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SOUTH AFRICA'S LEGISLATION AGAINST TERRORISM AND ORGANISED CRIME

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This article describes and analyses the two main pieces of legislation with which South Africa has responded to the phenomena of organised crime and terrorism, namely, the Prevention of Organised Crime Act and the draft Anti-Terrorism Bill. It identifies the main features of each and focuses on the elements which may be unconstitutional. It argues that the rights infringements in the Prevention of Organised Crime Act might, on the whole, be accepted as justifiable by the courts, but that those in the Anti-Terrorism Bill, in its current form, will probably not pass constitutional muster. A closing section compares the general severity of the anti-terrorism and anti-organised crime measures with the measures required by the international regime, and concludes that they are substantially similar. In light of the fact that the legislature and executive may possibly be *obliged* to adopt the extreme approach taken in the legislation, the article concludes with a brief examination of the resulting conflicts between international and domestic law and between the different branches of government.

I. INTRODUCTION

On 28 September 2001, acting under Chapter VII of the United Nations Charter,[1] the Security Council issued a resolution[2] instructing all states to prevent and suppress the financing of terrorism,[3] to refrain from supporting terrorist acts,[4] and to bring to justice those who participate in the "financing, planning, preparation or perpetration of terrorist acts".[5] It also noted the

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1 See articles 40 to 42 of the UN Charter for the full list of powers which the Security Council may exercise under Chapter VII. For this paper, the most significant feature is that the Security Council may issue instructions which are binding on all member states.

2 Security Council Resolution 1373 of 2001 (S/Res/1373 (2001), 01-55743 (E), barcode 0155743, available on the web at http://www.un.org/Docs/scres/2001/res1373e.pdf); (hereafter "SCR 1373") (accessed 1 July 2002).

3 Article 1(a) of SCR 1373.

4 Article 2(a) of SCR 1373.

5 Article 2(e) of SCR 1373.

"close connection between international terrorism and transnational, organized crime".[6]

Long before September 2001, the South African government had legislation in place against organised crime[7] and was drafting an anti-terrorism bill.[8] Technically, therefore, the country might be said to have done nothing *in response* to SCR 1373 at all. Yet, as this article will argue, South Africa's legislative proposals in response to terrorism were very much an attempt to measure up to the *international* measures against the phenomenon. Organised crime, on the other hand, presents South Africa with a very immediate, local problem and was tackled as such. It is largely coincidental that organised crime supports terrorism and must therefore, in line with SCR 1373,[9] be suppressed in tandem with the fight against terrorism.

The Security Council's view of the interrelationship between terrorism and organised crime is borne out by the facts. Not only do terrorism and organised crime encourage and sustain one another,[10] but, internationally, the measures used to combat the two are also similar.[11] In South Africa, however, to the extent that the measures against organised crime are inward-looking, while the response to terrorism reflects a largely executive enthusiasm to adopt the correct position in the international arena, the two regimes may have differing receptions in the courts and South African society.

This paper analyses the Prevention of Organised Crime Act 121 of 1998 ("POCA") and the Anti-Terrorism Bill with emphasis on the domestic context of each. The conclusion returns to the issue of South Africa's compliance with international requirements and discusses the effects of possible conflict between the executive and the judiciary within South Africa on the one hand, and between international obligations and domestic law on the other.

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6 Article 4 of SCR 1373.

7 The Prevention of Organised Crime Act 121 of 1998, available at http://www.polity.org.za/govdocs/legislation/1998/act98-121.html (accessed 1 July 2002).

8 The full text of the Bill and the accompanying report of the South African Law Commission are available at: http://wwwserver.law.wits.ac.za/salc/discussn/paper92sum.html (accessed 1 July 2002).

9 Article 4.

10 For African examples of this symbiotic relationship, see generally J-F Bayart, S Ellis and B Hibou, *The Criminalization of the State in Africa* (Bloomingdale: Indiana University Press, 1999).

11 C Powell and I Goodman, "Reconciling the Fight against Terrorism and Organised Crime with Banjul" in Institute of Security Studies Monograph *Terrorism and Africa* (2002) (forthcoming).

II. Prevention of Organised Crime Act 121 of 1998 ("POCA")

POCA was passed in 1998. Although it may incidentally meet South Africa's international obligations under SCR 1373,[12] it was created to be a solution to a South African problem. Within South Africa, both the high crime rate and the sense of panic it creates within society are notorious. A report issued soon after POCA was enacted claims that South Africa has the highest incidence of murder in any country in the world and that half the population live in considerable fear of becoming a victim of crime.[13] Studies have shown that 80% of 2,000 households have had some experience of crime over a two-year period and that 98,000 vehicles were stolen in 1995 alone.[14] Furthermore, the role of organised crime in these statistics is considerable: the total annual turnover from organised crime was reckoned in 1996 to exceed R41 billion.[15]

In 1998, the Minister of Justice initiated the drafting of new legislation against organised crime. An important model for the creation of new legislation was the United States Racketeering Influenced Corrupt Organisations Act ("RICO"),[16] which includes "civil" forfeiture of property connected with a crime. The forfeiture provisions of POCA, borrowed largely from RICO, form the backbone of the newly created Assets Forfeiture Unit.

POCA creates certain, specific crimes: "racketeering";[17] money laundering;[18] and participation in a criminal gang.[19] In addition, the Act provides for various forms of accomplice liability and renders it an offence to inform persons who might prejudice an investigation of an offence under the Act that the investigation is taking place.[20]

Commentators have noted that POCA has not added much to *substantive* criminal law.[21] Its "new" crimes cover activities already proscribed under pre-existing South African common law and statute. Racketeering is defined as the continuous or repeated commission of a wide range of

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12 And, through the SCR, the Convention on the Suppression of Financing of Terrorism and the Convention on Transnational Crime. See the discussion of South Africa's fulfillment of its international obligations below.

13 Bayart, *supra* note 10 at 49.

14 Bayart, *supra* note 10 at 49 and 50.

15 Bayart, *supra* note 10 at 50.

16 JL Pretorius and HA Strydom, "The Constitutionality of Civil Forfeiture" (1998) 13 South African Public Law 385 at 385-6. The court in *National Director of Public Prosecution v Patterson* Case no 12100/99 (C) (16 August 2001) (unreported) comments that elements of our new asset forfeiture provisions are also taken from the Republic of Ireland and New South Wales, Australia.

17 Section 2 of POCA.

18 Section 4 of POCA.

19 Section 9 of POCA.

20 Section 75 of POCA.

21 Burchell, "Criminal Justice at the Crossroads" (2002) 118 SALJ (forthcoming).

crimes, most of which predate the Act.[22] While the elements of "continuity" and "relationship" required for racketeering are new, the core crimes are not. Similarly, the offence of money laundering could be dealt with under the South African common law crime of fraud.[23] The common law doctrines on conspiracy, incitement, common purpose and defeating the administration of justice together provide for wide accomplice liability, the evident goal of s 9 of POCA ("gang-related offences"). Finally, the offence of passing on information about an investigation which could prejudice that investigation[24] is similarly an extension of the common law offence of defeating the administration of justice.

POCA does, however, introduce a significant change to the substantive law: it lowers the threshold of criminal liability by extending the fault component of the crimes to negligence, rather than intent. Negligence is included in the mental component for racketeering,[25] money laundering,[26] assisting another to benefit from the proceeds of unlawful activities,[27] the acquisition, possession or use of such proceeds[28] and the offence of passing on information about an investigation which could prejudice the investigation.[29] Just in case there is any doubt on the issue, the Act provides generally for constructive knowledge[30] of a fact (present when the person concerned believed there was a reasonable possibility that the fact existed, but failed to confirm the fact).[31]

POCA enacts the severest sentences known to South African criminal law. The maximum penalty for racketeering is set at R1000 million,[32] the highest in the statute books,[33] or life imprisonment. Money laundering can result in a fine of R100 million, or 30 years imprisonment.[34]

There appear to be two main groups of crime in the Act. The first consists of crimes proscribed elsewhere in South African law. Along with this partial "codification" of the common law, the Act attaches particularly severe penalties to the offences it includes. The second group broadens the definition of existing crimes to a point which may be open to legal challenge. As discussed above, acts which under the common law require intention to attract criminal liability now become crimes through the mere

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22 See Schedule 1 of of POCA.

23 See Burchell, *supra* note 21 and J Burchell and J Milton, *Principles of Criminal Law*, 2nd ed, (Cape Town: Juta & Co, 1997) at 579ff.

24 As well as many of the other offences in s 75 of POCA.

25 Section 2 of POCA.

26 Section 4 of POCA.

27 Section 5 of POCA.

28 Section 6 of POCA.

29 Section 75 of POCA.

30 Constructive knowledge is discussed, with approval, in P Smit, *Clean Money, Suspect Source* (Pretoria: Insitute for Security Studies, 2001) at 39.

31 Section 2 of POCA.

32 Section 3 of POCA.

33 P Smit (n 30).

34 Section 8(1) of POCA.

negligence of the perpetrator. The wide scope of the crime may fall foul of the Constitution for two reasons. First, the definition of the crime could be held to be too uncertain.[35] Secondly, the Constitutional Court has interpreted s 12 of the South African Constitution, which guarantees the right not to be deprived of freedom arbitrarily or without just cause, to include a *substantive* component.[36] It can therefore be argued, particularly where a statute attaches criminal consequences such as imprisonment to negligence, that the *reason* for which the State is depriving an individual of his or her liberty in insufficient.[37] A good example would be the offence in s 75 (1) of passing on information which may prejudice an investigation. Criminal liability arises when the perpetrator *ought* to have known that an investigation *may* be conducted and he or she *indirectly* alerts another person to information which is *likely* to prejudice such an investigation.[38]

Probably the most controversial element of POCA is asset forfeiture. This is almost completely new to South Africa. Before POCA was enacted, South African criminal law did allow the state to confiscate property which had been used in the commission of a crime, but only once a conviction for that crime had been obtained.[39] There were also extensive safeguards: the Act protected innocent persons who did not know how their property was being used; and the case law in this area allowed for a forfeiture order only once the accused had been heard and the court had applied its mind to several factors, including the financial implications of the forfeiture for the person against whom it was made and the financial value of the instruments subject to forfeiture.[40]

By contrast, POCA allows for two main forms of forfeiture: confiscation of property following a criminal conviction (chapter 5 of POCA) and civil forfeiture of property connected to a crime (chapter 6 of POCA). Restraint orders[41] and preservation of property[42] orders are granted on *ex parte* application of the prosecuting authority to prevent disposal of the property

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[35] See *State President v Hugo* 1997 (6) BCLR 708 (CC) at para 99, citing *The Sunday Times v The United Kingdom* 17 (1979) 2 EHRR 245: "[A] norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."

[36] *Bernstein v Bester* 1996 (2) SA 751 (CC) and 1996 (4) BCLR 449 (CC); *Lange v Smuts NO* 1998 (3) SA 785 (CC); *S v Coetzee* 1997 (1) SACR 379 (CC). See the discussion of these cases in V Ramraj "Freedom of the Person and the Principles of Criminal Fault" (2002) 18 SAJHR (forthcoming).

[37] See the analysis of V Ramraj, *supra* note 36, of the development of the substantive element of due process in Canadian and South African constitutional law and its impact on criminal fault.

[38] The penalty applicable to this section ranges from a fine to 15 years' imprisonment. See s 75 (4).

[39] Section 35 of the Criminal Procedure Act 51 of 1977.

[40] See the summary of the case law in JL Pretorius and HA Strydom, *supra* note 16 at 388.

[41] Sections 24A-29A of POCA.

[42] Sections 37-47 of POCA.

before the confiscation and forfeiture orders, respectively, can be granted. Despite the connection to a crime in both forms of confiscation, the act insists that all these measures are *civil*, not *criminal*,[43] and therefore subject to civil standards of proof.[44]

Chapter 5 of POCA provides for confiscation of the proceeds of crime only once a conviction for that crime has been obtained.[45] To prevent property which may become subject to a confiscation order from being disposed of before the order can be obtained, the act further provides for "restraint orders".[46] Restraint orders can be final or provisional and are issued by the High Court on the basis of an *ex parte* application by the National Director of Public Prosecutions.[47] They provide for the seizure of all the movable property of the person against whom the order was made.[48] Title deeds can be endorsed in respect of immovable property to prevent its alienation.[49] Notice of the order must be given to persons affected by the order[50] and the order may be modified or rescinded, on application of the person affected, if it causes undue hardship to the applicant.[51]

Chapter 6 of POCA allows for the forfeiture of property irrespective of whether or not criminal proceedings have been successful, or of whether or not criminal proceedings have been or ever will be instituted. The preservation order – the preliminary procedure which prevents the property in question from being disposed of – is mandatory; a forfeiture order cannot be granted unless a preservation of property order is in place. The latter, granted on the *ex parte* application of the National Director of Public Prosecutions ("NDPP"), is granted when there are reasonable grounds to believe that the property was used to commit, or is the proceeds of, an offence listed in Schedule 1 of the Act.[52] Once the preservation of property order has been granted, notice is given to parties who may be affected by it[53] and the NDPP must apply for a forfeiture order within 90 days, failing which the preservation order will lapse.[54]

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43 Sections 13 and 37 of POCA.
44 Sections 13 (2)-(5) and 37 (2)-(4) of POCA.
45 Section 18 of POCA.
46 Section 26 of POCA.
47 See sections 26 (1)-(3) of POCA.
48 Section 26 (8) of POCA.
49 Section 28 of POCA.
50 Section 26 (4) of POCA.
51 Section 26 (10) of POCA.
52 Section 38 of the POCA. Schedule 1 includes a wide range of crimes, from murder, rape, arson and public violence, to any crime related to the smuggling of arms or drugs, to fraud, forgery, perjury and the subornation of perjury.
53 Section 39 of the POCA.
54 As happened in *Levy v National Director of Public Prosecutions* No 9019/2001 (W) (1 November 2001) (unreported) in which a forfeiture order granted against the appellant was overturned on the basis that it had been served on the appellant after the preservation order had expired.

As commentators have noted, the legal fiction employed under chapter 6 is that the action proceeds against the property itself (*in rem*), rather than its owner.[55] This rationale allows the Directorate to obtain a forfeiture order even if it cannot link the commission of a crime to a particular person (the Directorate need *never*, therefore, institute criminal proceedings against the owner of the property). All that the National Director of Public Prosecutions has to establish, on a balance of probabilities, is that the property in question was either used to commit,[56] or is the proceeds of, a crime listed in Schedule 1 of the Act.[57] The absence of the person whose interests are affected by the order does not prevent the High Court from making the order,[58] but there is a procedure[59] to appeal against the order as such and to allow people who are affected by it to have their interests in the property excluded from the order.

The proceeds of confiscation and forfeiture orders are paid into the "Criminal Assets Recovery Account"[60] and from there are used to assist law enforcement agencies and to provide compensation for victims of crime.[61] The financial turnover, if POCA were to be applied to all organised crime in South Africa, would be simply staggering. It is worth nothing that the regional magistrates' courts are given the jurisdiction to deal with POCA cases in which a sentence of R100 million or 30 years' imprisonment is expected, even though these sentences are far above the normal penal jurisdiction of a regional magistrates' court (both in terms of the fine and the period of imprisonment).[62] The wisdom of this section is open to question: as lower courts, magistrates' courts do not produce published judgments and they probably have no constitutional jurisdiction.[63]

Chapters 5 and 6 of POCA can be challenged for infringing various constitutional rights, including the right to silence (s 35(1)), the presumption of innocence (s 35 (3) (h)), the right not to be deprived of one's property (s 25), the right to privacy (s 14) and the right to dignity (s 10).[64] One might therefore expect a fruitful harvest of constitutional challenges to

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55 Pretorius and Strydom challenge the "*in rem*" construction, noting that the concept of property is "indissolubly linked" to that of ownership, and that interference with the rights of property invariably amounts to interference with the rights of the owner. See J Pretorius and H Strydom, *supra* note 16 at 412, citing Hassemer, "Vermögen im Strafrecht: Zu neuen Tendenzen der Kriminalpolitik" 1995 Wertpapier-Mitteilungen Sonderbeilage 22. See also A Van der Walt, "Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause" (2000) 16 SAJHR 1.

56 Section 50 (1) (a) of POCA - the "instrumentality" provision.

57 Section 50 (1) (b) of POCA.

58 Section 50 (3) of POCA.

59 Sections 54-55 of POCA.

60 Established by s 63 of POCA.

61 Section 68 of POCA.

62 Section 3 of POCA.

63 But see S Jagwanth, "The Constitutional Roles and Responsibilities of Lower Courts" 2002 SAJHR (forthcoming).

64 All the sections referred to are from the South African Constitution, Act 108 of 1996.

POCA from the few short years that it has been in force. However, while there have been some "POCA cases", very few have attacked the constitutionality of the criminal provisions. Most centre on the *merits* of the case, focussing on the interpretation of the relevant forfeiture provisions. While the case law has noted that the effects of POCA are particularly severe[65] and the Constitutional Court has warned that the prevalence of serious crime may not be used to ignore procedural safeguards,[66] the courts have, overall, been fairly sympathetic to the Act. The first defence against a preservation order which relied almost completely on a constitutional challenge to POCA was given short shrift by the Cape High Court in *Director of Public Prosecutions: Cape of Good Hope v Bathgate*.[67] In applying the "limitations clause" of the South African Constitution[68] to Chapter 5 of POCA, the court accepted the crucial importance of the *purpose* of the limitation of the rights.[69] It then relied heavily on the combined testimony of the current head of the Assets Forfeiture Unit and the applicant for the order himself to determine that the nature of the limitation of the rights in question was reasonable and proportional to the goal which the limitation sought to achieve.[70] In enumerating the legal criteria applicable to a limitation analysis, the court further stated that these particular limitations are required by *international law*.[71]

A recent case, *Mohammed v National Director of Public Prosecutions*,[72] was, however, prepared to invalidate s 38 of POCA because its *ex parte* element was found to be an unjustifiable infringment of the applicant's rights.[73] Also, where cases have focussed on the interpretation of specific provisions of POCA, the courts have tended to interpret these provisions restrictively. Two leading examples are the rejection of retrospective application of the provisions of POCA in *National Director of Public Prosecutions v Carolus and others*[74] and *National Director of Public*

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65 *National Director of Public Prosecutions v Carolus and Others* 2000 (1) SA 1127 (SCA), confirming *National Director of Public Prosecutions v Carolus and others* 1999 (2) SACR 27 (C); *Mohamed NO v National Director of Public Prosecutions* No 21921/00 (W) (18 March 2002, unreported); and *Levy v National Director of Public Prosecutions* 2002 (1) SACR 162 (W).

66 *S v Manamela and another* 2000 (3) SA 1 (CC) at para 37; *S v Coetzee* 1997 (4) BCLR 437 (CC) at para 220.

67 2000 (2) SA 560 (C); 2000 (2) BCLR 151 (C). Bathgate challenged POCA as well as its Proceeds of Crime Act 76 of 1996, whose provisions on confiscation it replaced.

68 Section 36 of Act 108 of 1996.

69 *Supra* note 67 at para 86.

70 *Supra* note 67 at paras 88 and 107-8.

71 *Supra* note 67 at para 88. The court referred here in particular to international conventions to suppress drug-smuggling.

72 No 21921/00 (W) (unreported).

73 This finding is subject to confirmation by the Constitutional Court (s 167(5) of the South African Constitution). See also *National Director of Public Prosecutions v Mcasa and another* 2000 (1) SACR 263 (TkH).

74 1999 (2) SACR 27 (C); 2000 (1) SA 1127 (SCA).

Prosecutions v Meyer,[75] and the decision in *National Director of Public Prosecutions v Rebuzzi*,[76] which refused to confirm a restraint order on the basis that the crime in which the respondent was implicated was not a crime for which POCA granted confiscation orders. In effect, the court held that there was no *organised* crime; fraud had been alleged against only one complainant and there was no further evidence of criminal activity on the respondent's part.

On the whole, the Assets Forfeiture Unit and its allied Special Investigating Unit have carried through some high-profile investigations and seizures of property and enjoy the reputation of having returned stolen money to the state. The work of these units and the threat of POCA have even led directly to compensation for the victims of crime and are generally perceived as beneficial to South African society:

> Recently the unit has been involved in various major busts. The biggest involved a pyramid scheme company based in Cape Town, whose assists were seized. The unit head confirmed that the company was involved in a R43 million scheme. The owner pleaded guilty to 900 charges brought against him. In exchange for a lighter sentence he agreed to return all monies to pensioners. In another show of their legal might the crime-busting unit searched the homes of an alleged Durban druglord, removing expensive furniture, cars and other items, as well as seizing his property which allegedly had been bought with the proceeds of drug deals. The ground-level approach seems to work. In recent months there has been lower violence statistics than had been recorded since the early 1990's in violent areas like Richmond and the Cape.[77]

III. THE ANTI-TERRORISM BILL

The draft Anti-Terrorism Bill was first released for comment in 2000.[78] Although it was expressly drafted with South Africa's international obligations in mind,[79] the South African Law Commission Report links the

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75 [1999] 4 All SA (D).

76 2000 (2) SA 869 (W).

77 A report by the Centre for Socio-Legal Studies of the University of Natal, available at http://www.csls.org.za/dw/art7b.html (accessed 14 June 2002).

78 The full text of the Bill and the accompanying report (Report no 92 of the South African Law Commission) are available online from http://wwwserver.law.wits.ac.za/salc/discussn/paper92sum.html (accessed 1 July 2002)

79 See footnote 1 to the preamble. The Law Commission also includes as annexes a number of international instruments against various forms of terrorism. It is an interesting choice, as it includes treaties to which South Africa is not, and can not become, a party. The full list includes: the International Convention for the Suppression of Terrorist Bombings, the International Convention for the Suppression of Financing of Terrorism, the Arab Convention for the Suppression of Terrorism (the "Arab League Convention"), SCR 1269 of 1999, the European Convention on Extradition Between the Member States of the European Union, the European Convention on the Suppression of Terrorism of 1977, and

Bill to the South African context by listing 338 bombings between 1994 and 1998.[80]

The Commission itself acknowledges that most of these bombings occurred around the time of the elections,[81] which means the threat of such violence is not ongoing.[82] Of the remaining attacks, there is little evidence that they are politically motivated and a great deal of evidence that they emanate from organised crime. Since attaining majority rule, South Africa has had few experiences of "terrorism" which were clearly aimed at changing the political system of the country. On the other hand, organised crime is a serious problem in South Africa,[83] a definite source of *many* violent attacks (for example, the "taxi wars" and the battle for control of the drug trade) and, it is submitted, a more likely source of the remaining, still unsolved violence until perpetrators can be identified who have a particular political programme. If we add to this background the fact that anti-terrorism legislation was used during the Apartheid era to persecute and suppress political opponents,[84] it is understandable that there is strong opposition to the re-establishment of an "anti-terrorism" legal regime in this country. The fact that the South African Law Commission was nonetheless mandated to formulate the Anti-Terrorism Bill should rather be seen to reflect South Africa's new-found role within the international community and the enthusiasm of the executive, in particular, to foster and improve international links. On one occasion at least, the executive's eagerness to co-operate in the area of terrorism has led to a rebuke by the Constitutional Court. In 1999, the Minister of Justice summarily surrendered a suspect of the Dar-es-Salaam embassy bombings to the FBI, without requesting an undertaking that the death sentence would not be carried out on him should he be found guilty. The Constitutional Court declared the Minister's action unlawful on the basis that it infringed the suspect's rights to human dignity, to life and to freedom from cruel, inhuman or degrading punishment.[85]

As the closer analysis will show, the Bill has been strongly criticised and would have dubious constitutional validity in its current form.

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the Convention of the Organization of African Unity on the Prevention and Combating of Terrorism (the "Algiers Convention").

80 South African Law Commission Report no 92 of 2000, *supra* note 78 at para 1.5.

81 *Ibid,* at para 1.7.

82 See the treatment of South Africa's "terrorism" experiences in Cowling, "The Return of Detention without Trial? Some Thoughts and Comments on the Draft Anti-Terrorism Bill and the Law Commission Report" (2000) 13 South African Journal of Criminal Justice at 346-7.

83 See Bayart, *supra* note 10 at 49ff.

84 The South African Law Commission acknowledges this in its extensive coverage of the final report of the Truth and Reconciliation Commission. See the South African Law Commission Report no 92 of 2000, *supra* note 78 at paras 1.15 to 1.20.

85 *Mohamed and another v President of the RSA and others* (2001) 7 BCLR 685 (CC).

Like POCA, the Anti-Terrorism Bill criminalises several acts which are crimes already. The South African Law Commission acknowledges and defends this repetition in the following terms:

> It can be argued that any act of terrorism can in any event be prosecuted under the existing law as such an act would constitute an offence, whether under statute or the common law. The worldwide trend, however, is to create specific legislation based on international instruments relating to terrorism. The reason for this is twofold: firstly to broaden the normal jurisdiction of the courts to deal with all forms of terrorism, especially those committed outside the normal jurisdiction of courts, and secondly to prescribe the most severe sentences in respect of terrorist acts.[86]

This passage reiterates an already familiar approach, in that POCA re-criminalises existing offences in South African law while increasing the sentences. It also correctly characterises the international attitude to terrorism and organised crime.[87] The international mind-set entails, first, that a *legislative* response is necessary and appropriate even if the acts to be suppressed are already proscribed. Secondly, harsher penalties seem to be viewed as indispensable to an effective response to the problem. Thirdly, some sort of world-wide solidarity seems to be sought, in that, as each state extends its own jurisdiction over the crime, a seamless web can ideally be created to prevent perpetrators from escaping being held to account for their crimes. There is a further, psychological advantage to extending jurisdiction: it underscores the seriousness of the crime. To the extent that states are prepared to exercise extra-territorial jurisdiction over the crime, they also develop the conception of terrorism as an *international*, and not merely a *transnational*, crime.[88]

Just as POCA, in its racketeering provision, increases the penalty of already existing crimes if certain aggravating factors are present, the Anti-Terrorism Bill defines "terrorist act"[89] by reference to the intention behind the act:

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86 South African Law Commission Report 92 of 2000, *supra* note 78, "Introduction" at xi-xii.

87 See the discussion of the individual international crime-fighting provisions below.

88 Hitherto, the only crimes over which customary international law recognises universal jurisdiction are international crimes. See See JD van der Vyver, "Universal Jurisdiction in International Criminal Law" (1999) 24 SAYIL 115 and the references cited there at note 32; M Bassiouni *et al, International Criminal Law: Cases and Materials* (Durham: Carolina Academic Press, 1996) 1229; W Cowles, "Universality of Jurisdiction over War Crimes" (1945) 33 California LR 177. The rationale of universal jurisdiction and the supporting case law is considered in C Powell and A Pillay, "Revisiting *Pinochet*: the Development of Customary International Criminal Law" (2001) 4 SAJHR 477.

89 Like the international instruments, the Bill does not hazard a definition of terrorism as such.

"terrorist act", means -

(a) any act which does or may endanger the life, physical integrity or freedom of any person or persons, or causes or may cause damage to property and is calculated or intended to -
   (i) intimidate, coerce or induce any government or persons, the general public or any section thereof; or
   (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
   (iii) create unrest or general insurrection in any State.[90]

This definition contains the already existing South African crimes of murder, culpable homicide, assault, arson and malicious damage to property. It creates additional offences in that it attaches criminal liability to actions which are neither intended to, nor in fact do, cause damage, but merely have the *potential* to do so. It elevates both existing and new crimes to terrorist status if the crimes are carried out with the motivation contained in subclauses (i) to (iii). The phrasing of these clauses is wide enough to lead to the argument that the definition of "terrorist act" infringes the *ius certum* principle.[91] Certainly, under the definition as currently proposed, most violent crimes are rendered terrorist acts.[92] This is due in part to the lack of specificity in part (a)(i) of the definition.[93] Purely syntactically, the phrase "intimidate, coerce or induce ... " without a prolative infinitive is incomplete, as the verb "induce" cannot stand on its own. We must be told to what goal the inducement is aimed before the phrase can make sense. But, from a legal point of view, the fact that no goal is specified for the intimidation or coercion is just as problematic. Together, the verbs "intimidate, coerce or induce" denote the use or threat of force for the purposes of making one of the listed possible victims do some unspecified thing. As *any* violent act is by nature intimidatory, and *all* forms of violence except the most recreational are aimed at obtaining *something* - be it only a wallet from a mugging victim - violent crime as such can be argued to fall under the definition. It may be that the only additional prerequisite for a "terrorist act" is that the victim is somehow forced to "participate" in achieving the aim of the "terrorist" – *eg*, by handing over the wallet him or herself or by paying money to a protection racket.[94]

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90 The definitions are set out in clause 1 of the Bill, *supra* note 78.

91 See *supra* note 35, E Steyn, "The draft Anti-Terrorism Bill of 2000: the lobster pot of the South African criminal justice system?" South African Journal of Criminal Justice (2001) 179 at 184 and V Ramraj, *supra* note 37.

92 E Steyn, *supra* note 91 at 184-5.

93 While more narrowly delineated than part (a) (i), parts (a) (ii) and (iii) of the definition are also overbroad. See E Steyn, *supra* note 91 at 183-7.

94 Some element of victim "participation" seems to be indicated by the phrase "intimidate, coerce or induce". If a mugger were to kill somebody and thereafter rifle through through the victim's pockets for items of value, this may not be "terrorism" as the victim has not been induced to do anything. Similarly, mere housebreaking, though it may be violent and

Finally, the current definition of "terrorist act" uses the phrase "calculated or intended". This has attracted criticism for possibly introducing negligence as the requisite form of fault for criminal liability.[95]

Apart from its general proscription of "terrorist acts"[96] and other acts in contravention of itself, the Bill also creates additional, specific offences: membership in a terrorist organisation,[97] failure to provide information relating to offences under the Act,[98] aircraft hijacking,[99] endangering the safety of maritime navigation,[100] terrorist bombing[101] and the taking of hostages.[102]

As argued above,[103] South Africa's forms of accomplice liability make it unnecessary to criminalise membership of a terrorist group. In the case of the Anti-Terrorism Bill, this argument is further strengthened by the fact that the Bill itself creates another, specific offence in the area of accomplice liability, namely, "providing material support in respect of terrorist acts".[104]

Of the remaining specific offences created by the Bill, hostage-taking is already a crime as it can be subsumed under the offence of kidnapping.[105] Aircraft hijacking, endangering the safety of maritime navigation and terrorist bombing have a slightly different history in that they are all criminalised to some degree in our statute law, having originally been enacted to comply with earlier international treaty obligations.[106] Their incorporation in the new Act can be seen as a codification of existing, disparate laws. Of course, they too could for the most part be prosecuted under the common law, and the South African Law Commission itself doubts the wisdom of leaving offences such as "terrorist bombing" in the text.[107]

The only offence which is clearly new to South African law is the failure to provide information relating to offences under the Act.[108] It carries a

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intimidatory, would not be terrorism, whereas housebreaking which intimidates the residents to the point that they pay money to a protection racket would fit the current definition of the crime.

[95] Steyn, *supra* note 91 at 186-7. The argument relies on the general rule of interpretation that each word in a statute must have its own meaning. If "calculated" is not to be a mere synonym for "intended", it must denote a lesser form of fault liability.

[96] Clause 2 of the Bill.

[97] Clause 4 of the Bill.

[98] Clause 21 of the Bill.

[99] Clause 6 of the Bill.

[100] Clause 7 of the Bill.

[101] Clause 8 of the Bill.

[102] Clause 9 of the Bill.

[103] See the discussion of accomplice liability under POCA.

[104] Clause 3 of the Bill. I would argue that this particular offence is also duplication.

[105] J Burchell and J Milton, *supra* note 23 at 519ff.

[106] These are described in detail in chapters 4 and 5 of the South African Law Commission Report, *supra* note 78 or http://wwwserver.law.wits.ac.za/salc/discussn/chs1_5.pdf (accessed 1 July 2002).

[107] See para 10.39 of the South African Law Commission Report, *supra* note 78.

[108] There is no general duty in South African criminal law to disclose the existence of a crime.

severe sentence[109] and is particularly problematic from a constitutional point of view, because it places people with information on terrorism in a double bind. If they do not volunteer their information, they face up to five years' imprisonment but, if they do, they are not necessarily guaranteed indemnity.[110] Furthermore, as will be discussed below, if they do speak up but the NDPP is not satisfied that they have revealed *all* their information, they risk between detained under s 16 of the Bill. As it stands, the new offence under s 21 is likely to infringe s 35 of the South African Constitution[111] (rights of arrested, detained and accused persons), particularly s 35(1)(a) (the right to silence), s 35(1)(d) (which limits the period of detention without trial) and s 35(3)(j) (the privilege against self-incrimination).

The Anti-Terrorism Bill introduces changes to criminal procedure wherever terrorist crimes are suspected. These are controversial, not only because of the very wide range of offences which could trigger them, but also because they allow extensive inroads into the rights of accused and detained persons and even of witnesses. The measures have been criticised as a return to Apartheid-era legislation.[112]

In constitutional terms, the most disquieting innovation has been the proposed return of detention without trial. Clause 16 (1) of the Bill provides that a judge of the high court may issue a warrant for the detention of any person who, on the ground of information submitted under oath by a Director of Public Prosecutions, appears to be withholding information regarding any offence under the Act. The purpose of the detention, as set out in subclause 2, is interrogation. The detainee can be held until a judge orders his or her release if "satisfied that the detainee ... has satisfactorily replied to all questions under interrogation; or ... that no lawful purpose will be served by further detention" to a maximum of 14 days. Detention orders can clearly be issued against both suspects and witnesses and the duty of potential witnesses to volunteer information[113] means that they could conceivably land themselves in detention while attempting to avoid criminal liability.

The South African Law Commission has itself expressed unease about detention without trial, which suggests that the final version of the Bill might drop it.[114] If it is retained, s 16 might not survive constitutional scrutiny[115] despite the safeguards it contains.[116] On its terms, it directly

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[109] The maximum sentence under s 21 of the Bill is five years' imprisonment without the option of a fine.
[110] Clause 21 (2) provides for indemnity, but it is conditional.
[111] Act 108 of 1996.
[112] Steyn, *supra* note 91 at 182.
[113] Clause 16 of the Bill.
[114] See para 9 of the summary and paras 10.48-10.58 of the Report, *supra* note 78.
[115] Steyn, *supra* note 91; Cowling, *supra* note 82.
[116] These include appearances before the judge who issued the warrant on the second and seventh day after arrest, access to legal counsel and visits by the detainee's spouse, partner,

infringes s 12 of the Constitution (freedom and security of the person, including the right not to be detained without trial). If the Bill is passed in its current form and its s 16 comes before the Constitutional Court, the Court will have to decide whether the infringement of s 12 is a justifiable limitation under s 36 of the Constitution (the "limitations clause").[117] Amongst other criteria, s 36 requires that the court factor in issues such as the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and whether there are less restrictive means to achieve the purpose. A cursory application of these criteria demonstrates that the limitation is particularly severe and that there may well be less restrictive means by which South Africa can suppress terrorism. If, as has been suggested, the "Bill compromises ... rights in order to bail out the under-sourced, dysfunctional police service and justice system",[118] the goal of the Bill can be achieved less restrictively and possibly more effectively by improving the existing crime-fighting services rather than by adding to their powers. Furthermore, if one considers that terrorism, as opposed to organised crime, is not a severe problem within South Africa itself, the South African Constitutional Court has little reason to rate the *purpose* of the rights limitation particularly highly.[119] Finally, even where the problem to be addressed by the limitation is serious, as in the case of organised crime, the Constitutional Court has pointed out that seriousness of the problem does not justify the abandonment of procedural safeguards. One judge has phrased it in the following terms: "[T]he more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become."[120]

Clause 20 of the Bill subjects bail applications to the strenuous conditions of s 60 (11) of the Criminal Procedure Act.[121] The effect of s 20 of the Bill is that bail will *not* be granted unless the accused adduces evidence that there are exceptional circumstances which permit his or her release in the interests of justice.

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next of kin and religious counselor, unless the National Director of Public Prosecutions shows the judge good cause why these visits should be refused.

117 See the analysis of a possible "limitations" enquiry by Cowling, *supra* note 82 at 349 - 54.

118 Steyn, *supra* note 91 at 182.

119 It is not within the scope of this paper to analyse the role that South Africa's *international* obligations play in a constitutional "limitations" (s 36) analysis. Section 39 of the Constitution, which deals with the interpretation of the Bill of Rights, sets out that courts "must consider" international law. However, it is submitted that, even if South Africa's international obligations were paid full regard in an application of the limitations clause to a right infringed by the Anti-Terrorism Bill, these obligations would play less of a role with the judiciary, and in the context of a s 36 analysis, than they have played with the executive. See also the conclusion to this paper.

120 *S v Coetzee* 1997 (4) BCLR 437 (CC) at para 220 (Sachs J). See also *S v Dlamini* 1999 (4) SA 623 (CC) and *S v Manamela and Another* 2000 (3) SA 1 (CC).

121 51 of 1977.

Finally, the Bill attempts to support international efforts to ensure the prosecution of terrorists by extending the courts' jurisdiction beyond South Africa's usual, territorial basis.[122] What is perhaps unexpected[123] in this regard is that the Bill does not, in fact, claim universal jurisdiction, under which South Africa would require no link or connection with either the act or the individual in order to prosecute him or her for the crime.[124] Instead, jurisdiction is based on a wide range of connecting factors. Apart from using the active and passive personality principles, the Bill also gives South Africa jurisdiction if the offence is committed on her territory, on ships, aircraft or fixed platforms registered in South Africa, or on aircraft operated by South African carriers. Stateless persons normally resident in the country fall under South African jurisdiction.

IV. THE SOUTH AFRICAN LEGISLATION AS FULFILLMENT OF INTERNATIONAL OBLIGATIONS

The argument has been made throughout this discussion that South Africa may be guilty of overkill. The country may not, however, be alone in its mistake. As suggested above, the international trend, particularly in response to terrorism, focuses on legislation which may well be redundant, on harsh sentences and on other intrusive provisions. If we look in detail at various instruments, we see that SCR 1373 expressly instructs states to criminalise the funding of terrorism and to freeze funds connected with it.[125] It further calls on states to become party to international conventions[126] which in turn propose measures very similar to those which South Africa has taken or proposes to take. The international instruments prohibit membership in either a criminal or a terrorist group.[127] They include measures that allow for the freezing and seizure of assets or resources.[128] The international instruments consider both terrorism and organised crime

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[122] Clause 15 of the Bill. For South Africa's usual, "territorial" claim to jurisdiction, see J Dugard *International Law: a South African Perspective*, 2nd ed (Cape Town: Juta & Co, 2000) at 135-6.

[123] But in line with South Africa's claim of jurisdiction in respect of international crimes under the International Criminal Court Bill (clause 4).

[124] Jessberger and Powell, "Prosecuting Pinochets in South Africa - Implementing the Rome Statute of the International Criminal Court" (2001) South African Journal of Criminal Justice 344 at 347.

[125] Article 1 (b) and (c) of SCR 1373.

[126] Article 3(d) of SCR 1373.

[127] Article 2 of SCR 1373, article 5 of the Convention against Transnational Organised Crime and article 3 of the Arab League Convention.

[128] Article 8 of the Convention on the Suppression of Financing of Terrorism and articles 12 to 14 of the Convention on the Prevention of Transnational Organised Crime. It is noteworthy that the Arab League Convention is directly opposed to these measures of confiscation, and specifically sets out that any property or proceeds seized may be used in evidence provided there is a guarantee that they will be returned. See article 20 of the Arab League Convention.

to be serious offences for which punishment must be harsh.[129] Signatories are required to create specific crimes within their domestic criminal justice systems,[130] allowing for the punishment of corruption, money laundering and the obstruction of justice. Under the Arab League Convention, accused persons may be held for up to 60 days pending extradition,[131] which amounts to detention without trial. The other anti-terrorism conventions[132] do not specifically authorise detention without trial, but neither do they explicitly exclude it.

The seemingly inexorable executive-minded orientation of the international regime against terrorism has been noted with unease by commentators, who have also expressed concern about the effect of the implementation of severe international norms on domestic legal systems.[133] Of course, a blunderbuss anti-terror regime creates a conflict within international law itself, in that some of the anti-terror measures may fall foul of the international human rights system.[134] What is needed is a constant re-evaluation of the international anti-terror norms in the light of the international human rights norms with which they have to cohere.

If the anti-terror regime is applied outside of its proper context, undiluted and regardless, the options for constitutional democracies are stark. Damaging power struggles between the executive and the judiciary seem almost programmed into the international anti-terror regime. If laws have vague definitions and harsh consequences, judicial practice will generally restrict interpretation of these laws to make them as narrowly applicable as possible (depending, of course, on the particular court's willingness to subjugate human rights to the effective control of crime).

The conflict between executive and judiciary will be exacerbated if the conception and experience of "terrorism" within the constitutional democracy do not resonate with the dominant approach to "terrorism" in the international sphere. In South Africa, the courts' ambivalent to positive response to the government's measures against organised crime is not a reliable indicator of their response to the anti-terrorism measures. Organised crime is a serious problem in South Africa; terrorism is not. As shown above, the Constitutional Court has generally embraced a watch-dog role in the light of South Africa's anxiety levels about crime[135] and has publically

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[129] Article 2 of the Algiers Convention. See also article 2 of SCR 1373.

[130] Article 2(e) of SCR 1373, articles 5, 6, 8 and 23 of the Convention against Transnational Organised Crime, article 2(a) of the Algiers Convention and article 2 of the Convention on the Suppression of Financing of Terrorism.

[131] Articles 24 and 26 of the Arab League Convention.

[132] The Algiers Convention and the Convention for the Prevention of the Financing of Terrorism are most immediately relevant to South Africa.

[133] See the editorial comment in (2001-2) 45 Criminal LQ at 249ff and 389ff.

[134] See S Jagwanth and F Soltau, "Terrorism and Human Rights in Africa" and C Powell and I Goodman, "Reconciling the Fight against Terrorism and Organised Crime with Banjul", both in the ISS Monograph *Terrorism and Africa* (2002) (forthcoming).

[135] See note 120 and accompanying text.

crossed swords with the executive on the latter's surrender of terror suspects without regard to their rights.[136]

Untempered by human rights considerations, the international anti-terror regime looks set to cause conflict between the branches of government. By doing so, it may well be imposing a lose-lose choice on many constitutional democracies. States may be forced either to abandon constitutionalism or to breach their international obligations.

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[136] See note 85 and accompanying text.