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Drafting legislation against terrorism and violent extremism

In terms of the international law, terrorism is a crime, but effectively combating it, is dependent on states becoming party to the international instruments and incorporating the required crimes in their national laws. States are obliged to enact the crimes provided for in the 19 international instruments to combat terrorism and the financing thereof. Such legal framework is also required to implement the resolutions of the United Nations Security Council to combat terrorism. The drafting of counter-terrorism legislation therefore requires a multi-disciplinary "whole of government" approach involving intelligence; law enforcement; immigration; control over nuclear material, conventional arms; firearms, ammunition and explosives.

Model laws, such as the United Nations Model Law, the African Union Model Law and the SARPCCO/SADC Model Law on counter-terrorism are useful.

Numerous states have not yet become state parties to all the international instruments aimed at countering terrorism and have not established the required legal framework to combat terrorism as a crime.

The experience of South Africa in drafting counter-terrorism is useful to be shared. South Africa, during the period preceding democracy, has a tragic history of the abuse of counter-terrorism legislation in order to suppress the struggle against Apartheid. The Internal Security Act, 1982, and emergency measures, later called "unrest regulations" were abused in the absence of a constitutional democracy and where the courts were subject to the legislator.

During the transformation process a project was registered with the South African Law Reform Commission in 1996, focusing on reviewing the Internal Security Act, 1982. The Law Reform Commission Project was chaired by Judge Yvonne Mokgoro of the Constitutional Court. During the project, in-depth

comparative legal research and research into the international law and obligations was undertaken. The proposals of the Law Reform Commission were introduced in Parliament, which again used public consultations and public hearings to finalise the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 (POCDATARA). The Act was adopted in 2004 and implemented on 19 May 2005.

The implementation and application of the Act had been closely monitored. In respect of jurisprudence, the most important is the Constitutional Court's judgment on Henry Okah, a Nigerian citizen and permanent resident of South Africa. Okah was the leader of the Movement for the Emancipation of the Niger Delta (MEND), in Nigeria. He was charged with terrorism under POCDATARA relating to two bombings in Warri and Abuja, Nigeria killing in total nine people and causing extensive injuries and damage.

The Constitutional Court set aside the findings of the Supreme Court of Appeal, that the extraterritorial jurisdiction provided for in the Act was not allowed for under the Act, except in so far as it relates to the financing of terrorism. Okah also argued that he qualified for exemption under section 1(4), which provides for exemption of legitimate freedom struggles. The Constitutional Court found that the acts in question plainly violated international humanitarian law, and therefore, Okah forfeited protection under the statute's exemption.

Upon the invitation of the South African 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 POCDATARA and he recommended that the Government closely monitor the implementation of the Act to ensure that its interpretation do not suggest a threat to human rights. The United Nations Security Council Counter-Terrorism Executive Directorate (CTED) visited South Africa from 2 to 9 June 2009, in pursuance of the mandate of the CTED to conduct visits to member states of the UN on behalf of the CTED, in order to monitor the implementation of resolution 1373 (2001). The CTED praised the adoption of POCDATARA and mentioned that the Act, and supporting legislation, could serve as a model for other jurisdictions.

A review of POCDATARA is in the process. Issues that might be considered in the review are an update to the references in the Act to international instruments to which South Africa has become a state party to since 2004. It must also be ensured that the Act is compliant with all the obligations in the latest international instruments. A more streamlined process for listings by the United Nations Security Council Resolution 1267/1999 Committee is required. In respect of sentencing, the sentence for terrorism financing should be increased as it is less than that for committing money-laundering.

A comprehensive counter-terrorism strategy should provide for a proper legislative framework to combat terrorism in all its forms, inclusive of the financing of terrorism, and building expertise within the criminal investigative agencies and prosecution to deal with terrorism investigations and prosecutions.

Suggested further reading.

Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004. https://www.saps.gov.za/resource_centre/acts/downloads/juta/terrorism_act.pdf

South African Law Commission. (2002) Project 105. Report on Review of Security Legislation: Section 54 of the internal Security Act, 1982 (Act No. 74 of 1982). http://www.justice.gov.za/salrc/reports/r_prj105_2002aug.pdf

United Nations Office for Counter-Terrorism. International legal instruments. https://www.un.org/counterterrorism/ctitf/en/international-legal-instruments

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