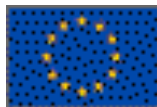




***SUBMISSION ON THE ANTI-TERRORISM
BILL [B12-2003]***

April 2003

**Submitted to the Parliamentary Portfolio Committee on Safety
and Security**



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Acknowledgement

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Introduction

The Freedom of Expression Institute (FXI) welcomes this opportunity to make a written submission on the Anti-Terrorism Bill (ATB). We wish to begin by noting that in principle, we are strongly opposed to the introduction of the ATB in South Africa for a variety of reasons which will be elaborated further-on in this submission. It stands to reason that if this bill is passed, it will seriously impact on individual civil and political liberties such as the rights to freedom of expression, association, security of the person, belief, opinion, assembly and demonstration.

The major problem with the ATB is that it is fundamentally flawed and the logic behind its motivation remains unclear. There is no justification for the introduction of this legislation in our country and furthermore, the Bill fails, as did its predecessors, to provide a simple, clear and unambiguous definition of what is meant by a terrorist act. It is our considered view that the very vague and broad definition of 'terrorist act' in the Bill could be used to proscribe a whole range of legitimate civil and political activities in the country such as demands for land, demonstrations, pickets or civil disobedience campaigns.

As an offence, terrorism is not an easy concept to define, a fact which even the state's own legal drafters explicitly acknowledge. The explanatory memorandum accompanying the 2002 draft Bill states that "terrorism as a phenomenon" can not be defined. Similarly, during a briefing by the South African Law Commission and the South African Police Services to the Safety and Security Portfolio Committee on January 29 2003, it was argued that the ATB could only define a 'terrorist act' because of "a lack of international agreement on what constitutes terrorism".

It is not lost on us that this is the third attempt on the part of the present democratic government to arrive at a definition of terrorist act for purposes of legislation in South Africa. The first attempts to do so in the Draft Anti-Terrorism Bill of 2000 failed, and the draft 2002 Bill, which underpins the ATB, betrayed the same difficulties. The flawed nature of the state's latest attempt to define terrorism or terrorist acts points to the fact that reaching a satisfactory definition of this offence is all but impossible and if that is the case, then it is extremely dangerous to criminalise actions that cannot even be properly defined.

The problem with defining or legislating on terrorism is that, as the adage says, “one man’s (sic) terrorist is another man’s freedom fighter”. Perhaps recognising that acts constituting terrorism can depend on (among other things) social context, historical perspective and racial, religious or other group identity, the Canadian Courts have consistently refused to define terrorism as a concept (Ziyaad E Mia: *Terrorising the Rule of Law: Implications for the Anti-Terrorism Act (Canada)*).

The UN Special Rapporteur on terrorism has noted that “terrorism is emotive and highly loaded politically. It is habitually accompanied by an implicit negative judgement and is used selectively” (Amnesty International, “Rights at risk: Amnesty International’s concerns regarding security legislation and law enforcement measures”, AI Index: ACT 302002, available at: <http://www.web.amnesty.org/ai.nsf/recent/ACT300012002>).

The Canadian Bar Association, when making submissions against the Anti-Terrorism Act in Canada, recognised that there is good reason for the fact that no useful definition of ‘terrorism’ exists internationally (*Terrorising the Rule of Law: Implications for the Anti-Terrorism Act (Canada)*, Ziyaad E Mia).

Statutory attempts to define this crime invariably inject the element of motive and this moves away from the accepted principle that criminal law is designed to prevent and punish socially unacceptable acts, rather than motive. (Motive may be relevant as aggravating or mitigating factors and even then it will inevitably depend again on the politics of the day). Academics in Canada warned that the implications of including certain political, religious or ideological motives in our criminal law could be far-reaching (Ziyaad, *ibid*).

As we shall argue in this submission, the problem with defining or giving special motives to the purported crime of terrorism is that it becomes very difficult, on paper, and consequently in implementation, to distinguish between real terrorists and political protesters or ordinary criminals with no ‘terrorist’ intention.

As a matter of fact, terrorism as an offence is well covered by existing laws. The nature of crimes that the Anti-Terrorism Bill seeks to proscribe are already punishable under our own common law and criminal procedures. Similarly, during debates on the Canadian

anti-terrorism legislation, the government admitted that most if not all the activities sought to be punished within the framework of terrorism were already offences under Canadian criminal laws and were dealt with as such (Ziyaad, *ibid*).

The Canadian government appointed the McDonald Commission to conduct extensive analyses of security issues in the context of maintaining constitutionality, political legitimacy and preventing indiscriminate criminalisation of anti-state activities. The Commission proposed that, in the context of security fears, the common law be used and the following be enacted as security crimes to replace the controversial 'terrorism':

(a) '*Political violence*' – defined in the context to mean: the use or threat of violence (other than trivial violence), whether directed against persons or property, for political purposes. Threats should be punishable only if they are threats of imminent action. Loose talk about the desirability or necessity of violence should not be made a crime.

(b) '*Encouragement of political violence*' – the use, in circumstances likely to cause it, of language or rhetoric of violence.

In the heyday of the so-called 'IRA terrorist activities' when the UK was experiencing severe 'law and order' problems in Northern Ireland, legislation was enacted to deal with terrorism without creating a special crime of 'terrorism'. The prosecution of offenders took place mainly under the common law or under statutes dealing with the unlawful possession or use of firearms and explosives. Legislation focussed on such matters as the outlawing of terrorist organisations, the deportation of suspected terrorists, the prohibiting against, receiving or soliciting of material support for 'unlawful' acts of terrorist groups (The Prevention of Terrorism (Temporary Provisions) Act 1984 and the Northern Ireland (Emergency Provisions) Act 1978).

During the height of this conflict, the Baker Report on Northern Ireland security legislation set out a statistical table of security related prosecutions. It showed that the normal criminal law and procedures were used, and that charges fell into the following categories: murder, attempted murder, firearms and explosive offences, theft, arson, hi-jacking, petrol bombing, assisting offenders, withholding information and other ordinary crimes ('*Review of the Operation of the Northern Ireland (Emergency Provisions) Act*

1978' (Cmnd 9222, April 1984) 162; A S Mathews, Freedom, State Security and the Rule of Law, p222 and 33).

It is our considered view that any strictly legal and literal analysis of what is or what constitutes terrorism runs the risk of occluding the broader political, economic and ideological interests that tend to underlie legislation concerned with maintaining the security of existing state formations. To cite one example, the African National Congress was for many years denoted by legislation as terrorist both in South Africa and the United States.

This bears witness to the fact that, unlike being a murderer, being a 'terrorist' is often a function of being on the wrong side of power rather than possessing any inherent and universally disagreeable qualities or having committed a readily identifiable act. This introduces a fair amount of uncertainty and scope for politically coloured interpretation into the definition of the proscription that the Bill provides for the offence of terrorism. In terms of both criminal and constitutional jurisprudence this is problematic.

It should be borne in mind that terrorism is an offence in which those who legislate have very immediate, often personal, and certainly vested political and ideological interests. For this reason, we submit that the law should not have the effect of advancing sectional and elite interests under the guise of ensuring the safety of the public. Terrorism should also not be allowed to become synonymous with anti-government or, even, anti-state activism nor should the law include in the compass of terrorism most of the vigorous, direct and effective tactics of political activism that are common in this country. Such activities are more than adequately mediated and handled in terms of existing legislation and policing practices.

There should be an understanding by law-makers that the political expressions of many opposition groups in the country, particularly those rooted within marginalised sectors of our society, will often be militant and, even, in rhetoric, seditious. To have drafted legislation in such a way that social movements and militant student or community activists are apt to be sent to prison for the stiff terms provided in the Bill, is to create a very dubious domestic political instrument indeed.

Because politics is often about struggling against the policies of government or for a completely different kind of state, legislation that purports to deal with terrorism must be scrutinized very carefully to ensure that it does not proscribe legitimate struggle, inhibit fundamental rights and freedoms and ensconce the powerful.

Many political commentators have suggested that countries passing anti-terrorism legislation are using the events of Sept 11 and the purported need for such laws to establish a legal system to crush political dissent, especially because of the international support that many domestic political struggles now entail.

This submission is divided into two chapters. The first chapter critically analyses international jurisdictions that have passed similar legislation and considers how the anti-terrorism laws have been debated and opposed or passed, both in the public sphere and by the legislatures. It also presents a critical perspective of the European Union wide measures implemented to tackle domestic and international terrorism and analyses the trends emerging from the manner in which the anti-terrorism laws have been implemented.

This chapter also considers how particular individuals and groups have been specifically targeted in the so-called 'anti-terrorism drive', and the activities which led or have led to their being targeted. Finally a summary is presented of how these anti-terrorism laws have impacted on or affected fundamental rights and freedoms including the right to freedom of expression, and the impact which similar legislation could have on human rights and fundamental freedoms in South Africa.

Chapter two of this submission examines the content and substance of the Anti-Terrorism Bill by subjecting it to a critical socio-economic and legal inquiry. It dwells at length on the definition of 'terrorist act' because this forms the fundamental rationale for the introduction of anti-terrorism legislation. It also considers other contentious aspects of the Bill such as the offences and penalties, the stringent bail conditions, investigative hearings, the blacklisting of organisations and the admission of secret evidence.

In the final analyses, we argue that the state has not demonstrated the need to introduce this legal regime in our country, or that this legislation is for the benefit of our nation.

Furthermore, we argue that the state has not provided the justification required to pass a law of this nature which seeks to limit the basic rights and freedoms of individuals beyond the barrier allowed by the constitution.

We end the chapter by cautioning that our government ought to be careful when considering the enactment of legislation relating to terrorism because such cannot be treated in isolation of the broader political economy of the current anti-terrorism drive, which is being spearhead by powerful nations to further their imperialist aims.

Before embarking on a study of international jurisprudence, it is trite at this stage to point out that had the current international drive against 'terrorism' been in place in the 1980s when thousands of people gave money to support the lawful anti-Apartheid work of the ANC, and when thousands of people met representatives of the movement openly in their offices in many Western capitals, then they would have been punished as offenders and supporters of terrorism.

Such people would have had no defence even if they could prove that their support, links or meetings only furthered the lawful, non-violent work against apartheid. The reason for this is that the ANC was designated as a terrorist organisation both in South Africa and the US well up to time it was un-banned in the early 1990s. It is a lesson worth remembering and to recall the words of a recent article in one of the daily newspapers; "The ANC stands to betray its own political history by adding its weight to prevent international liberation movements from charting a course similar to its own (Jane Duncan, "Anti-terrorism Bill will trample on rights" Sowetan, Friday, January 10 2003, p 8).

As an emerging democracy, it is important that we look back to our sad and repressive past and ask ourselves what lessons we have learned from that dark history. In so doing, we will perhaps be able to see more carefully the kind of glorious future that we want to build as promised by our own Constitution. The anti-terrorism legislation, we strongly believe, will only serve to undermine this noble goal.

Chapter 1

1.1 International comparative anti-terrorism legislation

The United States (US) launched the 'war on terrorism' shortly after September 11 by passing the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ('Patriot Act'). Numerous countries followed suit by enacting new or amending their existing anti- terrorism laws.

In addition to domestic and EU legislation, the US, the United Kingdom, France, Germany, the Netherlands, Turkey and other allies have formed coalition structures to fight terrorism on the international front. This has the backing of the United Nations' (UN) International Security Assistance Force (ISAF) which comprises allied troops from the above states. The coalition is basically a pooling of military, navy, aviation, intelligence and computer resources and joint structures, including the following:

- 1) North Atlantic Treaty Organisation AWACS (Airborne Warning and Control System) – patrolling of airspace since October 2001.
- 2) Operation Enduring Freedom – military, navy and customs coalition which sees to the security of ship and air routes and the cutting of escape and supply routes of 'terrorists.
- 3) UN International Security Assistance Force (ISAF) which provides military assistance and 'aid' in countries occupied and deemed terrorist –for instance the current occupation of Afghanistan and the still yet to be decided question of Iraq.

1.2 The UN, The European Commission and Organisation for African Unity (OAU, now African Union 'AU')

The enactment of terrorism legislation is actively supported and even made a requirement by these organisations. They have stipulated that their member states must enact legislation to cater for domestic and international terrorism. Examples of this include the UN International Convention for the Suppression of Terrorism, the UN

Convention for the Suppression of Financial Terrorism, the OAU Convention on the Prevention and Combating of Terrorism and the European Union's 'anti-terrorism package'.

1.3 Domestic legislation

We will examine herein the Patriot Act, 2001 (US), the Anti-terrorism, Crime and Security Act, 2001 (UK), the Prevention of Terrorism Act, 2002 (India), the Anti-Terrorism Act, 2001 (Canada) and the Anti-Terrorism Act, 2002 (Germany).

Most of the statutes are momentous pieces of legislation, especially the Patriot Act and the UK legislation. All these Acts create various offences, limit fundamental civil rights and freedoms and grant extraordinary powers to the executive and police to investigate and prosecute terrorism and associated offences.

1.4 Lengthy and draconian legislation passed in record time

The Patriot Act, amongst others things, grants additional wiretapping and surveillance authority to federal law enforcement, removes barriers between law enforcement and intelligence agencies, adds financial disclosure and reporting requirements, and gives greater authority to the Attorney General to detain and deport aliens suspected of having terrorist ties. This very weighty piece of legislation was signed into law on October 26, less than six weeks after the September 11 attack.

The accelerated timetable bypassed both the committee process and floor debate. The money laundering legislation (the interception and monitoring of financial information of citizens) was added at the last minute, so hardly, if any debate was raised on this issue. Despite having similar provisions and considered in the UK to be the most draconian and weighty legislation passed in peacetime, the UK Act, consisting of 129 sections and 8 schedules was drafted in two months, allowed only 16 hours of debate, was published on 13 November and received royal assent on 14 December 2001.

Canada introduced its bill on 16 October 2001. In spite of the extensive counter submissions from the Canadian Bar Association (CBA), the Coalition of Muslim

Organisations (COMO) and human rights bodies before the House of Commons Standing Committee on Justice and Human Rights and the Special House and Senate Committees, no significant amendments were made prior into its passage into law on 18 December 2001.

In Germany, as at January 2002, numerous security laws were amended and have already come into effect. In its budget for 2002 the German government earmarked an additional three billion Deutschmarks for an 'anti-terrorism package', containing additional funding for the armed forces, the intelligence agencies, the Federal Border guard, the office of the Prosecutor-General and security checks. This was approved on 19 September 2001.

The Anti-Terrorism Act in India was enacted on 28 March 2002, a very short time considering that the statute covered considerable issues, including the setting up of special courts, interceptions of communications, drawing up a schedule of proscribed organisations- that list over 30 of them- and the extension of police powers.

1.5 Legislative opportunism

Some of the more intrusive and controversial provisions of the Patriot Act, namely the surveillance and money laundering provisions, the disfavouring of immigrants in the detention provisions and the expanded interception and monitoring powers, were drawn from legislation proposed before September 11, and which had been blocked by civil rights advocates. It has been suggested that the executive branch and legislators capitalised on the political and emotional aftermath of September 11 to expand executive power by enacting previously stalled legislation. In sum, the government took advantage of the national crisis to arrogate powers long desired, but politically unacceptable in peacetime.

1.6 Budgeting for the fight against terrorism

Most of the countries, in their 2002 and 2003 budgets, earmarked hundreds of millions of dollars for the fight against terrorism. The funding includes money for the police, the armed forces, intelligence agencies, Treasury, the offices of the prosecuting authorities

and Courts, new technologies and computer database search projects. Some countries like Germany funded their 'war against terror' by raising taxes on certain products and several categories of insurance.

1.7 The European Union

This body has a comprehensive action plan, dubbed an 'antiterrorism road map' for its member states. It has established a European arrest warrant, an EU-wide definition of terrorism, an EU public prosecutions agency, an EU mechanism for freezing suspects assets, examination of immigration and asylum laws, and a mechanism to prosecute computer crime and the pooling of intelligence resources. The EU also issued a directive to its members to ensure that involvement in a criminal organisation based in an EU country or carrying out illegal activities there can be prosecuted in any EU member state.

All member states except Italy agreed that the European arrest warrant should cover a list of 32 serious cross-border crimes. Italy insisted that fast-track extradition procedures should apply to a smaller list of six crimes.

European lawyers have denounced the European Union's definition of terrorism as so broad that it could include workers' strikes or protests against globalisation. More than 200 lawyers from nearly every country in the European Union have signed an appeal urging European Parliaments and EU governments to reject the adopted definition of terrorism.

1.8 Terror laws eat away at privacy and freedom of expression

A four-hundred page study compiled by Privacy International and the US based Electronic Privacy Information Centre painted a grim picture of the state of privacy in a post 11 September world, especially in the US and UK. In the study, the internet was found to play a huge part in the erosion of rights while the UK was said to be one of the worst places in the world for privacy rights.

1.9 Human rights Conventions

Article 15(1) of the European Convention on Human Rights (ECHR) provides that “in time of war or other public emergency threatening the life of the nation any High Contracting Party (state) may take measures derogating from its obligations under the Convention (European Convention for the Protection of Human Rights and Fundamental Freedoms) to the extent strictly required by the exigencies of the situation...”.

As far as ‘public emergency’ is concerned, the European Court of Human Rights held in *Lawless v Ireland* (1961) 1 E.H.R.R. 15, that this test required there to be “an exceptional situation or crisis of emergency which affects the whole population and constitutes a threat to the organised life of the community”.

The European Commission of Human Rights has held that a public emergency has to be “actual or imminent” its effects have to “involve the whole nation”, the “continuance of the organised life of the community must be threatened”, and the crisis or danger must be “exceptional”. It has also argued that that in such a situation normal measures have to be “plainly inadequate”.

The International Covenant on Civil and Political Rights and other instruments have derogation clauses, which is relevant to South Africa and other non-European Union countries when it comes to the question of limiting fundamental rights and freedoms. As we shall see, all the countries in question have changed their prior legislation on terrorism to further limit civil and human rights, some drastically so. However, excluding America and September 11, it is debatable whether there is any ‘public emergency’ as envisaged by the ECHR is present in SA, the UK, Canada and Germany which can justify the extensive limitation of fundamental rights and freedoms.

Even in Northern Ireland during the Irish Republican Army era, the UK did not introduce such drastic legislation to curtail rights. At the moment there has been no terrorist incidents in those countries associated with September 11 and there is no immediate threat to them. Even if these governments could establish a ‘public emergency’, many of the definitions in the Acts do not target only real terrorists, or terrorist acts or organisations but they threaten normal political protest as well.

2. USA – THE UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM ACT (PATRIOT ACT, 2001)

2.1 Definition of terrorism

Under the Patriot Act, the definition of domestic terrorism, ‘terrorist acts’ and ‘terrorist organisations’ is extremely broad and it extensively infringes on association and freedom of expression rights. The Act expands the definition to include any group that engages in violence or destruction of property and supports terrorist organisations. Opponents point out that this definition encompasses advocacy groups who use direct action and those who cause minor property damage during acts of civil disobedience. Moreover it is not limited to foreign or international groups but also local organizations.

They have argued that the plain text of the definition and offences would also allow the prosecution of a person who donates colouring books to a daycare centre run by an organisation that also has terrorist ties. The Justice Department, in response to the criticisms that the broad definition would prejudice civil advocacy groups, claimed that the authority in the Act will not be used in this way. They pointed out that since 1983, the United States government has targeted and defined terrorists as those who perpetrate premeditated politically motivated violence against noncombatant targets.

For the purposes of detention, the Attorney General (AG) has unfettered discretion to determine who is a terrorist. The AG can detain indefinitely immigrants convicted of crimes and immigration offences and any person that he or she has “reasonable” grounds to believe is a terrorist or “is engaged in any other activity that endangers the national security of the United States.” The definition also prohibits ‘support’ for terrorist organisations.

2.2 Detention

An individual can be detained for seven days, after which the government must bring immigration or criminal charges. The American Civil Liberties Union has opposed this provision as unconstitutional since it would allow the indefinite detention of non-citizens suspected of terrorism who could not be deported to their home countries.

Hundreds of people from mostly Middle Eastern or Muslim countries have been arrested and detained under this provision.

2.3 ‘Sneak and peek’ provisions

2.3.1 Information Sharing; warrants for surveillance

The Act modifies the grand jury secrecy rules of the Federal Rules of Criminal Procedure to allow grand jury information to be disclosed to federal officials without a court order.

It also allows intelligence information obtained through surveillance to be shared among “law enforcement, intelligence, protective, immigration, national defense, or national security “ officials, irrespective of whether the information was gathered domestically or internationally or pursuant to criminal investigations or intelligence gathering.

This effectively violates the underlying civil rights rationale for having separate statutory rules and jurisdictions for law enforcement and intelligence agencies. The separation between criminal investigations and intelligence gathering is attributable to two different legal and statutory authorities for obtaining warrants for electronic surveillance. In respect of national security (or intelligence) investigations, the AG requests warrants from a secret court to collect foreign intelligence information.

Unlike criminal warrants, these warrants can be issued without probable cause of a crime. Further, unlike in criminal surveillance warrants, the government need not reveal the warrant to the target on completion of surveillance. Thus intelligence gathering agencies have much broader surveillance authority and less, if any, judicial oversight or

review. The concern has been that information obtained through intelligence warrants will be used in ordinary domestic criminal investigations.

2.3.2 Expanded surveillance authority

The Act expanded the use and authority for pen registers, trap and trace devices, and roving wiretaps. These devices enable surveillance of any phone that a target may be using, instead of a particular piece of equipment, and to track dialing, routing, addressing, or signaling information, email and Internet usage. Privacy advocates have criticised this process on the basis that the FBI uses a 'carnivore' system to monitor email and web addresses and it enables access to the content of the communications (thus a person's thoughts and interests) and identifies a person instead of a fixed piece of equipment.

In response to this, the Act stated that the authority to use the carnivore-like devices "shall not include the contents of any communication", but this is still a problem since content remains undefined in the Act. Further, since the state has the means, one will have to depend on good faith that the authorities will not peep further than they are authorised to do.

Critics have pointed out that the state does have a history of abusing private and personal information gained from secret surveillance. They point to the example of Edgar Hoover, a former director of the Federal Bureau of Investigations who unable to prove that Civil Rights leader Martin Luther King was a crook or communist through secret surveillance, leaked irrelevant but embarrassing personal and private information about him to the press.

2.4 Financial information, money laundering and compulsory reporting

Through title 111 of the Act, the International Money Laundering and Abatement and Anti-Terrorist Financing Act of 2001, the government has declared that it will target and disrupt 'terrorist' financial networks. The Act does this in the following 'secret' ways. It:

- 1) Requires banks and financial institutions to monitor account activity and to report suspicious transactions;
- 2) Provides for increased information sharing: it allows suspicious activity reports to the Treasury to be shared with intelligence agencies;
- 3) Authorises sharing of surveillance information between law enforcement and intelligence agencies;
- 4) Grants the government access to credit records without notifying the target; and lastly,
- 5) Allows the use of undisclosed warrants

One of the major concerns raised has been that the government will abuse the information it secretly gathers. The Money Laundering provisions were added to the Patriot Act at the last minute, so hardly, if any, debate was done regarding these provisions.

2.5 Computer crimes

The Act also classifies certain activities as new computer crimes. As a result, companies providing information and technology activities in certain countries, including Somalia's only internet company and key telecoms business, have been forced to close because the US suspects them of terrorist links.

2.6 Anti-terrorism technology experiments

Hundreds of millions of dollars have been granted for anti-terrorism technology experiments and research. A database search project has been launched to test whether new computer tools can comb through masses of information- such as credit

card and bank transactions, car rentals and gun purchases- and spot clues to the planning of terrorist acts.

2.7 Other offences under the Act

The Act contains the usual offences of supporting, aiding and abetting of terrorists and terrorist organisations, and the harbouring and concealing of terrorists.

3 UK: THE ANTI-TERRORISM, CRIME AND SECURITY ACT, 2001

The following analysis of the UK anti-terrorism legislation is based, inter alia, on submissions made during debates on the Bill by the Human Rights Committee, and Adam Tomkins (*Public Law, 2002, 199-390*).

3.1 The UK's formal derogation from human rights conventions: detention without trial

The UK Act is so draconian that the state had to enter a formal derogation from Article 5(1) of the European Convention on Human Rights (ECHR). Article 5(1)(f) of the Convention permits the "lawful detention of a person to prevent his (sic) effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation".

Section 23 of the UK Anti-Terrorism Act provides that suspected international terrorists may be detained, indefinitely and without trial. This provision applies only to persons subject to immigration control under the Immigration Act, and therefore not British citizens.

The Secretary of State may certify that anyone is a suspected international terrorist if he or she reasonably believes that that person's presence in the UK is a risk to national security and that that person is a terrorist. The definition of terrorist act and terrorism has been criticised as being wide enough to cover protest politics and non-terrorist criminal activity.

Since it is the UK government's intention to use section 23 of the Act to detain persons in respect of whom action is not being taken with a view to deportation, Article 5(1)(f) of the Convention will not save all the detentions which the government proposes under this provision. The European Court of Human Rights ruled in the case of *Chahal v UK* (1996) 23 E.H.R.R 413 that "any deprivation of liberty under art 5(1)(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible". It is for this reason that the UK government has formally derogated from art 5(1) of the Convention.

Critics wondered why the government would detain someone it could simply deport. It was suggested that the answer lay in the fact that the government is sometimes barred from deporting persons (art 3 ECHR) and because in terms of the normal immigration laws and procedures, a person can sometimes put an end to his or her detention by willingly leaving the country. The government obviously wants to prevent certain persons from leaving to other countries where they can continue their purported terrorist activities. The argument against the detention then is that the person must be tried for terrorist activities and the government must prove its case, rather than resorting to indefinite detention without trial.

Despite the international nature of the present 'war on terrorism' the UK is the only member of the 41 states that have ratified the Convention, which has deemed it necessary to derogate from the terms of the ECHR over this matter.

3.2 Definition of 'terrorist act/activity'

The definition provided by the Act includes providing training or instruction in the making of firearms, explosives or chemicals, biological or nuclear weapons and inviting others to do so. It also includes "the use or threat of action designed to influence the government or to intimidate the public...for the purpose of advancing a political, religious, or ideological cause...which involves serious violence against a person or serious damage to property, endangers a person's life, creates a serious risk to the health or safety of the public, or is designed seriously to interfere with or seriously to disrupt an electric system".

This definition has been criticised as too wide. By using the words 'Seeking merely to 'influence' the government, rather than seeking to intimidate or coerce the government, and extending the reach of terrorism beyond the most serious violence blurs the distinction between terrorism and other criminal activities. Such activities, it has been argued, "are governed by regular law rather than by the special provision of terrorism".

3.3 Freedom of expression and association and the definition of terrorist act

For purposes of certifying that a person is a suspected international terrorist and for detention without trial, the term terrorist is defined as a person who:

- 1) Is or has been concerned in the commission, preparation or instigation of acts of international terrorism;
- 2) Is a member of or belongs to an international terrorist group, or, a person who,
- 3) Has links with an international terrorist group.

A person has links with an international group if he 'supports or assists it'. During debates on the bill, the UK Human Rights Committee argued that this last criterion raises considerable free speech concerns, especially in regard to 'support'. They suggested that it would have been better if the provision had read: "supports in a material and active way".

But this does not alter the fact because there is no justification for why an individual should not be allowed to support in a material and active way, the political side and even the lawful causes of 'terrorist organisations'.

3.4 Injecting religion into terrorism (the listed offences)

The Act adds 'religiously aggravated' offences to the concept of 'racially aggravated' offences.

3.5 Freedom of expression and public interest disclosure

The Act gives the state further security control over nuclear weapons and other weapons. However there is a provision (s79) which makes it an offence for any person intentionally or recklessly to disclose any information which “might prejudice the security of. .site”. The criticism around this provision has been that the offence comes with no public interest defence. The Joint Committee on Human Rights argued that the absence of a public interest defence could mean that s79 amounts to a disproportionate interference of freedom of expression under Article 10 of the ECHR.

3.6 Disclosure of information – violation of privacy

Part 3 of the Act permits public authorities to disclose information to each other for purposes of investigations. Criticism has been leveled against this provision on the grounds that because of the broad range of offences covered by the Act, and because of the lack of statutory criteria to guide decisions and procedural safeguards to be followed when deciding whether it is necessary and proportionate to make a disclosure, it may lead to a violation of art 8 of the ECHR which protects privacy.

Part 11 of the Act provides that communication service providers (e.g. telephone companies, computer, cell phone service providers) must retain certain communication data (who makes which calls, to whom, when and from which location etc) and disclose such data to secret intelligence agencies. The concern raised is that the Act compels disclosure far more extensively than the UK Regulation of Investigatory Powers Act, of 2000, and that the terrorism Act contains no details as to which data should be retained, nor as to how and when the data should be disclosed.

In any case such matters are determined by the Secretary of State, namely a member of the executive, rather than having judicial oversight. Again criticism has been made that this provision has the potential to violate privacy and further that the Act does not make it clear that the monitoring and recording should not include contents of the communications.

3.7 Extension of police powers

Part 10 of this Act significantly amends the Police and Criminal Procedures and Evidence Act, 1984 and the Criminal Justice and Public Order Act, 1994. It extends police power to stop and search and seize items. Rather than a court order/warrant, only an inspector's authorisation for such acts is needed and are available whenever an inspector 'reasonably believes that they would be expedient in order to prevent or control the commission of any criminal offence, no matter how minor. Formerly, the authorisation of a police superintendent was required and the powers were available to the police only where there were reasonable grounds for believing that incidents involving serious violence were likely to occur.

Police may now also forcibly obtain or photograph identifying marks, and also take photos of persons in custody or detention.

3.8 Judicial review

The Act excludes judicial review of the Secretary of State's decisions and action under section 21- which provides for the certification of a person as a suspected international terrorist- and section 23, which deals with the indefinite detention without trial of a suspected international terrorist.

The Act provides that such decisions and actions may only be questioned (appealed or reviewed) before the Special Immigration Appeals Commission (SIAC). However in procedures before the SIAC, the appellant's legal representative is chosen by the Attorney General and will not be responsible to the appellant. Further, proceedings before the SIAC may be held in the absence of the appellant and his or her legal representative, and the appellant doesn't have to be given full particulars of the reasons for the decision of the SIAC.

Cancellation of a certification by the SIAC "shall not prevent the Secretary of State from issuing another certificate, whether on the grounds of change of circumstances or otherwise".

Further constraints on the SIAC were added by the House of Lords in *Rehman v Secretary of State* (2001) UKHL 47, where it ruled that the SIAC had no jurisdiction to determine what was “in the interests of national security; defining national security was a matter on which the judiciary could rule, whereas determining what actions were necessary in the interests of national security was a political question for the relevant Ministers...”

In the face of much opposition the government compromised only as follows: That the operation of sections 21-23 shall be reviewed within 14 months of the operation of the Act by a person appointed by the Secretary of State, and that sections 21-23 shall expire 15 months after the Act comes into force.

4 CANADA: THE ANTI –TERRORISM ACT, 2001

The following critique of the Act is based, inter alia, on the submissions made by the Canadian Bar Association, the Coalition of Muslim Organisations (COMO) and Ziyaad E Mia, *Terrorising the Rule of Law: Implications of the ATA*.

4.1 The definition of ‘terrorist act’ and ‘terrorist activities’

The definition of terrorist act in the Canadian legislation has been criticised as being imprecise and capable of covering all sorts of political protestors and criminals, and including questionable motives. For example as in South Africa’s draft Anti-Terrorism Bill, terrorist activity is defined to include an act or omission committed for a “political, religious or ideological purpose, objective or cause”.

It also includes “an act or omission in or outside Canada that: causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage or work. Despite this exception it should be noted that the definition has the potential to criminalise marginal or unpopular political views and actions.

4.2 How the definition of ‘terrorist act’ leads to discrimination

The definition of terrorist activity is linked to a religious or ideological context. Critics, especially Muslim-Canadians, have argued that this opens the possibility of certain populations being targeted on the basis of discrimination. In Toronto in 2001, the police reported that hate crimes increased significantly after September 11. Of the 57 reported such crimes, 79% of them were linked to September 11.

4.3 Freedom of expression and association

The wide-ranging definition affects the right to freedom of expression and association. A useful example was illustrated by the CBA with respect to the prohibition against the financing of terrorism. The ATA also effectively curtails fund-raising on behalf of organisations if there is a possibility that some of the money will go to groups labeled as terrorist in their countries, even if the causes are legitimate and the regimes repressive.

4.4 The definition (non-disclosure, secrecy provisions and intelligence from foreign agencies)

Since the definition of terrorist activity includes acts and omissions committed outside Canada, information from foreign governments will form the basis of actions taken under the ATA. The government recognises this by providing non-disclosure and secrecy provisions with respect to information obtained from foreign governments and intelligence sources. A major concern has been that Canadians may be labeled as terrorists on the word of governments whose record of human rights and tolerance for political dissent may be dubious. Many Muslim-Canadians sought refuge in Canada from oppressive governments. It appears that those same regimes may now use Canada's laws to persecute Canadians in their own country.

4.5 Arrest and detention

The ATA provides for preventative arrest without a warrant and without a charge being laid for several days. Under existing law in Canada, a police officer may detain or arrest a person who he or she believes, on reasonable grounds, is about to commit an offence. For a warrantless arrest, the commission of an offence must be imminent. In contrast, the ATA allows for arrest without charge or warrant where the officer believes that a

person may commit an offence. Since may lacks the sense of urgency and immediacy of imminent, the ATA significantly lowers the threshold for arrest without a warrant.

4.6 Review of detention by a judge

The Canadian ATA provides for judicial review of detention by a judge of the High Court. However there is concern that the ATA provides 'wriggling room' to allow the police to delay the appearance of the detainee before a judge for review purposes.

4.7 'Blacklististing' of organisations; closed and secret proceedings

The ATA allows government to create a list of terrorist organisations. It is an administrative process by the Solicitor General (SG). The decision of the SG is open to judicial review but a judge may "hear all or part of that evidence or information in the absence of the applicant and his legal representative, if the judge is of the opinion that the disclosure of information would injure national security or endanger the safety of any person".

Thus, legitimate political dissenters may be black-listed based on information (e.g. from foreign agencies) and accusations adjudicated in a closed process. As such, the long respected principle of due process under the Canadian Rights Charter is severely limited, and in some cases, even excluded.

4.8 Is the limitation of rights in the ATA justified?

Similar to South Africa's limitations clause in the Constitution (section 36), the Canadian Charter of Human Rights permits a justifiable limitation of rights. In *R v Oakes* (1986) 1 S.C.R. 103, the Supreme Court of Canada set out the required framework for the limitations of rights to be justified:

- 1) There must be a rational connection between the legislation in question and the objective/purpose sought to be achieved;
- 2) There must be a minimal impairment of rights; and,
- 3) The effect of the measures used must be proportionate to the objective/purpose.

The Court further held that "even if an objective is of sufficient importance...it is possible that, because of the severity of the deleterious effects of the measures on individuals or groups, the measures will not be justified by the purpose/s it is intended to serve."

4.9 Is there a substantial and imminent security threat or threat to the welfare of the whole population?

As in the other countries discussed in this submission, the purported objective of the ATA is to fight terrorism, which the Canadian government argues, constitutes a substantial threat to Canada's security and the welfare of its people.

However, critics have argued that, despite September 11, there has been no substantial or even 'imminent threat to Canada's security neither is there a public emergency as defined by the ECHR and the European Commission. Excluding the US, the same can be said about the other subject countries discussed here.

Even if there was such a threat or need for the ATA, many of the ATA's measures are not rationally connected to the objectives. Because the ATA is vague and overly expansive in its definitions, offences and powers, it is very likely to have a very adverse impact on legitimate political dissent rather than terrorists, and in this respect it fails to establish any rational connection with the objectives it seeks to achieve.

4.10 Minimal impairment

The minimal impairment of rights requires clearly defined parameters, precision and forethought. By using the vague and overly broad definitions of 'terrorist activity' and 'facilitation' as the cornerstone of many of the offences, the ATA casts the net too wide. It has been argued that preventative detention; the open-ended electronic surveillance and the use of secret process and evidence in *ex parte* applications are an extreme, not a minimal, impairment of rights.

4.11 Proportionality

By the government's own admission, Canada's existing laws have always been used to prosecute 'terrorist activities'. The CBA argued that the ATA was unnecessary in light of Canada's existing law. They identified an extensive array of available legislation that meets many of the needs ostensibly addressed by the ATA. They also showed that the existing law is both reactive and preventative. This submission and the imprecision of the Act make the ATA disproportionate to the ends sought.

5. INDIA: THE PREVENTION OF TERRORISM ACT, 2002

We have dealt with this Act in more detail in this submission because, in certain important aspects it appears to be more relevantly focused than the other legislation discussed herein. However for all intents and purposes, it is still an unjustifiably repressive piece of legislation.

5.1 Definition of terrorist acts

The Indian Prevention of Terrorism Act provides a narrow, though clumsy definition of what is meant by an act of terrorism. It states that:

(1) Whoever-

- (a) with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people, does any act by using bombs, dynamite,...inflammable...poisonous...chemical...biological...substances or firearms or other lethal weapons...in such a manner as to cause, or likely to cause death or injuries...or damage to, or destruction of, property or of any supplies or services essential to the life of the community or damages (defence) equipment or property, ...or kidnaps or detains any person and threatens to kill or injure such person in order to compel the (government) or the person to do or abstain from doing any act;

(b) is or continues to be a member of an association declared a terrorist organisation, or voluntarily aids or promotes the objects of such an association and in either case is in possession of any unlicensed ammunition, explosive or other instrument or substance capable of causing mass destruction and commits any act resulting in loss of human life or grievous injuries to any person or damage to any property, commits a terrorist act.

The intent provision would appear to be wide and vague only in respect of 'unity' and 'integrity'. The act part is to a large extent somewhat qualified by serious violence and weapons of mass destruction.

5.2 Membership and 'terrorist act'

Interestingly, in respect of 'membership' of a terrorist organisation, an individual can only commit a terrorist act if he or she is a member of a declared terrorist organisation. Such persons must also be in possession of certain unlicensed weapons capable of causing mass destruction or death or they must commit an act resulting in human life or grievous injury or damage to property.

5.3 Membership and offences

Confusingly though, an individual can still commit an offence if he or she belongs to a terrorist organisation which commits terrorist acts. The distinction between the two is relevant to the penalty imposed; if a person commits a terrorist act that results death, the punishment may be death or life imprisonment. If the same person commits a prescribed offence, then he or she can receive various prison terms or a fine.

5.4 Terrorist organisation

This is described as an organisation listed in the schedule, or which operates under the same name as a listed organisation or which is concerned with or involved in terrorism. An organisation is deemed to be concerned with or involved in terrorism if it commits or

participates in acts of terrorism, prepares for terrorism, promotes or encourages terrorism, or is otherwise involved in terrorism.

In this respect, it has been pointed out that the term 'otherwise' is vague and far too wide and does therefore not comply with the foreseeability rule, because individuals cannot reasonably foresee if their actions can fall within the web of 'terrorism'. A similar argument is made in respect to the words operating under the same name as being too excessive and vague in that it discloses no requirement of a real criminal act or intention relevant to the purposes of the Act.

Even as early as the publishing of the Act in March 2002, 32 organisations had already been identified and declared as terrorist organisations in a schedule to the Act.

5.5 Definition and offences: Freedom of expression and association

In respect of aiding and promoting the objects of a terrorist organisation, the term 'objects' is undoubtedly too wide and vague in that it does not define or qualify what these objects are. This means that any object of the proscribed organisation, even its political wing or legitimate activities cannot be supported or aided.

The following are also declared to be offences in the act: attending or arranging a meeting, which is to support the organisation or to be addressed by a member of a terrorist organisation. These offences raise freedom of expression and association concerns, especially since no distinction is made between the lawful acts and objects of an organisation and its unlawful side. It potentially criminalizes journalists or other professionals for meeting with any member of a terrorist organisation, irrespective of the purpose of that meeting.

5.6 Knowingly harbouring and concealing a terrorist

This provision is similar to what is contained in the South African Anti-terrorism Bill and attracts a 5 year sentence but quite interestingly, it does not apply to the husband or wife of the terrorist.

5.7 Holding of proceeds of terrorism, and fundraising for a listed terrorist organisation

According to the Act, proceeds of terrorism are to be forfeited to the state, and despite forfeiture, the person can also be prosecuted. Fundraising for black listed organisations is also illegal if a person knows that the proceeds of such activity will go to a terrorist organisation.

5.8 Police power: Obligation to furnish and share information

An investigating officer may, notwithstanding the provisions of any other law (e.g. privilege), and without a court order but merely with the written approval of a police superintendent, require a state body or bank or company or any institution to furnish information in their possession. The only requirement is that the officer should have reason to believe that such information is relevant. Failure to furnish the required information is a criminal offence. This procedure does not make allowance for judicial oversight or supervision.

5.9 Powers of police: Search and seizure

With the written approval of the General of Police (and thus not a court warrant) and in investigating offences under the Act, investigating officers of the rank of Superintendent and above, can seize or attach any property he or she reasonably believes are proceeds of a terrorist organisation or will be used for such. Such seizures or attachments must be reported to the 'designated authority' within 48 hours and it may confirm or revoke such seizure or attachment. A designated authority is basically a state official appointed for such purpose.

The designated authority's decision is open to review by the Special Court. See below for section on "Special Courts". In turn the decision of the Special Court is open to appeal in the normal High Court.

It ought to be noted that the seizures and attachments are in the hands of the state or the executive and not the judiciary and this violates an individual's right to procedural fairness and judicial oversight.

5.10 Confessions to a police officer

The Act contradicts the Indian Evidence Act by making any confessions to a police officer admissible at trial, which is a serious violation of an individual's fair trial rights.

5.11 Special Courts

Basically the Act sets up special courts in different areas of the State to deal with offences under the Act. A concern has been raised that the special courts are presided over by judges appointed by the state with the concurrence of the Chief Justice.

Although the appointment is with the concurrence of the Chief Justice, the fact that the state has a hand in the choice of the judge raises concerns regarding judicial independence. However the Act also provides that if the circumstances show it is not possible to have a fair, impartial or speedy trial, or it is not otherwise in the interests of justice, the Supreme Court may transfer any case to another special court within the State. All appeals against the decision of Special Courts lie in the High Courts.

5.12 Power to direct samples (identification items)

The special courts regulate such warrants, unlike, for example in the UK Act. The accused is not forced to cooperate nor can the police forcibly obtain samples, as in the UK law. However if the accused refuses to cooperate, an adverse inference may be drawn against him/her. Such adverse inferences have not been ruled as unconstitutional in most democratic countries including South Africa, Canada, and the USA.

5.13 Interception and Monitoring of Communications in certain cases

Warrant applications are made, not to a Court, but to a designated state official, called the Competent Authority, specially appointed for such purposes under the Act. The

provisions and grounds for application and granting the warrant are similar to the recently passed Interception and Monitoring Act of South Africa, except that in India, there must be probable cause of an offence that is, has or will be committed under the Anti-Terrorism Act.

The warrants are also subject to set time periods, specified information and targets and equipment. Interception and monitoring may take place without a warrant in situations of emergency, immediate danger of death or serious injury to persons and imminent state security threats.

All warrants issued by the Competent Authority are reviewed as a matter of course by a Review Committee, which may approve, revoke, disapprove or stop the warrant. Orders or warrants that are not confirmed are not admissible evidence against the accused in any consequent trial. The other difference with the SA Interception and Monitoring Act is that all material collected and recorded must be protected, sealed and kept in safe custody for 10 years.

5.14 Admissibility of evidence collected through interception

Such evidence is admissible against the accused provided that he or she was provided with the warrant application, its contents, the contents of the warrant and the full contents of the interception (i.e. whatever was intercepted and recorded), at least 10 days before the commencement of the trial.

5.15 Annual reports of interceptions to Parliament and the Legislature

Reports of all interceptions, disapproved and approved, must be compiled annually and laid before Parliament. However, part of the report which in the opinion of the Central Government is prejudicial to state security or the prevention of terrorism, may be excluded.

The criticism that has been made here is that the executive or central Government draws up the report, has a subjective (opinion) discretion to determine the exclusions and there is no checking mechanism as to how or whether this discretion was used

properly. It is basically done behind closed doors in secret. Further there is no public interest defence or mandatory disclosure clause.

There is also no provision for the disclosure of interceptions to the targets after the interception. The only time a target may know there was an interception and monitoring is if he or she is prosecuted and it is used at their trial.

5.16 Arrest

Any person arrested or taken into custody under this Act must immediately be informed of their rights and is immediately entitled to legal representation. The representative is not entitled to be present throughout the interrogation process.

The police also have to immediately inform the person's family and in the absence thereof the person's relatives etc. This notice must be confirmed in writing and signature of the arrested person and the police officer.

5.17 Bail and Detention

The Code of Criminal Procedure, 1973 was amended under the Act to provide for detention without charge for a period up to 180 days.

An accused may apply for bail. However if the application is opposed by the state and the court finds in favour of the state, ie refuses bail, the accused may be kept in judicial custody for 90 days without charge pending the outcome of the investigations. After the 90 days the accused must be released or charged and proceedings commenced, or the state can apply for 3 additional months detention.

The Public Prosecutor will have to indicate the progress of the investigations, why the extension is required and the specific reasons for the detention of the accused beyond the 90 days. No person charged under this Act may be released on bail or on his or her own bond until the Court is satisfied that there are grounds for believing that the accused is not guilty of the relevant offence.

No bail shall be granted to a person who is not an Indian citizen and has entered the country unauthorisedly or illegally, except in very exceptional circumstances.

5.18 Transfer from judicial to police custody

An investigating officer may, for the purposes of investigation, make application to the Court for the transfer of the detainee from judicial to police custody.

5.19 Officers competent to investigate cases under the Act

Only the following ranks or ranks equivalent thereto may do so: the Deputy of Police Commissioner, an Assistant Commissioner of Police, or a Superintendent of Police.

6. GERMANY: THE ANTI-TERRORISM ACT

It has been said that in the second half of the 20th century, terrorism was an issue of serious concern in Germany. Terrorist acts (bombs, arson, kidnapping, executions) accounted for more than 15000 crimes against state security in the 1980s. During this period 10% of the police force were assigned to forces dealing with state security. Between 1970 and 1979 there were 649 'terrorist' attacks (bombs etc) that killed 31 people and injured 97. 163 people were taken hostage. Between 1980 and 1985 attacks increased to 1601.

It appears that most of these acts were committed by organisations like the Red Army Faction (RAF) and 'sleeper' terrorist organisations comprising foreigners and immigrants living in Germany.

Germany is also considered to be the home and 'staging ground' for 'terrorist cells' that were responsible for September 11 and present day terrorist attacks all over the world. It is seen by some as relevant that with its three million Muslims, more foreigners than any other society in Europe and its liberal asylum and immigration policies, Germany is an attractive location for sleeper terrorist cells and a staging ground for terrorist plans and attacks.

6.1 The monitoring of citizens' private affairs

Even before Sept 11, besides the expansion of police powers, police time and resources went into massive monitoring of the public. Rather than reacting to terrorism, proactive police work sought to prevent terrorist threats thus blurring the line that separates normalcy from emergency and weakening the tenets of liberal government and privacy laws.

The police conducted massive data collection, storage and retrieval and monitoring of certain people. They engaged in computer matching of information on a large scale. This means large amounts of data are scanned into computers in the effort of identifying overlapping clusters of 'suspicious' traits in particular populations segments. For example the police would use files of utility companies to identify customers who pay their bills in cash or through third parties.

This group is narrowed down further by running data checks on lists on residence and automobile registrations as well as receipts of social security and childcare payments. The people that remained in the dragnet were potential suspects. If they lived in large apartments complexes with underground garages and unrestricted direct access to four lane highways even during rush hour, changed their locks as soon they moved in, kept their curtains closed, and received little or no mail, they were placed under direct police surveillance. As much as five percent of the West German adult population appear to have been covered by some sort of police surveillance system since the 1980s.

Basically preventative or intelligent police work, conducted in the name of internal security, was informed by abstract social categories that the police had defined. It was not informed by evidence that a specific individual had been involved in a criminal or terrorist act.

However studies have shown that these efforts by Germany were not successful because not many cases were successfully based or prosecuted on these methods.

6.2 Warrantless Information monitoring and collection

According to the Federal Constitution Protection Amendment Act, banks, credit and other financial institutions, postal service providers, airlines and telecommunication service providers are required to divert information on accounts and securities into a state central database system at the Federal Finance Supervisory Authority.

The Federal Office of Criminal Investigations Act grants authority to conduct criminal investigations on the data without having to obtain permission in advance.

Amendments to the Aliens Act, Aliens Central Register, Social Security Act, Passport Act, Social Welfare Act, Criminal Investigations Act, Federal Constitution Act and the Income Tax Act collectively permit the state to issue special and forgery proof ID documents to asylum seekers. They also require certain information on ID documents and social security forms to make computer checks on people easier, especially on foreigners, immigrants and asylum seekers and to make voice recordings and other identification recordings of asylum seekers.

The Income Tax Act amends privacy laws to enable the state to gain access to financial and other information.

6.3 German courts ruling on computerised data search

Investigators searching for *al-Qaeda* sleepers in Germany risk losing what they regard as the most important weapon against terrorism. German Courts in two cities have upheld objections to the controversial use of computerised search of official records based on profiling of suspects, partly on religious grounds. This search has often allowed police and intelligence agents to pick out people.

6.4 Definitions of terrorists and foreigners

The Aliens Act stipulates that persons who constitute a threat to democracy and freedom or to the security of Germany, who engage in acts of violence in the pursuit of their political objectives, who publicly incite the use of force, or who are members of

organisations that supports international terrorism shall not be granted entry visas or residence permits and will be subject to a ban on entry and residence in Germany.

6.5 Support for organisations

Groups that support organisations in or out of Germany that cause, threaten or practice assaults against persons or things or if they are a danger to public order and security will be banned. Legislation forbids the support or advertisement of terrorist organisations and bans the public use of symbols of prohibited organisations.

6.6 Erosion of the rules of evidence and proof of criminal liability

Under certain conditions, legislation permits the arrest of individuals even in the absence of any suspicion of criminal activity. Article 129a subjects criminal intent rather than criminal behaviour to legal prosecution. Mere suspicion that an individual is supporting a criminal organisation constitutes a criminal act and thus provides legal ground for issuing of search and arrest warrants. The extension of powers and offences beyond criminal conduct is deemed to be part of Germany's preventative measures against terrorism.

6.7 Amendment of the Association Act - Religion and terrorism

Before September 11, a clause in the German Basic Law prohibited the government from banning any group, even one advocating terrorism, that described itself as religious or faith-based. The Anti-Terrorism Act eliminates this clause and removes religious privilege from the ambit of prosecution.

7 LESSONS LEARNT FROM THESE JURISDICTIONS

There a number of common themes, which one can draw out of all the anti-terrorism laws analysed in this chapter:

- 1) There is a deliberate targeting of foreigners, immigrants and asylum seekers, especially for detention without trial or charge. These laws especially target those who cannot be deported or those who the state does not want to be deported. As

one individuals put out in relation to the United States: “What we have done is to trade off the rights of and liberties of a vulnerable minority, immigrants, in particular Arab and Muslim immigrants, for the purported security of the rest of us”;

- 2) These laws provide for very broad definitions of terrorism, which potentially proscribe robust legitimate political dissent. They also draw in ordinary criminals and common criminal activities within their purview;
- 3) All the jurisdictions establish secret monitoring systems, and sanction the collection and use of private, financial and other information about citizens for purposes of evidence;
- 4) There is serious erosion of long established rules and constitutional procedures relating to evidence, proof of criminal liability and the basic elements of a crime;
- 5) These jurisdictions criminalize organisations and further prohibit support and sympathy for such organisations even if this support is directed towards the legitimate activities of the groupings;
- 6) These jurisdictions compel citizens to inform on each other;
- 7) These jurisdictions deny the disclosure of state information or public interest information.
- 8) Since the definition of ‘terrorist act’ in all the jurisdictions is broad enough to cover political action and protest of any kind, these laws adversely affect and stifle freedom of expression. They restrict freedom of expression and freedom of the media by among other things compelling individuals and institutions to disclose information or even their sources of information.
- 9) These jurisdictions provide the authorities with wide and sweeping powers to monitor and intercept all forms of communications; and lastly,

10) These jurisdictions turn individuals into 'serious' offenders who then become deportable or punishable by long prison sentences not for committing terrorist offences, but for providing ordinary support to any group which the state decides to label as a terrorist group.

Chapter 2

THE ANTI-TERRORISM BILL [B12-2003]

2.1 Definition of ‘terrorist act’

(N.B: There appears to be a typographical error in the definition of terrorist act in this section, see paragraphs 40-45 in page 4 of the Bill).

For purposes of this submission, we shall take the definition to read; -

‘Terrorist act’ means an unlawful act, committed in or outside the Republic which is-

1. A convention offence;
2. Likely to intimidate the public or a segment of the public

To begin with, this definition is extremely vague, overly broad and too wide to be understood or construed with any reasonable degree of precision. One of the fundamental canons of legal drafting is that legislation must be clear and sufficiently precise for the public to know and be certain of what conduct is prohibited. The definition therefore fails to comply with this basic rule.

The definition is broad enough to cover a number of common-law crimes such as intimidation, malicious injury to property, murder, attempted murder, kidnapping and arson, which ordinarily would be dealt with under the less drastic common law principles of criminal law and the Criminal Procedure Act. The consequence of this is that, even if the accused or the suspect never intended a terrorist act, potentially he or she can be subjected to the extraordinary detention provisions and penalties in the Bill. The wide definition thus creates the potential for abuse and confusion.

This definition also fails to give cognisance to another very vital element contained in the Organisation of African Unity’s Algiers’ Convention of 1999. This Convention states that “...the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including the armed struggle against colonialism, occupation, aggression and domination by foreign forces, shall not be considered as terrorist acts.”

The 'liberation movement' exception has been a feature of international law since the 1960s and it has all along been recognized and accepted as an important facet of modern day democracies including South Africa.

2.2 A Convention offence: The definition of 'terrorist act' in international conventions, The OAU Convention as an illustrative example

In criminal law, each unlawful act has two intertwined components viz. criminal conduct (the act) and the criminal intent (the intent).

2.2.1 Criminal conduct

Under the Organisation of African Unity's (OAU) Convention on the Prevention and Combating of Terrorism, the criminal conduct (act) covers violence of any degree. By so doing, it extends the reach of violence outside the most serious boundaries and inevitably blurs the distinction between 'terrorists' and other criminal acts. The words 'physical integrity or freedom of' are rather imprecise and too vague. At a guess they could mean anything from touching, minor assaults to the causing of inconvenience.

Again the description of acts covered in the Convention is not precise enough in respect of an extraordinary offence like terrorism.

2.2.2 Criminal intent

The Convention specifies three different kinds of intent, and the presence of any one of them will render the conduct described above, irrespective of the seriousness thereof, to be terrorism. The breadth of the intent requirement becomes apparent if one asks the question whether there is any activity in the public domain that will not be covered by at least one of these forms of intent.

The answer to this is a categorical "No" because most of the public protest activities are not entirely purposeless and are usually directed at inducing the government or bodies or institutions to adopt or "abandon a particular standpoint, or to act according to certain

principles". A few examples below will help illustrate the ambiguity created by this imprecise definition:

- 1) If a local authority announces an increase in rents for low paid workers, and some of them storm its offices and break property to induce the authority from acting, they fall within the convention definition of the crime of terrorism since they will have committed unlawful act with the aim of inducing the authority to "abstain from doing (any) act";
- 2) If squatters decide to resist police on their next eviction raid, they too seem guilty of terrorism, since they will have advised acts which "may cause serious injury/death" to "any number or group of persons" with the intent to "induce" the "government's" to change its "standpoint" concerning squatters;
- 3) If workers in the essential or maintenance service go on strike they potentially fall within the definition of a terrorist act because their strike is illegal (so they are committing an act in violation of the country's labour laws) and because their strike will and is intended to "disrupt any public service, the delivery of any essential service to the public or to create a public emergency".

All the above acts and intentions are already punishable by our common law. The conclusion is inescapable that protest politics and industrial action in SA will fall within the definition of terrorism even if a person had no intention of being a terrorist and even if no violence or serious violence is used.

It may be argued that the legislation will not be used to target such activities, but the point is that, in terms of the definition, the state has the latitude, should it wish, to treat these actions as terrorism. This is a chilling thought when we take into account the power of the state to interrogate, the drastic bail provisions regarding being treated as a Schedule 6 offender and the limited rights under the investigative hearings.

The intention clause therefore does not target a specific frame of mind and consequence relevant to terrorism.

Even if the conventions were to be redrafted, the following extraction from the definition, which includes the use of death and violence, would still lack a rational connection to terrorism and would still be adequately covered by the common law:

“Any unlawful act which may endanger the life...of, or cause serious injury or death...and is calculated or intended to disrupt any public service, delivery...public emergency”.

Let us now turn to the second part of the definition, which we submit poses an even more absurd situation.

3 An act ‘likely to intimidate the public or a segment of the public’

3.1 Criminal conduct

The conduct made punishable by this definition is the commission of an ‘unlawful act’ – meaning basically any act that is unlawful. Such act is not qualified by, at the very least, violence. As long as an individual committed an unlawful act, even if trivial in degree and nature, if such a person has the relevant intent, and this is neither provided for nor defined in the Bill, then the said person will be guilty of the offence of terrorism.

Such definition is reminiscent of one of our older ‘terrorism’ Acts, which criminalized “any act”, committed with a specified intent. We submit that the act of terrorism is or should be an act of serious violence. Extending the reach of terrorism outside the most serious violence blurs the distinction between terrorism and other criminal conduct. It may be argued that the law does not concern itself with trivialities or that the Legislature could not have intended to confer the status of terrorism on persons who commit minor unlawful acts. However bearing in mind that the state has elected to make terrorism a special offence, the definition must disclose an extraordinary act to supply the required justification to legislate this crime as a unique offence.

3.2 Criminal intent

The words; “which is likely to intimidate the public or a segment of the public” seeks to supply the required intentional element when prosecuting a terrorist act. It has been said that the Committee tasked with the drafting of the Bill did not include a specific intent or purpose because it was of the view that such a phrase or purpose was superfluous. In their view ‘intimidating’ a person is in any event forcing or trying to force someone to do something. That is correct.

But the point, in the context of terrorism is, forcing someone to do what exactly or specifically? The exact or the specific separates the terrorist from normal intimidators. Some acts of intimidation are acts of terror to those affected. This however does not mean that every act of intimidation should be labeled as an act of terrorism. This definition extends its reach to ‘intimidators’ who have no intention of being ‘terrorists’.

It is generally accepted that an act of terrorism is committed with the intent to bring about a specific social or political end. In this sense, the definition fails to draw a line between ordinary criminal activities from acts of terror. This it does in the following manner:

- 1) It does not for instance distinguish a terrorist from strikers who commit an unlawful act to dissuade the public from entering their retail workplace or customers from entering their workplace;
- 2) It does not demarcate a terrorist from a vigilante group which kills a gang member to dissuade others from selling drugs in their area;
- 3) It does not identify a serial rapist or killer on the loose; from a sharpshooter picking off members of the public because of a marital dispute.

The definition gives no guidelines or standards by which the required distinction must be made, neither does any other section of the Bill disclose such guidelines or standards to separate the special intention of a terrorist from that of an ordinary criminal.

On the plain language of this definition, a member of the public will not be able to foresee whether his or her acts or intent may be viewed as terrorist. In similar vein, this imprecise definition of the crime will make it will be well nigh impossible to determine

what criteria or standards or meaning of terrorist acts the following categories of people will use when implementing the legislation:

- 1) The police when stopping and searching the public or their vehicles and arresting any persons in this regard (section 6);
- 2) The police when investigating and questioning members of the public and applying for warrants or executing warrantless arrests (section 6 and 9);
- 3) The Director of Public Prosecutions when he or she has to decide whether prosecution proceedings should be instituted against an individual or group (section 7);
- 4) The High Court when issuing directives, examining persons who are alleged to have information about terrorists or determining a case; and lastly,
- 5) The Minister of Safety and Security when issuing a notice in the government gazette to have an organisation proscribed (Section 14).

The drafters may argue that when applying or acting under this section of the definition, the State and Courts will exercise their discretion to target real 'terrorists' and not extend the Act to cover other crimes. However the guidelines or standards used in the exercise of such discretion must be open and foreseeable in the statute to both the person who must apply the law and the persons who may be covered thereby.

Even if one can depend on the judiciary to apply judicial restraint and common sense, the main problem will lie at the ground and less 'judicious' level, namely the police. Foreseeable problems include the system being clogged with numerous misconceived section 6 (warrants to stop and search persons and vehicles) and section 8 (orders for gathering evidence) applications and the public being questioned and investigated in similar misconceived circumstances.

3.3 The problems posed by the term 'likely'

The definition targets not only acts that actually 'intimidate the public' but also acts, which are likely to intimidate the public. What the lawmaker has provided for is a speculative offence. In actual sense, an offence has been created out of a conjectural likelihood of intimidation, which may arise out of an act. It matters not that no intimidation

actually eventuates. This part of the offence is concerned with likelihood rather than reality. There is no requirement of proof of any consequences, of damage to the public or impact upon the public.

Such a phrase has been found to be vague and too wide by the court as it would place persons in doubt as to what can be lawfully done and what cannot (*Chavunduka and Another v Minister of Home Affairs, and Another* 2000 (4) SA 1 (ZSC) at 13 B-E).

connected to this unwieldiness and more worrying as well is the manner in which the state is going to interpret the word 'intimidation'.

3.4 The problems posed by the term 'intimidation'

Though this term, together with the word likely constitute the essential elements of the offence of terrorism in the Bill; it is surprisingly left undefined. It is not certain what parameters the court will use to delimit the extent and reach of what will constitute intimidation but for purposes of this submission, we would like to closely examine the potential dangers posed by this word, precisely because of its unique history and dubious application in South Africa.

The word intimidation formed part of the wide arsenal of oppressive instruments at the disposal of the Apartheid State. It was specifically legislated through the Intimidation Act (72 of 1982), an archaic piece of apartheid law that formed part of the battery of security legislation such as the Internal Security Act of 1982, enacted in the days of the 'total onslaught'.

The predecessor of the Intimidation Act was the notorious Riotous Assemblies Act of 1956, which originally regulated employer-employee relations. Its provisions were later given universal application by the elimination of the requirement that the intimidatory or similar conduct had to be in 'respect of employment'. In 1982 the Intimidation Act repealed the provisions of the Riotous Assemblies Act and replaced them by a single crime. So far there has been no move to repeal this Act, despite its notorious history.

Section 1 (b) of the Intimidation Act reads as follows:

“Any person who acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication-

- (i) Fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person shall be guilty of an offence and liable on conviction to a fine not exceeding R40 000.00 or to imprisonment or to both such fine and imprisonment”.

This definition we argue, cannot pass constitutional muster because not only is it too wide, but it is also unclear and has no rational connection to the real meaning of intimidation. In order to obtain a conviction of the crime created in subsection (b) the prosecution need not necessarily prove that the prohibited result (ie that a person fears for his or her safety) necessarily ensued. Instead of the actual happening of the result, it is sufficient that “it might reasonably be expected that the natural and probable consequences” of the conduct would be that a person fears for his or her safety or that the other possible consequences which are mentioned ensue.

Subsection (b) is wide enough to cover cases where a person had already committed the particular act aimed at intimidating a certain group of people, but has not yet succeeded in bringing the intimidatory message to the attention of the group.

An example of such action is where a person draws up and prints a pamphlet but has not yet succeeded in distributing this pamphlet among the members of the group of people he or she wishes to influence. This subsection is also wide enough to cover cases where, because of the alleged intimidation, its alleged victims are not prepared to come forward and give evidence that the intimidator’s conduct resulted in their fearing for their own safety or, for example, the safety of their property (C.R. Snyman, *Criminal Law*).

In subsection (b) intention is not required. The words “that it might reasonably be expected that the natural and probable consequences thereof would be that...”

embodies a test which is difficult to square with the subjective test which the courts apply to determine the existence of intention (Criminal law, C.R.Snyman).

There is even no requirement that the alleged perpetrator directed his or her act at the alleged victim or that he or she intended the alleged victim to fear for his or her safety or property. The provision could cover activities in which the alleged perpetrator may not even be aware or reasonably have known that his or her conduct was making a person fear for his or her life or property.

Basically the connection in the provision between the perpetrator and victim is extremely tenuous and very unclear. It fails to clearly define the conduct it proscribes and is susceptible to too wide an interpretation. Accordingly it does not provide reasonable notice to the public of what is prohibited so that individuals can act accordingly. It places in doubt what can lawfully be done and what cannot. As a result it exerts an unacceptable 'chilling effect' on the ability of people to express themselves individuals will tend to steer clear of this potential zone of application to avoid censure.

The provision is so wide that it technically covers the following situations:

- 1) A journalist writing a sensational article that a particular country is threatening to declare war on South Africa and that it has nuclear weapons. In this scenario the public would reasonably fear for their safety and property. Similarly, a journalist who writes a sensational article that the high murder, rape and robbery rate in South Africa is on the increase and the state is failing to solve the problem would also be 'intimidating' the public.
- 2) Workers who verbally and through pamphlets threaten to stage a lawful or unlawful strike or protestor sit-in or consumer boycott in respect of a particular company.

It is very likely that with no other definition at hand, the prosecution as well as the courts will turn to the provisions of the Intimidation Act for succour. We submit that it is not only improper, but also dangerous to revive the same old instruments of oppression that were designed to specifically suppress dissent and keep the majority of our people under control. The state should on the contrary be spearheading a drive to rid our statute books of such obnoxious laws, not revive them.

3.5 Offences and penalties (Section 2)

The defective definition of ‘terrorist act’ in the Bill has obvious roll-on consequences for the offences listed in this section. Broadly speaking, this section prohibits any person from committing a terrorist act or from joining, remaining a member of, or supporting an organisation that has been declared to be a ‘terrorist organisation’ by the Minister of Safety and Security.

A person found guilty of a terrorist offence faces a possible punishment of between 15 years and life imprisonment. Among other things, this section imposes an obligation on every person to inform the authorities about people belonging to terrorist organisations. It is an offence to give any economic, financial or other form of support to a terrorist organisation. It is also an offence to receive any form of benefit from such organisation.

We submit that this section as well as its wording is highly problematic. It means that a person can never belong to or support organisations that the Minister has proscribed. Once passed for instance, the Act will permit the prosecution of persons and their imprisonment even if that person’s activities (material, abstract and/or spoken/written support) are lawful, non-violent, not functional to any terrorist act and not intended to further the proscribed organisation’s policy of violence.

It is our contention that this provision is too wide and unduly infringes on the rights of freedom of expression and association. It simply goes further than is necessary for purposes of combating unlawful acts. The section creates a serious dilemma for individuals especially because of its attempt to turn individuals into informers on behalf of the state.

The Supreme Court of the United States in *Nato v United States* 6 L Ed 2nd 836, 842-3(1961) and *Scales v United States* 6 L Ed 2nd 782 (1961) stated that guilt is personal and that the judiciary should guard against the danger that “one in sympathy with the legitimate aims of such an organisation (one dedicated to the violent overthrow of government) but not specifically intending to accomplish them by resort to violence, might be punished for his (sic) adherence to lawful and constitutionally protected

purposes, because of other and unprotected purposes which he does not necessarily share”.

Again, US Supreme Court in *Brandenberg v Ohio* 395 U.S 444, 447 (1973) and *NAACP v Clairborne Hardware Co* 458 U.S 886, 927 (1982) respectively held that advocacy (speaking in support, abstract or otherwise) of an unlawful act, the use of force or violence does not remove speech from the protection of the First Amendment. Only communications that actively and materially solicit and teach and encourage such an act is not protected.

What makes this section also worrying is that there are many individuals and groups in South Africa who give material, financial and moral support for charitable purposes to organisations in other countries. Some of these organisations operate under very severe constraints in countries such as Palestine and the Kashmir region. Once these organisations are proscribed for whatever reasons in their own countries, then the ATB will require that individuals in this country will have to give up their support to them.

We submit that this section is a blatant and indefensible interference of the right of individuals to associate with and support lawful causes and organisations in the manner that they wish to do under our constitution.

3.6 Internationally protected persons (Section 3)

This section provides that where an act has been committed against an internationally protected person (e.g. a diplomat) or the property of an internationally protected person, then the fact that the person is a diplomat shall be treated as an aggravating factor in passing sentence.

We fail to understand why such extra ordinary penalties should be provided yet this category of persons is already protected under the various international conventions, local statutes, common law and the criminal procedure. The major problem with this section is that even if a person commits an ordinary crime against a diplomat (e.g. robbery, assault etc) or steals or damages their property (e.g. steal car, hijacking,

burglary, etc) then the suspect will be tried as a terrorist. The suspect will therefore be exposed to the more severe penalties created by the Bill.

We are especially worried that the motivation behind this provision is to curtail political protests against well know diplomatic missions in the country particularly those belonging to the United States and Israel. So far government has not demonstrated that the provisions of the almost certainly unconstitutional Regulation of Gatherings Act (205 of 1993) have been inadequate to deal with the many demonstrations and pickets held outside the consulates. As we have argued elsewhere in this submission, there appears to be a hidden hand driving the substance of the anti-terrorism legislation and it is for this reason that we hold that it is not in the interests of our country.

3.7 Bail (section 5)

We submit that this is one of the Bill's most contentious provisions. By providing that a person charged under the Anti-Terrorism Act, will, for purposes of bail be treated as a Schedule 6 (of the Criminal Procedure Act (CPA, 51 of 1977)) offender is another way of ensuring that such a person is not freed under any circumstances.

One of the most controversial amendments to the CPA was section 60(11) of the Act a few years ago. This section singles out for more stringent treatment applicants for bail who are arrested for schedule 6 offences (termed the 'more serious offences'). The section requires that a person accused on a Schedule 6 charge must adduce evidence (that is, the onus is on the accused) to satisfy a court that 'exceptional circumstances' exist which permit his or her release.

Section 60(11)(a) contemplates an exercise in which the balance between the liberty interests of the accused and the interests of society in denying the accused bail will be resolved in favour of the denial of bail, unless 'exceptional circumstances' are shown by the accused to exist (SA Constitutional Law: The Bill of Rights, Cheadle Davis Haysom p635).

On the other hand, an accused on say a Schedule 5 charge (the less serious offences) need only satisfy the court that 'the interests of justice' permit his or her release. The

Constitutional Court in *S v Dlamini; S v Dladla and others; S v Schietekat* 1999 (7) BCLR 771 (CC) found that the amendment was not unconstitutional but emphasized that it can only be used for ‘very serious offences’.

The major problem with the ATB is that all persons charged under the Act will be treated as Schedule 6 offenders. It is problematic because the definition of terrorist act casts such a wide net that many offences, which are not objectively serious, will be classed as terrorist related activities and will be treated as such.

The effect of this provision is that for purposes of bail and securing one’s liberty, persons involved in a public protest or a person who unwittingly has knowledge of another deemed by the state to be a terrorist will be treated in exactly the same way as a person who places a bomb in a public place to cause death and destruction. It will also be the same case with a person who is ordered to stop by a police officer during a vehicle search under section 6 of the ATB but fails to do so.

We submit that considering the problems associated with the definition of ‘terrorist act’ and the provisions relating to ‘supporting’ and ‘being a member of a proscribed organisation’, even people who do not or are not accused of committing objectively serious offences will be subjected to these drastic bail provisions.

We further wish to point out that this provision is of grave concern because it affects the liberty of individuals. Inevitably, even if the accused has evidence of ‘exceptional circumstances’, which could then persuade the court to grant him or her bail, such will require time to prepare and establish. It goes without saying that the accused, even if he or she succeeds in discharging the heavy onus, will inevitably spend time in detention before release.

3.8 Power to stop and search vehicle and person (Section 6)

According to the Bill, a police officer of or above the rank of director may apply *ex parte* to a judge for a warrant to stop and search vehicles and people, and to seize any articles or things that could be used to commit a terrorist offence.

We submit that since the definition of ‘terrorist act’ is so vague and obscure, this section gives police officers a very wide margin of play. They could for instance stop cars and seize ordinary farming equipment such as fertilizer or physics and chemistry manuals, which explain the basic workings of a nuclear bomb.

Again, as we have argued above, the very imprecise manner of the definition of terrorist act means that there are virtually no guidelines, which could be used by the police in implementing this section. It also means that there are no limits to which police officers are bound once they obtain the warrant to stop and search vehicles and people. We are apprehensive that the issue of racial profiling, which has remained a repugnant aspect of our divided society and which features so prominently in Europe and especially America will now become even more entrenched in South Africa.

3.9 Investigative hearings (Sections 8-13)

We note with curiosity that this part of the Bill makes no mention of whether the hearings are to be considered within the framework of section 205 of the Criminal Procedure Act (51 of 1977). The Constitutional Court has found that the provisions of s205 of the CPA “are as narrowly tailored as possible to meet the legitimate state interest of investigating and prosecuting crime” (*Nel v Le Roux*).

We submit that there is no justification for investigative hearings to be held under circumstances and legislation other than s205 and although not above criticism, s205 is a less limiting of rights provision and is a far less intrusive method of procuring information.

We are particularly worried that this provision will seriously impact on the right to freedom of expression and media freedom in the country. It is not unthinkable that the state would begin to use section 11 of the ATB, instead of s205 of the CPA, to force journalists and other people to disclose and hand over information. All that the state has to do is situate the act or activities being investigated within the confines of the ATB and its wide definitions.

We look at the individual clauses of this part of the Bill in more detail below:

3.10 Order for gathering evidence (section 8)

A police officer may apply *ex parte* to a judge for an order for the gathering of information relating to the commission of a terrorist act. Such application is to be made with the written consent of the NDPP. The order may require a person to appear before the judge and provide information or produce a thing in his or her control.

Quite interestingly, this section does not mention that the person called in for questioning has a right to legal representation at the hearing. Though section 11 further down says that no answer given or thing produced or evidence derived from the investigation may be used against the person, we submit that it still leaves an individual open to prosecution for perjury.

Government has often claimed that investigative hearings are the alternative to the politically unpalatable option of detention without trial, because law enforcement agencies will be able to secure crucial information without trampling on the safeguards enacted by the Constitution. In Canada, from where this provision is borrowed, human rights activists opposed its introduction arguing that the hearing of potential evidence outside of a formal trial was unprecedented and dangerous. The authorities agreed to a five years sunset clause and it is possible that the provision will be reviewed, and possibly revoked.

3.11 Warrant for arrest (Section 9)

A person required to attend an investigative hearing may be arrested on a warrant issued by a judge if information is provided under oath that the person is evading service of the order, is about to abscond, or failed to attend the examination, or failed to remain in attendance during an investigative hearing.

This section does not say who provides the information that eventually leads to the warrant of arrest being issued. A presumption may be made that the information will come from a police officer, but in law, and where people's liberties are concerned, this is a very dangerous assumption to make. We submit that this silence is fatal because once combined with the requirement for individuals to inform the state about terrorists under

section 2 of the Bill, we may soon end up in witnessing a significant rise in witch-hunts and personal vendettas.

3.12 Detention or release on bail or warning (Section 10)

A person arrested under section 9 may be detained in custody or released on bail. If a person is detained, he or she will have a right to 'retain or instruct a legal practitioner at any stage of the proceedings', and to communicate or be visited by a spouse, partner or next of kin. The person will also have a right to communicate and be visited by a chosen religious counselor or medical practitioner.

Subsection 1, which provides for a person to 'retain or instruct a legal practitioner at any stage of the proceedings' calls for further interrogation. It appears that this right will be exercised purely at the accused person's expense. It differs in construction and meaning from Section 35 (2) of the Constitution which states as follows: -

Every person who is detained, including every sentenced prisoner, has the right-

(b) To choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

© To have a legal practitioner assigned to the detained person by the state and at the state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

We submit that it is patently curious why the state would not want to assign a legal practitioner to a person charged with an offence under this stringent and punitive legislation.

3.13 Obligation to answer questions and produce things (Section 11)

Under this section, a person may only refuse to disclose information or answer questions or produce a thing if such information is protected by any law relating to non-disclosure of information or to privilege. Section 189 of the CPA will apply "with the necessary changes required by the context".

We submit that section 11 violates freedom of expression and privacy and the provisions are incapable of being read down. The shield from prosecution that is provided to those compelled to answer questions in such an interrogation before a judge is incomplete in that such a party is still exposed to civil claims. The supposed qualification or defence, “is protected by law relating to non-disclosure of information or privilege”, would apply to the rare individual like an attorney or spouse.

While the compellability of witnesses is already a feature of our Criminal Procedure Act, the ATB severs the fetters of ‘just cause’ theoretically provided for in section 205 of the CPA. The defences and excuses developed by the Courts under ‘just cause’ in Section 205 of the CPA will not be available to an accused because “any law relating to non-disclosure of information or privilege” refers to some specific legislation that expressly protects specific disclosures. The concept ‘just cause’ embraces and includes more than a defence based on “information protected by law relating to non-disclosure or privilege”

We submit that this violates an individual’s right to remain silent, one of the hallowed canons of constitutional democracy.

3.14 Order for custody of thing: (Section 12)

The presiding judge may order a thing which is ‘relevant to the investigation of any offence under this Act’ to be placed into custody with a police officer or someone else acting on behalf of that officer.

As in section 11 above we submit that this provision will unjustifiably interfere with the right to freedom of expression particularly for the media because journalists will be compelled to provide their material including, for that matter, revealing their confidential sources of information.

3.15 Power of the court with regard to recalcitrant witnesses: (Section 13)

When a person is summoned for investigation under section 8, then he or she shall be compelled to provide the required information failure to which he or she may be

imprisoned for a period of up to five years in terms of section 189 of the CPA (51 of 1977).

We submit that this section poses a spectacularly serious threat to many individuals but more so to media practitioners. It must be remembered that the section calls for investigations to be conducted with 'the necessary changes required by the context'. If terrorism is taken to be that context, it means that the person under investigation will be treated more severely than a person summoned for a different reason under section 189 of the CPA.

3.16 Combating Support for Terrorist Organisations (Section 14)

Like some of the sections mentioned above, this part of the Bill also constitutes one of the most atrocious aspects of this legislation. It empowers the Minister of Safety and Security to declare an organisation to be a 'terrorist organisation' through the following two ways: -

- By notice in the Government Gazette if that organisation is an international terrorist organisation in terms of a decision of the Security Council of the United Nations(UN);
or,
- If he/she has reasonable grounds for believing that the organisation or any of its members on its behalf has: -
 - a) Claimed responsibility for a terrorist act; or,
 - b) Committed a terrorist act; or
 - c) Endangered the security or territorial integrity of the Republic or another country

Before the minister can take action under the second ground, he or she must publish a notice in the Gazette stating that he or she wants;

- a) To declare the organisation to be a terrorist organisation;
- b) The grounds for such declaration; and,

c) That the organisation has 60 days within which to apply for an interdict to oppose the Minister's decision.

A member of such organisation may also apply to the High Court within 60 days to stop the Minister's action. If no application is made within this period, or if the court refuses to grant the interdict, then the Minister may declare the organisation to be a terrorist organisation through the Government Gazette.

In the Gazette notice, the Minister must state details of the organisation so that the public may be able to identify the organisation, its office bearers and its members.

The Minister can also appeal to the High Court for the interdict to be revoked (if it has been granted).

In relation to the first ground where the minister is empowered to declare an organisation as a 'terrorist organisation' because the Security Council has made a decision to this effect, we must first question the bona fides and the independence of the Council itself.

It is no secret that the SC is heavily compromised and influenced by the main players who happen to be the powerful Western States. Recently, this corrupting influence has become even clearer after the US and the UK decided to wage war against Iraq in total disregard of international opposition. In the build up to the invasion, the US and the UK, who are also permanent members of the SC went about trying to force the nine non-permanent member states to vote in their favour. In any event, both powers have been at the forefront of prosecuting the so-called 'war against terror' and as such are interested in ensuring that other states comply with their dictates.

We submit that although the UN General Assembly is undemocratic and although the time has come to reappraise the role and function of this body, the SC, on the contrary continues to be unduly influenced and controlled by the United States. At the present historical juncture, the SC is the worst yardstick for any country to use in deciding which organisations to proscribe and which ones not to. Once the SC designates an organisation as a terrorist organisation the Minister will be compelled to do the same. Liberation movements such as the Popular Front for the Liberation of Palestine,

Hizbollah and the ETA in Spain, which have already been blacklisted by the US and the UK will possibly be the first to make it into the list in our country if this Bill is passed

We submit also that the second ground gives the Minister far too wide, arbitrary and over-reaching powers to proscribe organisations. The minister will have unfettered authority to 'black list' any organisation as long as in his or her opinion, such group or its office bearers pose a threat to the security of South Africa or any other country. There is no reason to suppose that militant and radical organisations especially the newly emergent social movements will not soon come under the attention of the Minister.

What we find rather troubling about this section is that it does not even require the Minister to inform the organisation directly about his or her intentions to declare it as a terrorist organisation. The Minister only has to put the notice in the government gazette. It is most likely that organisations will learn of the Minister's decision from the media or once they have been proscribed with the lapse of the 60 days period.

The purpose and nature of the proceedings in s14(6) is unclear and appears to afford the state an opportunity to challenge any adverse ruling in a de novo application. The Act, while specific about the recourse of the state against adverse decisions, is silent in respect of similar rights of the organisations. This places in doubt whether the organisation has the usual rights of appeal and review.

Once an organisation has been declared to be a terrorist organisation it is a criminal offence under section 2 of the Bill for an individual to join it, express support, or make any contributions of a financial, material or other nature. In the US, the government has succeeded in ensuring that citizens refrain from expressing any form of support or solidarity with many bona-fide liberation or charitable organisations, which have already been listed as "Foreign Terrorist Organisations" in terms of the 1996 Anti-Terrorism and Effective Death Penalty Act.

We submit that far more than anything else, this section will seriously violate the spirit, and purpose of our constitution as even the ANC can admit, had such legislation been in existence prior to its unbanning in 1990, most probably we would not be having the kind of solid democracy and government that we have in South Africa today.

3.17 Determination by accountable organisation (Section 15)

This section imposes a duty on every accountable institution as defined in the Financial Intelligence Centre Act (FIC Act -No. 38 of 2001) to determine whether they are in control of any property belonging to an organisation which has been declared to be a 'terrorist organisation'. If it finds such property-, which could include money, bonds, share certificates, fixed or movable property etc, it should forthwith report that fact to the Financial Intelligence Centre.

In terms of the FIC Act, an accountable institution is defined to cover virtually everyone from attorneys to banks to estate agents. Our concerns with this provision are discussed in greater details under section 16 below.

3.18 Duty to report on property of terrorist organisation (Section 16)

Under this section, an accountable institution or 'a person' who has control over property owned by or on behalf of a terrorist organisation, or who has information about a transaction or proposed transaction in respect of such property must, as soon as they learn of this fact, make a report to the FIC.

The director of the FIC is empowered to order the accountable institution to make periodic reports that it is still in control of the property owned by the terrorist organisation or that there have been a change in the circumstances concerning the institution's possession of that property.

Section 35 of the FIC provides that the Centre can apply to a judge designated by the Minister of Justice for the purposes of the Interception and Monitoring Prohibition Act, 1992 for an order directing any financial institution to report to it in secret about transactions conducted by a client if there are reasonable grounds to suspect the institution is being used for unlawful or terrorist activities.

We submit that this provision raises a number of critical issues:

1. There is no provision for the questioning or interrogation of the accountable institution or person to be supervised by a judicial authority or for legal representation during such questioning. As it is, there are serious concerns with the FIC Act as well as the Interception and Monitoring Act of 2002 in relation to the objectivity and partiality of the 'designated judge' under the Interception Act.
2. It is not clear whether the accountable institution or person will report to the Centre, only after an organisation has been declared to be a 'terrorist organisation' by the Minister; or, indeed the minute they become aware of certain transactions going on which they suspect to be of a terrorist nature-e.g. a large financial deposit or withdrawal of money.
3. The section introduces a new creature called 'a person who has control over property'. The Bill does not define who this person is or what degree of control they should exercise over such property.

While section 16(1) of the Bill requires both the accounting institution and the 'person' to report to the FIC, Section 16(2) leaves this 'person' out and only compels the institution to report back to the director of the Centre.

N.B: Supposing that under section 15 an institution can only report to the FIC once an organisation has been 'black listed', it is not clear why section 16 is necessary unless the state is trying to sneak in a provision to compel reporting even before the minister moves to act on an organisation. Whatever the case, section 16 is very vague and quite worrying.

3.19 Applicability of rules relating to confidentiality (Section 17)

This section only recognises an attorney-client communication as being privileged in terms of the reporting requirement under section 15 and 16 of the Act. In other words such communication is protected by the common law right of secrecy and confidentiality. No other communications or relationships such as husband-wife or doctor-client are protected

Again we wish to note here that section 15 does not talk about 'a person'. This creature is only introduced in section 16. It is not clear therefore whether a husband-wife relationship will be exempt from the rules of confidentiality.

3.20 Protection of person making report -secret evidence (Section 18)

An accountable institution or a person making a report in 'good faith' under section 15 (not certain in light of our arguments above) and 16 is protected from criminal or civil action. Furthermore, the said person is competent, but cannot be compelled to give evidence in criminal proceedings and no evidence about the identity of the person is admissible unless that person wishes to testify at these proceedings.

We submit that this section attempts to introduce the unwarranted reappearance of secret evidence during trials. The section proposes to have a person's 'secret evidence' being admitted against an organisation or individual in court, but the accused cannot compel that person to appear for cross-examination or give evidence in open court.

This facility is an adaptation of the US anti-terrorism laws where groups that have already been listed as terrorist organisations cannot easily be removed from the list because the evidence used is secret, classified and cannot be produced or challenged in open court or even in in-camera hearings. In actual fact we submit that an accountable institution or person will have the liberty to report secretly to the FIC which will then inform the Minister who will consequently declare an organisation to be a terrorist organisation. Unfortunately, the affected group or people will not be able to test the evidence used to arrive at this finding.

3.21 Preservation and Forfeiture of Property of Terrorist Organisations (Section 19)

Any property which belongs to a 'terrorist organisation' or proceeds obtained or due to a terrorist organisation shall be subject to seizure and forfeiture and treated in terms of the Organised Crime Act (121 of 1998)

There has been a great deal of debate about the Organised Crime Act and human rights organisations and activists have slammed it for its draconian measures. Some of its provisions such as the reversal of onus in respect of drug-related crimes have drawn wide opposition and even the Constitutional Court has expressed serious misgivings about some of its aspects.

4 How does the ATB impair fundamental rights and freedoms?

If passed into law, the ATB will unreasonably limit individual fundamental rights and freedoms such as the rights to freedom of association, expression, security of the person, belief, opinion, assembly and demonstration, liberty and integrity. These crucial rights will be affected in the following manner:

1. Section 2 (offences and penalties) potentially affects freedom of expression and association. Furthermore the section provides for extremely harsh prison sentences;
2. Section 5 provides that persons charged under this Act will be treated as schedule 6 offenders for the purpose of bail. This will amount to what we term as the 'judicial detention of individuals without trial' some of whom may have not committed objectively serious offences;
3. Section 6 gives police officers extraordinary powers to stop and search persons and vehicles and seize any article. This authorises the police to swoop in and interfere in the everyday routine of ordinary citizens rights, and immediately arrest any person who refuses or questions such interference. There is a high possibility of racial profiling and already there have been media reports about this phenomenon in South

Africa after September 11 in relation to air travel where certain individuals were singled out and thrown off the plane on the basis of their appearance.

4. Section 8, 9, 10, 11, 12 and 13 permit the state to issue a warrant for the questioning of any person to gather information for an investigation and to require the person to produce anything in his or her possession. The sections constitute a limitation of the examinee's normal rights and defences in that the hearing is not a s205 hearing under the CPA.
5. Section 14 gives the state the right to proscribe organisations by declaring them as terrorist organisations. This interferes with peoples' freedom of association as well as the concomitant right to freedom of expression.
6. Section 15-19 allows secret reporting and gathering of evidence as well as the use of such evidence in a court of law. This is a throwback to the days of apartheid where individuals were convicted upon evidence they could not challenge in an open court. It impermissibly infringes on an individual's right to a fair trial and the full discovery of evidence as guaranteed by section 35 of our Constitution.

5. Existing laws and procedures are adequate to tackle terrorism

5.1 Specific crimes and intentions

Under our existing common law and statutory offences, 'terrorists' can be charged with inter-alia intimidation, hijacking, murder, attempted murder, assault, various acts of violence, malicious injury to property, administering poison or other noxious substances, dealing with and possession or use of firearms and explosives.

Similarly, criminal activity can be prevented since we have in place the common law crimes of conspiracy, attempt and incitement to commit offences. Our criminal law is also broad enough to cover those who counsel criminal acts or are the directing minds of terrorist organisations. It is also broad enough to cover all manners of parties to an offence e.g. accessory to and after the fact, omission to report knowledge of a crime,

common purpose, negligent homicide, defeating or obscuring the course of justice and public violence.

Accordingly our criminal law encompasses not only those who actually commit criminal or even terrorist activities but also those who aid, abet or support them.

However, we wish to put it on record that we do not in this argument support the use of the statutory offences of 'attempt, conspiracy or incitement to commit offences' in section 18 of the Riotous Assemblies Act of 1956 and the statutory offence of intimidation in the Intimidation Act of 1982. These Acts should be repealed as part of the repressive security legislation used by the apartheid era to suppress political dissent in the country.

5.2 The Criminal Procedure Act

Section 205 of the CPA can be used for detention for purposes of investigating crime and obtaining information. As argued elsewhere in this submission, the Constitutional Court has found that the provisions of Section 205 of the CPA are narrowly tailored to meet the legitimate state interest of investigating and prosecuting crime (*Nel v Roux*).

5.3 Specialist bodies have been established to investigate and prosecute serious crimes

Special units, comprising expert and experienced detectives, lawyers and forensic persons, namely the Scorpions and now the National Priority Crimes Litigation Unit (NPCLU), exist. The NPCLU is supervising the prosecution of 23 alleged *Boeremag* members. This matter was investigated and is being prosecuted under the existing law. No special law or powers were needed. While Pagad is not a terrorist organisation, there may be reason to believe that the state would like to see and deal with it as such. That notwithstanding, the state was able to prosecute key members using the existing laws.

5.4 Constitutional relevance of the common law and criminal procedure act

Many of the rules and offences found in our common law as well as criminal procedure have had the benefit of judicial scrutiny to ensure consistency with civil rights. They have

also had precedential history, making it perhaps more difficult for courts to rationalise violation of civil rights in the name of national security or purported terrorism.

6 Is there a need for this legislation in South Africa?

The need for this Bill has not been sufficiently demonstrated especially given that there are over 22 existing laws in the country's statute books, which can take care of the crime of terrorism. The fact that last year the Minister of Safety and Security stated that the government had managed to 'break the back' of the right-wing threats against public order, and apprehend successfully those responsible for the spate of bombings in late 2002, is proof that there are enough laws to deal with terrorism.

All the countries discussed in chapter 1 of this submission such as the United States, the United Kingdom, Canada and Australia as well as the European Union are already implementing their anti-terrorism legislation. Initially this was meant to outlaw the Al Qaeda and associated individuals and organisations in the wake of September 11. However, these laws are now being used much more broadly to ban a range of legitimate national liberation movements, bona-fide human rights organisations and charitable institutions.

Such organisations include for instance groups fighting for the liberation of Palestine and against US imperialism. The banning is taking place in spite of the fact that numerous international instruments recognise the difference between national liberation struggles and terrorist acts.

Furthermore, anti-globalisation and emerging social movements have now become an issue of special concern, with the American Federal Bureau of Investigation having called for action against left-wing groups who profess a revolutionary socialist doctrine and view themselves as protectors of the people against the dehumanising effects of capitalism and imperialism.

As in other countries where this law has been passed, it is these vociferous voices against oppression and state repression which have been silenced and not the 'real terrorists'

7 Is there any justification for the ATB?

Section 36 of the Constitution permits a limitation on a right in the Bill of Rights only by way of a law of general application that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Seeing that our Constitutional Court often looks to Canadian constitutional jurisprudence, it would be relevant to use the framework for limitations set out by the Supreme Court of Canada in *R v Oakes* (1986) 1 S.C.R. 103, to see how far the ATB purports to extend. In this case, the Court held that

1. There must be a rational connection between the legislation in question and the objective/purpose sought to be achieved;
2. There must be a minimal impairment of rights; and,
3. The effect of the measures used must be proportionate to the objective or purpose.

7.1 Rational connection

In respect of the 'rational connection' criterion, we submit that there is no substantial or imminent threat of 'terrorism' in SA and there is certainly no 'public emergency' as defined by the ECHR (see comparative anti-terrorism legislation in Chapter 1 hereof). We would be stretching the meaning of this term if we were to argue that recent right wing threats constitute a 'public emergency'. Vigilante groups like Pagad cannot be defined as 'terrorist organisations and though the state may want us to see it as such, we argue that Pagad has been relatively contained by existing law and procedures.

Even if there was a semblance of a threat of terrorism or a need for an ATB, the proposed measures in the legislation are not rationally connected to the objectives sought. The definitions and offences are not narrowly focussed to target 'terrorists', but are vague and overly expansive. Accordingly the legislation is very likely to have a disproportionate adverse impact on innocent and legitimate political dissenters.

7.2 Minimal impairment

We argue here that minimal impairment requires clearly defined parameters, precision and forethought. By using vague and overly broad definitions and offences, the legislation will not avoid or ensure minimal impact. This will result in major problems around its implementation with potential risks of extensive violation of individual fundamental rights and freedoms.

7.3 Proportionality

In terms of proportionality, and as we have shown above, our existing laws are more than adequate to deal with any law and order problems (i.e. the ends sought to be achieved by the ATB).

8. Conclusion

We submit that the definition of a 'terrorist act' is critical because it forms the justification of any limitation of rights and therefore hold that the proposed legislation is not constitutionally justifiable. The following reasons underpin this finding:

1. The definition of 'terrorist act' in the Bill (conventions included) does not disclose an extraordinary offence which justifies the non-use of the common law or existing criminal procedure;
2. The definition is vague, imprecise and overbroad;
3. The definition does not comply with the foreseeability rule;
4. The convention offences are inaccessible to the ordinary members of public;
5. The defects in this definition will materially affect the practical implementation of the Act in that because the definition is imprecise, then the application will be imprecise and uncertain and unforeseeable; and, lastly,

6. Adequate common law and criminal procedures already exist to deal with the problem of 'terrorism', which the lawmaker wants to introduce.

We submit that vague and imprecise definitions are the foundation for abuse and violation of fundamental rights and freedoms. There is the very real threat that political dissenters and groups will be investigated, interrogated and prosecuted with a broad offence. We submit that the state probably included this definition to have a 'catch-all' fall back to use in uncertain situations and to give it flexibility. This is not permitted.

For all the reasons advanced in this submission, we hold that the proposed anti-terrorism legislation is not justifiable, and that it fails the required constitutional muster. Consequently we argue that this Bill should not be allowed to succeed and accordingly ask that it be withdrawn.

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