

DRAFTING LEGISLATION AGAINST TERRORISM AND VIOLENT EXTREMISM

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AND

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BACKGROUND

- ▶ The drafting of counter-terrorism legislation is multi-disciplinary in nature, involving International Law obligations reflected in international instruments as well as binding Chapter VII Resolutions by the United Nations Security Council in terms of the UN Charter.
- ▶ As a result of the evolving nature of the terrorist threat, 19 international instruments were adopted dealing with civil aviation; protection of international staff; maritime navigation and platforms; explosive materials (plastic explosives); terrorist bombings; financing of terrorism; and nuclear terrorism/ control of nuclear material. The adoption of a universal international instrument on terrorism has remained only an ideal in view of differences on a universal definition of terrorism.
- ▶ In addition, laws related to control of firearms, explosives, cyber crime, including cyber terrorism, the control of the trade in conventional arms, witness protection and immigration are of particular importance to effectively combat terrorism.
- ▶ The result is that effective counter-terrorism legislation needs to address the threat on a number of levels involving a number of institutions/departments.

BACKGROUND

- ▶ There are useful Model Laws available to assist in the drafting of CT legislation, such as the UN Model Law, the AU Model Law and the SARPCCO/SADC Model Law on Counter-terrorism and these can be supplemented by a proper comparative study of CT Laws, and best practices, best suited for the legal system of the country involved.
- ▶ The legislation should fit in with the institutions, the law enforcement instruments and capacity in a country and where possible the country needs to be capacitated to effectively combat terrorism- especially border control, intelligence capabilities, witness protection.
- ▶ Once adopted, the implementation and application of the CT legislation as well as developments in respect jurisprudence and international obligations should be closely monitored in order to keep the legislation updated.
- ▶ Counter-terrorism legislation should not be aimed at or abused to stifle political dissent which is of a democratic and non-violent nature.
- ▶ In this presentation the experience to draft Counter-terrorism legislation in South Africa will be shared.

BACKGROUND

- ▶ South Africa, during the period preceding democracy has a tragic history of the abuse of counter-terrorism legislation in order to suppress political opinions directed at the Apartheid government as well as generally the struggle against Apartheid.
- ▶ Over decades wide-ranging legislative measures as well as administrative measures through such legislation were used which affected: Organisations- by banning and criminal offences relating to participating in activities of such banned organisations and the financing of affected organisations; Persons- by means of detention without trial and detention for interrogation; as well as restrictions of movement by administrative order; and the prohibition of Publications and Gatherings. For the period between 1984 and 1995, a state of emergency and declared “unrest areas” (where emergency-type regulations were applicable)
- ▶ These laws were also used in the absence of a constitutional democracy and where the courts were subject to the legislator.

SA's TRANSFORMATION TO DEMOCRACY

- ▶ During the transformation and democratisation process, the review of “**security legislation**” was regarded as important, in terms of process as well as contents.
- ▶ A project was registered with the South African Law Reform Commission in 1996, focusing on the **Internal Security Act, 1982**. Through the **Security Matters Rationalisation Act, 1996**, 36 security laws applicable in the erstwhile Republic and TBVC States were rationalised to provide for a single set of legislation applicable in the whole territory of the new South Africa, but still subject to the review.
- ▶ The Law Reform Commission Project, chaired by Judge Yvonne Mokgoro of the Constitutional Court performed an in-depth process of comparative legal research. The focus was on best practices world-wide, especially in countries with constitutions similar to that of South Africa such as Canada. Cognisance was also taken of the spate of legislative responses world-wide to the September 11, 2001 events. The Law Reform Commission published an issue paper, with a draft Bill for public comments. A final report was approved and handed to the Minister of Justice in 2002.
- ▶ The Organisation of African Unity (now African Union) Convention on the Prevention and Combating of Terrorism, was also taken into account in the drafting of the recommendations of the SA Law Reform Commission.
- ▶ The proposals of the Law Reform Commission, after approval by Cabinet were introduced in Parliament. The Parliamentary process again involved public consultations and public hearings. The Act (33 of 2004) was eventually adopted in 2004 and implemented on 20 May 2005. The Act is now aimed at international terrorism, taking into account the international obligations referred to above. Save for the offences established pursuant to the international instruments, the Act in a schedule, amended laws relating to extradition, mutual legal assistance, financial intelligence, criminal procedure, non-proliferation of weapons of mass destruction and minimum sentencing.

MONITORING PROCESS

- ▶ The implementation and application of the Protection of Constitutional Democracy against Terrorist and Related Activities Act (referred to as POCDATARA) had been closely monitored since adoption as well as developments regarding international law obligations and changes to the nature of the threat.
- ▶ A number of prosecutions were performed in terms of the Act. The Boeremag trial was in terms of charges under the Internal Security Act, 1982, possible as a result of transitional provisions in POCDATARA. George Kiratzidis and Marthinus Vorster were sentenced respectively to 12 years' and five years' imprisonment as a result of a conviction for conspiracy to commit terrorist activities committed during 2010. There are also ongoing matter such as the prosecution of the Thulsie twins.
- ▶ Henry Okah, was the leader of the Movement for the Emancipation of the Niger Delta (MEND), in Nigeria and a Nigerian citizen who was a permanent resident of South Africa, was charged with 13 counts relating to terrorism under POCDATARA. Six counts arose from a car bombing in Warri, Nigeria on 15 March 2010 and six months later in Abuja, Nigeria on 1 October 2010. One person was killed in the Warri bombings, and at least eight people were killed in the Abuja bombings. Injuries and damage in both bombings were extensive.
- ▶ Okah, despite a partly successful appeal to the Supreme Court of Appeal, appealed further to the Constitutional Court on the basis that he was exempted from the Act as a result of the exclusion of "legitimate freedom struggles"; that there were special entries which were not made on the court record, (not being informed of his right to consular assistance), the presence of a Nigerian Prosecutor at the trial and the fact that South Africa did not make a request regarding his extradition to Nigeria. The SCA found that the Act only provided for a limited extraterritorial jurisdiction (basically only in respect of the financing provisions).

MONITORING PROCESS (OKAH)

- ▶ The ConCourt concluded that the SCA's narrow interpretation creates a series of absurdities, namely to grant courts wide jurisdiction over terrorism-financing crimes, but very narrow jurisdiction over the crime of terrorism itself in which it would be possible to "prosecute the banker, but not the bomber" AND a court would have no jurisdiction to try someone for harbouring a terrorist, but it would have jurisdiction to try someone for harbouring a terrorist-financier.
- ▶ The ConCourt concluded such interpretation could not be correct.; also that the SCA' interpretation riddles the definition of "specified offence" itself with surplusage and concludes that the definition of "specified offence" is closely integrated with the offence of terrorism that lies at the heart of the entire legislative scheme.
- ▶ Section 2 provides that "any person who engages in a terrorist activity is guilty of the offence of terrorism". Terrorist activity is, in turn, widely defined in section 1. In compacted form, it includes any act committed "in or outside the Republic" that creates specified deleterious effects; is intended to cause certain effects; and is committed "for the purpose of the advancement of an individual or collective political, religious, ideological or philosophical motive, objective, cause or undertaking".

MONITORING PROCESS (OKAH)

- ▶ As to the interpretation of the exclusion clause, the ConCourt found that it is required that (1) the act must have taken place within the context of a “struggle waged by peoples”; (2) that struggle must be ‘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’; and (3) the act must be taken ‘in accordance with the principles of international law, especially international humanitarian law’.
- ▶ The ConCourt found that the evidential material relating to the first two criteria is wholly insufficient to make a determination in favour of Mr Okah, AND the evidential material that is available indicates that the third criterion has not been met. Therefore, section 1(4) does not apply, and there is no for exemption from prosecution... even if the bombings had a limited aim or design, as contended, they would remain grossly indiscriminate and, thus, in breach of international humanitarian law.
- ▶ The acts in issue plainly violated international humanitarian law and, therefore, Okah forfeited protection under the statute’s exemption under section 1(4).

MONITORING PROCESS UNITED NATIONS

- ▶ Upon the invitation of the RSA Government, the Special Rapporteur of the United Nations on the Promotion of Human Rights and Freedoms while Countering Terrorism (at the time Prof Martin Scheinin), visited South Africa from 16 to 27 April 2007.
- ▶ The Special Rapporteur commended South Africa on the adoption of the Protection of the Constitutional Democracy against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004). He recommended that the Government closely monitor the implementation of the Act and be prepared to amend it should its interpretation suggest a threat to human rights.
- ▶ The United Nations Security Council Counter-Terrorism Executive Directorate (UNCTED) visited South Africa from 2 – 9 June 2009.
- ▶ This visit was made in pursuance of the mandate of the CTED in terms of Resolution 1535(2004) of the Security Council to conduct visits to member states of the UN on behalf of the Counter-Terrorism Committee of the Security Council, in order to monitor the implementation of its resolution 1373 (2001).
- ▶ The CTED praised the adoption of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 and mentioned that the Act, together with supporting legislation, could serve as a model for other jurisdictions.

LISTING OF PERSONS AND ENTITIES

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- ▶ The UN 1267 Committee may list a person suspected of involvement in terrorist activities. The purpose is to deny a person listed by the 1267 Committee travel facilities, banking facilities and access to arms.
- ▶ In the Nada and Kadi cases in the European Court on Human Rights (ECHR) and the Court of Justice of the European Union (CJEU) it is clear that there is a conflict between the human rights obligations of States or regional bodies and the international law obligations. The 1267/1999 Committee does not follow a judicial process to list a person and the person does not have a sufficient recourse (not even the Ombudsperson or delisting process of the AQ Committee).
- ▶ The decision to list or delist remains a political one. In the Kadi matter the court undertook an independent process to apply the right to be heard and found the reasons provided by the Committee as inadequate for listing. “ The overriding message from the CJEU and the ECtHR is that extensive reform is required in relation to all the de-listing procedures of those sanctions committees that engage in direct listing and de-listing.”
- ▶ There is no jurisprudence to assist in regard to the review of the implementation of listings, by South Africa, but it is clear that a balance might need to be found between the effective implementation of a United Nations Security Council Resolution under Chapter VII of the UN Charter and the State’s obligation to protect human rights.

CONCLUSIONS

- ▶ The drafting of effective CT legislation requires a multi-disciplinary “Whole of Government” approach involving all Departments involved in intelligence; law enforcement, immigration, control over nuclear material and control of conventional arms, firearms, ammunition and explosives. Save for the “standard CT offences” to be established, it must be ensured that related legislation are amended, not necessarily in the same Act.
- ▶ The existing Model Laws can be useful as “check lists”.
- ▶ In the case of the review of existing CT legislation it needs to be updated in terms of the reference in the legislation to international instruments to which countries have become a Party to since the initial adoption of the legislation.
- ▶ It must also be ensured that the legislation is compliant with all the obligations in the latest international instruments (see changed tactics in respect of terrorist attacks, Foreign Terrorist Fighters and the promotion and propagating violence).
- ▶ Streamline process for implementation listings by UNSC. Ensure there is legislation to implement all UNSC sanctions, including Res. 1267/1999 listings. Take into account the developments in the EU relating to listings in review of legislation.
- ▶ Ensure cyber terrorism is covered in the legislation.
- ▶ Address any shortcomings related to sentencing in respect of the financing of terrorism if compared to money-laundering.

CONCLUSIONS

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- ▶ Prosecution is already a reactive step and the ideal is to prosecute persons when they are still preparing for a terrorist attack or conspiring to perform it. Legislation must, however, provide for the whole spectrum from conspiring, assisting to execution.
- ▶ A comprehensive counter-terrorism strategy which does not provide for a proper legislative framework to combat terrorism in all its forms, inclusive of the financing of terrorism, would be wanting. Part of the legislative framework would be to ensure that the relevant country is a party to the 19 Counter-Terrorism International Instruments.
- ▶ As a result of the nature of terrorism, the key to the prevention of terrorism and criminal investigation thereof, is adequate intelligence.
- ▶ Preventive measures such as improved border control, the reporting of suspicious transactions and a proper system to follow-up and verify such transactions, is essential. (A Financial Intelligence Centre is indispensable).
- ▶ Expertise must also be built within the criminal investigative agencies and prosecution to deal with terrorism investigations and prosecutions. In South Africa investigations are dealt with by the Directorate for Priority Crime Investigation (DPCI) and prosecutions by the Priority Crime Litigation Unit (PCLU). In terms of balance, CT legislation need to address terrorism effectively whilst ensuring that human rights are still respected. Both these elements are monitored by the UN.

Thank you

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