister intended to declare an organisation a terrorist organisation. The gravest danger, though, was that it undermined several fundamental human rights.

It is no wonder then that the Portfolio Committee on Safety and Security introduced extensive amendments to the Bill. These related to the Preamble, which included elements of the Algiers Convention (1999); the definition of a terrorist act; the detailed listing of Convention offences; the deletion of the power of the Minister to declare an organisation a terrorist organisation; measures to combat the financing of terrorism; the provision for civil and criminal asset forfeiture and the freezing of property related to terrorist activities; and

provision of parliamentary supervision in respect of any notice issued by the President, pursuant to resolutions of the Security Council of the UN. These amendments, including COSATU's recommendations discussed earlier, were included in the Protection of Constitutional Democracy against Terrorist and Related Activities Bill (12F-2003). The entire process points to the vibrancy of South African parliamentary democracy, wherein organs of civil society contributed directly and meaningfully to the shape and design of a highly contentious and emotive matter, namely, terrorism and public policy to combat it. The next chapter provides a summary of the dissertation, an evaluation of the hypothesis, and concluding remarks on the issue of public policy on counter-terrorism.

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CHAPTER 5 - EVALUATION

1. SUMMARY

Globally, terrorism as a concept is highly problematic. It is politically elusive and socially contentious. There exists no agreement either internationally or in many cases even domestically, on the definition of the term. Nevertheless, terrorism can be described as a specific form of political struggle involving the use of indiscriminate and arbitrary violence. It targets civilians, public and private property, public officials and business leaders and natural resources. It is intended to cause death or serious bodily harm to civilians and non-combatants, with the purpose of intimidating a population, and compelling a government or international institution to do or abstain from doing any act. It is inspired by political and ideological, religious and cultural, and racial and ethnic conflicts in societies, or by criminal syndicates who employ terror for ill-gotten material gains.

Historically and presently, acts of terrorism have emanated from individuals and groups across the ideological spectrum, including some states, with actors seen either as freedom fighters or as reprehensible terrorists. In the 20th century, terrorism as a specific tactic was largely associated with insurgencies and revolutionary warfare linked to nationalist struggles or ethnic/secessionist struggles within national boundaries.[1] In the 21st century, however, terrorism is to a great extent religiously motivated and is increasingly transnational in scope. Present-day terrorists aim at mass casualties with indiscriminate selection of targets.[2]

South Africa has not been immune from domestic and international terrorism. Revolutionary warfare and terrorism had been a feature of its political history since 1961 until the suspension in the early 1990s of the armed struggle by liberation movements. From 1996 to 2000, there was a wave of urban terror in the Western Cape, allegedly conducted by PAGAD as it waged a violent campaign against drugs and criminal gangs. Urban terror was eventually brought to a halt after the arrests and prosecution of a number of PAGAD members. Shortly thereafter, *Die Boeremag* launched an armed campaign against the government. Its campaign proved to be short-lived as the security services quickly arrested and prosecuted the alleged perpetrators of the attacks. This was followed by the possibility

of an international terror network operating inside South Africa, which resulted in the deportation in April 2004 of seven foreigners, who allegedly had been connected to al-Qaeda. In July 2004, two South Africans were arrested in Pakistan, allegedly in the company of a wanted al-Qaeda operative.

Since the 1960s, international and regional organisations under the auspices of the UN, and more recently under the AU, have adopted numerous resolutions and Conventions calling upon member states to adopt specific counter-terrorism measures. The 9/11 terror attacks against the US had dramatically highlighted the international character of the problem. It prompted the UN to take urgent measures to combat the financing of terrorism; created formal obligations on all UN member states to counter terrorism in a more co-ordinated manner; established a Counter-Terrorism Committee, and later a Counter-Terrorism Executive Directorate (CTED), to monitor the implementation of UN Resolution 1373. The CTED specifically aims to strengthen collaboration among governments and to broker technical assistance for those member states that lack the capacity to meet their international obligations in combating terrorism.[3]

The post-1994 South African government is a participant in the global efforts against terrorism. In adopting a new policy on terrorism, it condemned all forms of terrorism. It supported lawful measures to prevent acts of terror and to bring to justice those who are involved in terrorism. In countering terrorism, it committed itself to upholding the rule of law; never to resort to any form of indiscriminate repression against civilians; defending and upholding the freedom and security of all its citizens; and acknowledging and respecting its international obligations in combating terrorism.

Practically, it adopted a three-fold strategy in response to domestic terrorism and the possible threat of international terrorism. Firstly, it drew on elements of security legislation of the previous era to combat acts of domestic terrorism. Secondly, it undertook a review of security legislation and promulgated a comprehensive counter-terrorism law entitled the Protection of Constitutional Democracy against Terrorist and Related Activities Act (No. 33 of 2004). Finally, it took active steps to ratify or to accede to Conventions relating to the combating of international terrorism.

The review of security legislation had begun in a contradictory fashion under the auspices of the SAPS. In 1998, it was left to the SALC to research the matter and to submit policy proposals to government. The SALC solicited public input by releasing the draft Anti-Terrorism Bill together with its Discussion Paper 92. It advocated the ratification of and accession to the respective international instruments on terrorism and the promulgation of specific legislation on terrorism. It called for broadening the normal jurisdiction of the courts to deal with all forms of terrorism, including those committed outside South Africa. It also proposed the incorporation of measures to suppress the financing of terrorism both domestically and internationally. However, the Anti-Terrorism Bill (12B-2003) tabled in parliament by the Minister of Safety and Security confounded both parliamentarians and civil society. The brevity and wide scope of the definition of terrorist activity confused rather than legally clarified the essential purpose of the Bill. The provision empowering the Minister to ban organisations brought back memories of the previous era. In the end, the parliamentary committees were left with the unenviable task of substantially amending the Bill.

The passage of the Bill through parliament was met with stiff opposition from organs of civil society. Opponents of the Bill charged that it infringed on human rights, restricted civil liberties and tended to be repressive in character. They agreed unanimously that the definition of terrorist activity was flawed. The parliamentary submissions could be classified into three broad categories: namely, the ‘rejectionists’, the ‘reservationists’ and the ‘supporters’, with the vast majority of groups rejecting the Bill. Nonetheless, organs of civil society that had made written and oral presentations to the Portfolio Committee on Safety and Security had offered valuable recommendations, many of which were ultimately incorporated in the final version of the Bill.

The Protection of Constitutional Democracy against Terrorist and Related Activities Bill (12F-2003) was finally enacted into law in 2005. It entrenched the principle that terrorist activity committed for the purpose of advancing political, religious, ideological or philosophical goals is unacceptable. It offered a detailed definition of terrorist activities; recognised that just armed struggles for national self-determination and freedom from oppression and occupation cannot be equated to terrorism; proposed stiff penalties on

conviction of terrorist and related offences; and extended the court's jurisdiction beyond South Africa's borders.

2. TESTING OF PROPOSITIONS

The introduction had indicated that the counter-terrorism policy approved by the South African government between 1994 and 2004 needed to be tested against three propositions. The first proposition in the study is that the South African government's counter-terrorism policy after 1994 was designed to outlaw terrorist activities, rather than also viewing terrorism as a socio-political phenomenon. It is evidently clear from the research that the post-1994 South African government's official policy on terrorism is aimed at outlawing carefully defined terrorist activities. It does not subscribe to a policy that is sympathetic to terrorist acts based on political, ideological, racial, ethnic, religious and cultural motivations. Both the Anti-Terrorism Bill (12B-2003) and the Protection of Constitutional Democracy against Terrorist and Related Activities Act (No.33 of 2004) scrupulously avoided any reference to terrorism as a concept rooted in specific socio-political contexts. Instead, both specifically defined terrorist activities; the former rather problematically, while the latter offered a detailed definition of the form and nature of such activities that were to be criminalised. The only exception, however, is the recognition in the latter that acts committed in accordance with international law and international humanitarian law during a struggle waged by peoples, including any action during armed struggle in the furtherance of their legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces, will not be construed as terrorist acts. This means that any armed struggle for national liberation would have to be conducted in compliance with international law and international humanitarian law in order for such attacks not to be construed as acts of terrorism.[4] Otherwise, the Act specifically defined terrorist activity as "(a) any act committed in or outside the Republic, which (i) involves the systematic, repeated or arbitrary use of violence by any means or method".[5] Furthermore, it criminalised specific acts such as exposing the public and the environment to any toxic chemical, biological or radioactive materials; the destruction of or serious damage to public and private property, natural resources or cultural heritage; the damage and destruction of public infrastructure; and the destabilisation of an

economic system either inside or outside South Africa, including serious interference with banking or financial systems.[6] It included specific offences relating to terrorism such as terrorist bombings, the hijacking, destroying or endangering of fixed platforms, the taking as hostage, kidnapping and murdering of internationally protected persons, the hijacking of an aircraft and the hijacking of a ship or endangering the safety of maritime navigation, and required proof of motive and intent. Quite clearly, this minutely detailed definition of terrorist activity in the legislation is designed to outlaw very specific terrorist acts, rather than terrorism as a sociological phenomenon.

The second proposition in the study is that these initiatives are the result of both international as well as domestic requirements and pressures. The research has shown that the impetus for the adoption of a new policy on counter terrorism by the South African government after 1994 was partially motivated by domestic and international pressures. This was the case as the stated aim of the newly-elected government was to rescind the repressive security legislation of the previous government. Hence, shortly after the advent of democracy, the government had announced its intention to review its security legislation and appointed the SALC to undertake the task. However, the unanticipated phenomenon of urban terrorism in the Western Cape, coupled with terror attacks allegedly launched by the *Boeremag*, injected a sense of urgency on the part of the new government to finalise new security legislation. The wave of urban terror had generated an understandable sense of insecurity and fear in the South African public, with growing pressures on the government from political parties and organs of civil society, to take effective counter measures to defeat the terrorists. Similarly, the unforeseen 9/11 attacks on the US, and the resultant steps taken by the international community to counter international and transnational terrorism, added new obligations on the South African government to promulgate an omnibus law on terrorism whose jurisdiction extended beyond the borders of the country, and which included measures to combat the financing of terrorism.[7] Therefore, the new policy initiatives on countering terrorism can in part be attributed to domestic and international pressures; the other stemmed from the democratic values of the liberation movement, which itself was a victim of the repressive security laws of the previous regime.

The third proposition in the study is that these counter-terrorist measures are compatible with South Africa's rights-based, constitutional order. This study has shown that the South African government displayed a degree of ambivalence to its commitment to a rights-based, constitutional order when formulating counter-terrorism legislation. Its strong commitment to the Bill of Rights enshrined in the Constitution was gradually dissipated as it was confronted by the wave of urban terror that swept through the Western Cape and other parts of the country. Public statements by the former Minister of Safety and Security, Steve Tshwete, for example, suggested the need to tamper with the Constitution to fight terrorism, and the various drafts of the Anti-Terrorism Bill indicated a willingness to dilute the government's resolute commitment to the Constitution and its Bill of Rights.[8] However, the public participatory processes initiated by parliament provoked an outcry from human rights and other organs of civil society over the proposed limitation to fundamental rights of citizens encapsulated in the Anti-Terrorism Bill (12B-2003). The pressures exerted by organs of civil society ensured that the Protection of Constitutional Democracy against Terrorist and Related Activities Act (2004) is compatible with a rights-based constitutional order. However, the constitutionality of this Act might still be tested in the Constitutional Court in future.

In short then, the proposition that the South African government's counter-terrorism policy after 1994 was designed to outlaw terrorist activities, rather than also viewing terrorism as a socio-political phenomenon, is affirmed by this study; that this initiative was the result of both international as well as domestic requirements and pressures is partially borne out by the study; and that these counter-terrorist measures are compatible with its rights-based, constitutional order is true to the extent that the government succumbed to public pressures to ensure that this was the case.

3. CONCLUSION

The formulation of South Africa's new counter-terrorism policy in the post-1994 era has signposted a fundamental tension in democratic societies between respect for human rights and civil liberties on the one hand, and the effective prevention and combating of terrorism on the other. Any hasty and ill-considered formulation and application of counter-terror

policies and measures tend to erode democratic values in society and infringe on civil and political liberties. The 21st century, faced as it is with the ever present threat of transnational terrorism, has seen a worrisome tendency that forces a society to make a singular choice between advancing human rights and countering terrorism. This implies that the pursuit of human and national security in some societies now supersede human rights concerns and values. It is necessary that this false dichotomy be rejected in South Africa, precisely because of its authoritarian past and the infant stage of the development of its democracy. This also does not mean that stringent adherence to human rights values should be ignored in mature democracies. Countering terrorism and defending human rights and civil liberties must be seen as two sides of the same coin in any democratic society, particularly in South Africa, as this approach considerably reduces the risk of terrorism and minimises the potential support bases of terror groups.

Secondly, in countering terrorism there must be a scrupulous respect for the rule of law by the democratic government itself. Wilful disregard for the rule of law by a state only paves the way for civilians to disregard the law. It also encourages a terrorist organisation to claim that it is acting in the interest of the populace or a section of the population that is either a victim of the breach of law or aggrieved with the policies of the government. The deportations of Khalfan Khamis Mohamed, Suleiman Damra and six others and Khalid Mahmood Rashid by South African security officials, have raised concerns among human rights activists and religious leaders. The case of Mohamed drew a sharp rebuke from the Constitutional Court, while the alleged abduction of Rashid has created serious disquiet in the South African Muslim community. These deportations were ostensibly effected due to the persons involved violating the Aliens Control Act, but they are increasingly being perceived as disguised extraditions of terror suspects. It is essential that government officials in particular respect and obey the law when tracking terror suspects and countering terrorist threats. This will inspire confidence within the civilian population, in the security services, and in the democratic system as a whole.

Thirdly, any government strategy to counter terrorism must have as its principal arm a political strategy to minimise support among the population for the actions and deeds of a terrorist organisation. This implies that the fight against terrorism cannot be reduced only to

legislative measures, good intelligence and effective law enforcement. A democratic government must actively strive to wean away political support from the cause of a terrorist group. This can be achieved in two ways. Firstly, it must uphold democratic values and practices and strive to address the underlying grievances, if any, of the population, particularly of disaffected ethnic minorities and religious communities. Secondly, it must guard against either over-reacting or under-reacting to a potential terrorist threat or an actual terror attack. On the one hand, an over-reaction might antagonise the civilian population or a segment of it, thereby increasing sympathy for the terror group. It might even drive the terror organisation underground rendering it more difficult to counter it over time. On the other hand, an under-reaction might exacerbate feelings of fear and insecurity in the civilian population, which could result in diminished public confidence in the ability of the democratic order to counter the security threat effectively. Hence, in reacting to terrorism or the threat of it, a careful balance needs to be struck aimed at ensuring popular support for the actions of the democratic government.

Finally, as terrorism is an international problem, the South African government must co-operate with other states and international and regional security institutions and communities to combat terrorism. Its principal focus, however, should be on the African continent, which is the hallmark of its foreign policy. It should share its technological, training and intelligence capabilities with foreign partners, as well as learn from their experiences in countering terrorism. However, in its drive to forge bilateral and multilateral partnerships to counter terrorism, it should remain resolute in its commitment to defending fundamental human rights, protecting civil liberties and respecting the rule of law. At the same time, it should develop a superb intelligence capability based on accurate, timely and reliable information on its targets, so that it could act decisively to neutralise a terror threat or simply refuse to act if the intelligence, either from its own operatives or from its foreign partners, is not credible.

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SUMMARY

TOPIC: COUNTER-TERRORISM POLICY IN SOUTH AFRICA: 1994-2004

by

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This study focuses on South African counter-terrorism policy and legislation in the post-1994 period. It investigates the objectives of, and underlying reasons for, the new counter-terror policy of the South African government as reflected in the Anti-Terrorism Bill (12B-2003) and the Protection of Constitutional Democracy against Terrorist and Related Activities Act (No. 33 of 2004). It assesses whether or not the South African counter-terrorism legislation is an appropriate policy response by the South African government to the emerging national security threats arising from terrorism between 1994 and 2004. Finally, it discusses public responses to the new policy initiatives on counter-terrorism. It analyses the extent to which these policy proposals are consistent with the democratic values and the human rights culture enshrined in the South African Constitution.

The study uses primary and secondary sources, including international Conventions and Protocols acceded to by the South African government and the reports of the South African Law Commission. Submissions by organisations of civil society on the Anti-Terrorism Bill (12B-2003) are compared and analysed.

The dissertation is based on the following propositions:

- the recent South African counter-terrorist initiatives are designed to outlaw terrorist activities, rather than also viewing terrorism as a socio-political phenomenon;
- these initiatives are the result of both international as well as domestic requirements and pressures; and
- that these counter-terrorist measures are compatible with its rights-based, constitutional order.

OPSOMMING

Onderwerp: Teen-Terreur Beleid in Suid-Afrika: 1994-2004

deur

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Hierdie studie fokus op die Suid-Afrikaanse teen-terreur beleid en wetgewing in die tydperk na 1994. Dit ondersoek die doelwitte van, en onderliggende redes vir die nuwe teen-terreur beleid van die Suid-Afrikaanse regering wat in die Teen-Terreur Wetsontwerp (12B-2003) weerspiëel word en die Beskerming van Grondwetlike Demokrasie Teen Terrorisme en Verwante Aktiwiteite Wet (No. 33 van 2004). Dit bepaal of die Suid-Afrikaanse teen-terreur wetgewing ń toepaslike reaksie is op die bedreiging van terrorisme in die tydperk 1994 tot 2004. Ten slotte bespreek dit openbare reaksie teenoor die nuwe beleid oor teen-terreur. Dit ontleed die mate waarin hierdie wetgewing versoenbaar is met die demokratiese beginsels en menseregte kultuur soos wat bepaal word in die Suid-Afrikaanse Grondwet.

Hierdie studie gebruik primêre en sekondêre bronne, insluitend internasionale Konvensies en Protokolle waartoe die Suid-Afrikaanse regering toegetree het, en die verslae van die Suid-Afrikaanse Regskommissie. Voorleggings deur organisasies uit die burgerlike samelewing oor die Teen-Terreur Wetsontwerp (12B-2003) word vergelyk en ontleed.

Dié verhandeling is gebaseer op die volgende proposisies:

- die onlangse Suid-Afrikaanse teen-terreur inisiatiewe is daarop gemik om terrorisme en verwante aktiwiteite te bekamp, eerder as om terrorisme as ń sosio-politieke verskynsel te beskou;

- hierdie inisiatiewe is die resultaat van internasionale en binnelandse omstandighede en druk; en
- dat hierdie teen-terreur maatreëls versoenbaar is met basiese menseregte en die grondwetlike bedeling.

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