

SOUTH AFRICA

Country Report: Anti-terrorism laws & policing

1. Country summary*

- a. **Government:** Constitutional democracy
- b. **Population:** 44 187 637
- c. **Size:** 1 221 040 sq km
- d. **Region:** Southern African continent

e. General

During South Africa's apartheid regime, vigorous police action and strict enforcement of security legislation in the early 1980s (the *Internal Security Act* 1982 (ISA 1982)) resulted in hundreds of arrests. President Botha declared a state of emergency on 20 July 1985. During this time approximately 2,436 people were detained under the ISA 1982. The Act gave police and the military sweeping powers. The government could implement curfews controlling the movement of people. The president could rule by decree without referring to the Constitution or to Parliament.

These experiences under apartheid in South Africa act as a reminder that the powers granted to police in the exercise of curfews, control orders and detention without trial undermine the power of the judiciary, democratic controls upon human rights, and ultimately the rule of law. During the process of drafting the *Protection of Constitutional Democracy against Terrorism and Related Activities Act* 2004 (the PCDT Act), it was argued that there was no need to turn the clock back to apartheid era laws, under which the movement against apartheid was then proscribed as terrorism.¹

The recent memories of Apartheid and the persecution of liberation movements as terrorists means that in South Africa many anti-terrorism laws are likely to meet stiff popular resistance if they are perceived as anti-democratic.²

The South Africa Police Service (SAPS) is undergoing a major restructuring and transformation from a primarily public order security force to a more accountable, community service oriented police force. However, the US State Department's 2005 Country Report found that the service remains ill-equipped, overworked, and poorly trained.³ According to the governmental Independent Complaints Directorate (ICD), there were 366 deaths as a result of police action during the year March 2004-March 2005, and it received 1,731 allegations of criminal offenses committed by police and 3,407 complaints of misconduct.⁴

* Many thanks to Cathy Powell for her thoughtful review of this report. Her comments have been relied upon throughout the final edit.



2. Relevant legislation

- *Financial Intelligence Centre Act 2001 (FICA)*. This Act was amended by the PCDT Act 2004, which inserted Section 28A, requiring accountable institutions to report their possession of property that is owned or controlled by an entity that has committed, attempted to commit or facilitated the commission of an offence under the PCDT Act 2004.
- *Protection of Constitutional Democracy against Terrorism and Related Activities Act 2004 (PCDT)* – repeals the *Internal Security Act 1982*. It creates a range of new offences (including the financing of terrorism, hijacking planes or ships, taking hostages, causing harm to ‘internationally protected persons’, committing hoaxes) and lays down strict sentences for convicted terrorists. It amends or repeals the following Acts (amendments that are relevant to our report are detailed below):
 - *Extradition Act 1962*;
 - *Criminal Procedure Act 1977*;
 - *Internal Security Act 1982*;
 - *Non-Proliferation of Weapons of Mass Destruction Act 1993*;
 - *Criminal Law Amendment Act 1997*;
 - *Prevention of Organised Crime Act 1998*;
 - *Nuclear Energy Act 1999*;
 - *Financial Intelligence Centre Act 2001*; and
 - *Regulation of Interception of Communications and Provision of Communication-related Information Act 2002*.

Overview

The South African Police Service (SAPS) drafted the widely criticised Anti-Terrorism Bill 2000. This Bill proposed expansive powers for police to stop and search vehicles and persons and to detain people for the purpose of interrogation of individuals suspected of withholding information.⁵ It also placed legitimate strike and protest action within the ambit of terrorist activity. It should be noted that many current officers formed part of the abusive apartheid regime and it is of some concern that the Service sought to revive those past powers with the 2000 Bill.

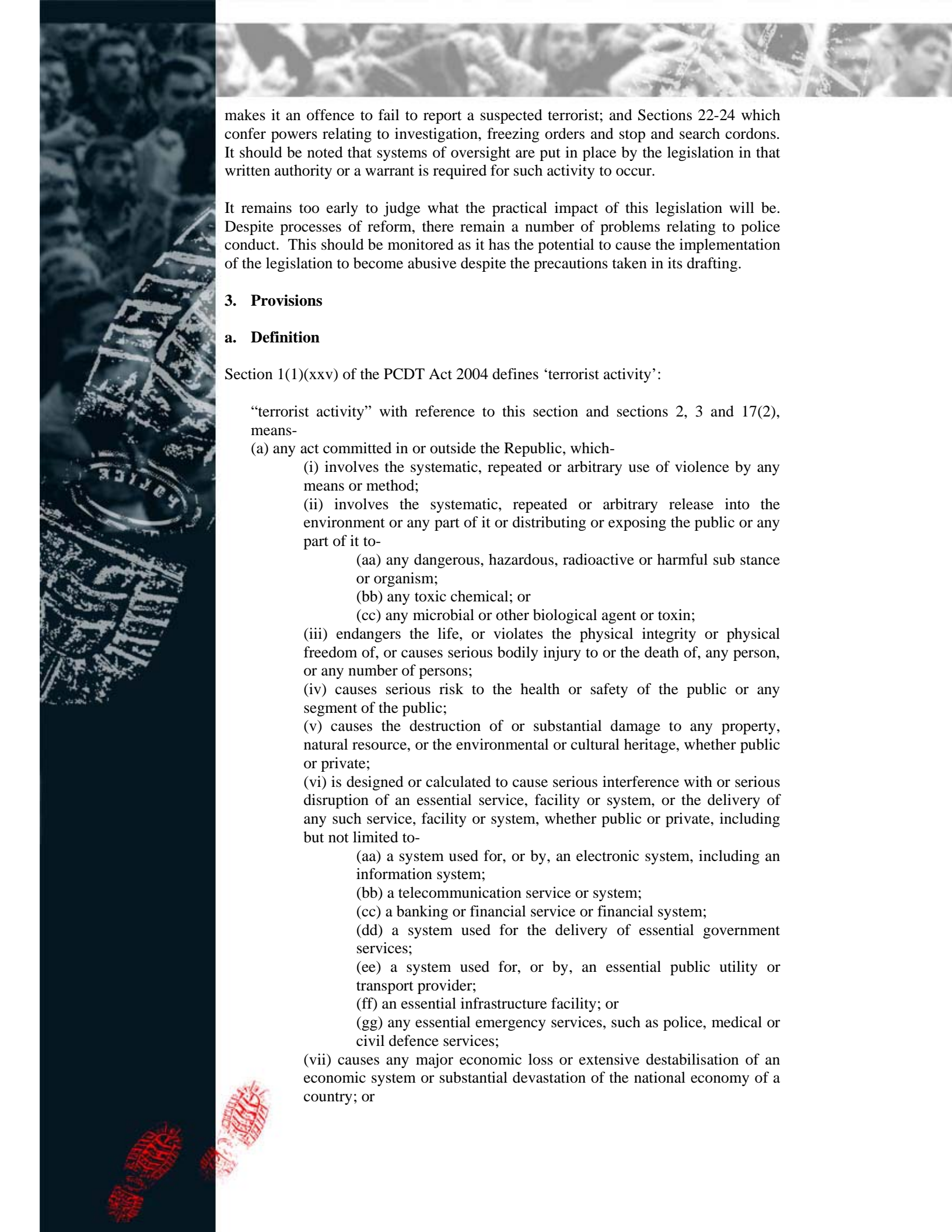
The much revised *Protection of Constitutional Democracy against Terrorism and Related Activities Act 2004* (‘PCDT Act 2004’) however, bears little resemblance to SAPS’ original Bill. In 2005, Annette Hübschle stated:

When comparing the Protection of Constitutional Democracy against Terrorism and Related Activities Act with others in Africa, Britain and the USA (the US Patriot Act) South Africa has by far the most liberal and least restrictive anti-terror law in place.⁶

The Congress of South African Trade Unions (‘COSATU’), a major and influential opponent of the 2000 Bill and its amended 2002 version, stated:

As a result of a series of interventions by COSATU ... some of the most problematic provisions were redrafted. The Bill has now been passed and is now in operation. The concessions made as a result of COSATU’s intervention constitute a major victory. However, the implementation of this law remains a priority area for us to monitor to ensure that labour and human rights are not compromised.⁷

The provisions which need to be closely monitored to ensure they are not implemented in a way that is in violation of human rights include Section 12, which



makes it an offence to fail to report a suspected terrorist; and Sections 22-24 which confer powers relating to investigation, freezing orders and stop and search cordons. It should be noted that systems of oversight are put in place by the legislation in that written authority or a warrant is required for such activity to occur.

It remains too early to judge what the practical impact of this legislation will be. Despite processes of reform, there remain a number of problems relating to police conduct. This should be monitored as it has the potential to cause the implementation of the legislation to become abusive despite the precautions taken in its drafting.

3. Provisions

a. Definition

Section 1(1)(xxv) of the PCDT Act 2004 defines ‘terrorist activity’:

“terrorist activity” with reference to this section and sections 2, 3 and 17(2), means-

(a) any act committed in or outside the Republic, which-

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

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

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

(bb) any toxic chemical; or

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

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

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

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

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

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

(bb) a telecommunication service or system;

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


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

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

(ff) an essential infrastructure facility; or

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

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



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

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

- (i) threaten the unity and territorial integrity of the Republic;
- (ii) intimidate, or to induce or cause feelings of insecurity within, the public, or a segment of the public, with regard to its security, including its economic security, or to induce, cause or spread feelings of terror, fear or panic in a civilian population; or
- (iii) unduly compel, intimidate, force, coerce, induce or cause a person, a government, the general public or a segment of the public, or a domestic or an international organisation or body or intergovernmental organisation or body, to do or to abstain or refrain from doing any act, or to adopt or abandon a particular standpoint, or to act in accordance with certain principles,

whether the public or the person, government, body, or organisation or institution referred to in subparagraphs (ii) or (iii), as the case may be, is inside or outside the Republic; and

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

Section 1(3) of the PCDT Act 2004 excludes from the definition of a terrorist activity any act committed in pursuance of “any advocacy, protest, dissent or industrial action” which does not intend the harm referred to in Section 1(1)(xxv)(a)(i)-(iv). More specifically, in respect of causing disruption to essential services and major economic loss as elements of the definition of a terrorist activity, any act which is committed in pursuance of any advocacy, protest, dissent or industrial action and which does not intend harm such as systematic, repeated or arbitrary use of violence, endangering the life, or violating the physical integrity or physical freedom of, or causing serious bodily injury to or the death of any person, or persons, shall not be regarded as a terrorist activity.⁸


The PCDT Act 2004 also excludes those actions taken in pursuance of a liberation struggle, self determination and independence against colonialism if they are in accordance with the principles of the Charter of United Nations and with International Humanitarian Law (Section 1(4)).

Section 1(5) provides that a “political, philosophical, ideological, racial, ethnic, religious or any similar motive” shall not be a justifiable defence in respect of any offence.

Section 1(1)(xxvi) of the PCDT Act 2004 defines “terrorist and related activities” to mean:

any act or activity related to or associated or connected with the commission of the offence of terrorism, or an offence associated or connected with a terrorist activity, or a Convention offence, or an offence referred to in sections 11 to 14.

Section 1(1)(ii) of the PCDT Act 2004 defines a “convention offence” as:

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- (a) an offence, created in fulfillment of the Republic's international obligations in terms of instruments dealing with terrorist and related activities, referred to in Part 2 of Chapter 2;
 - (b) an offence referred to in section 56(l)(h) of the Nuclear Energy Act, 1999 (Act No. 46 of 1999); or
 - (c) an offence referred to in section 2(1) or (2) of the Civil Aviation Offences Act, 1972 (Act No. 10 of 1972).

Section 1(1)(iv) of the PCDT Act 2004 defines 'engages in terrorist activity' as including:

- (a) the commission, performance or carrying out of
- (b) the facilitation of, participation or assistance in, or contribution to the commission, performance or carrying out of
- (c) the performance of an act in preparation for or planning of; or
- (d) instructing, directly or indirectly, the -
 - (i) commission, performance, carrying out of;
 - (ii) facilitation of, participation or assistance in, or contribution to the commission, performance or carrying out of; or
 - (iii) performance of an act in preparation for or planning of, a terrorist activity, and the expressions "to engage in a terrorist activity", "engaging in a terrorist activity" and "engagement in a terrorist activity" shall be construed accordingly.

Section 1(1)(xix) of the PCDT Act 2004 provides a definition of a 'police official' which appears to conflate police and military roles in regard to prevention and combating of crime and maintenance and preservation of law and order:

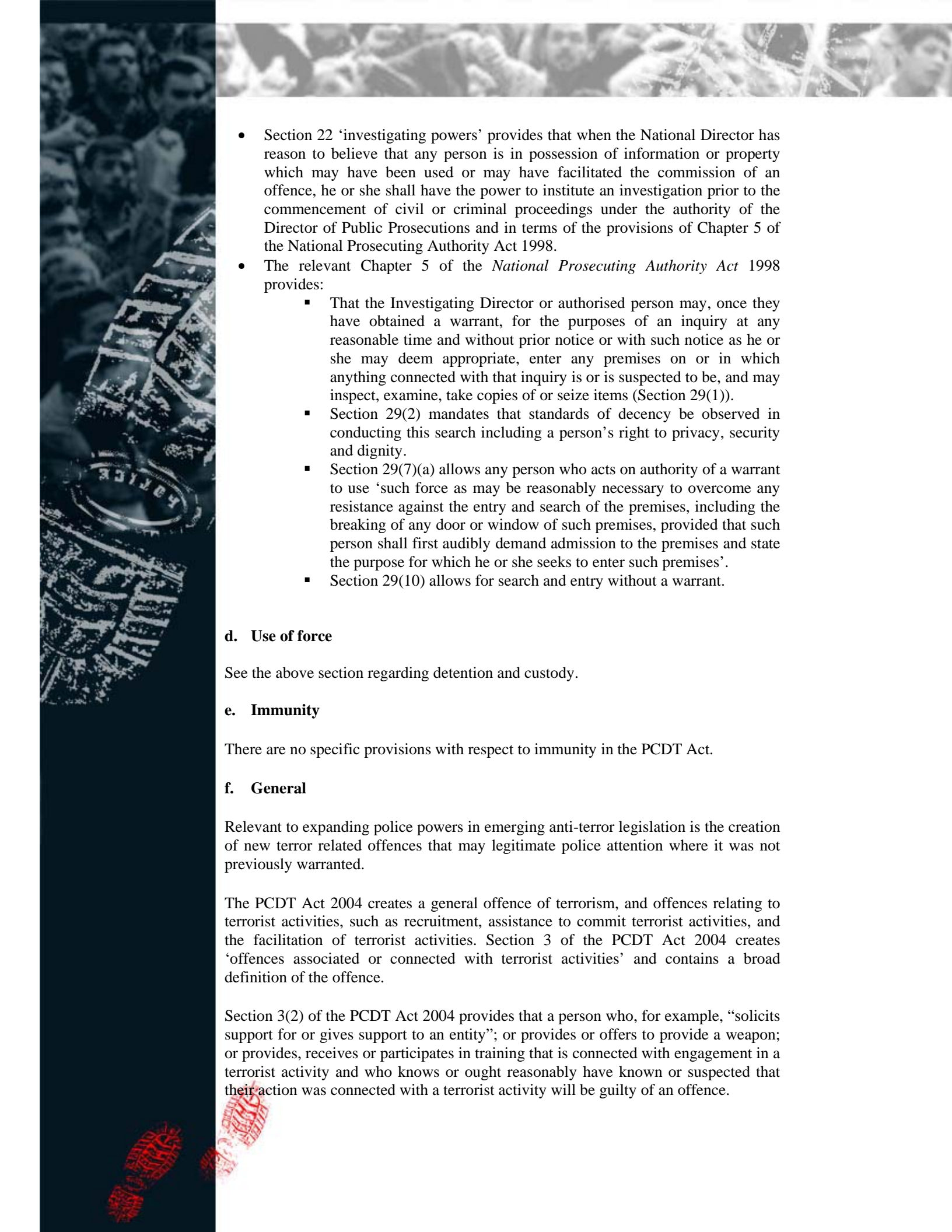
"police official" means a "member" as defined in section 1 of the *South African Police Service Act, 1995* (Act No. 68 of 1995), and with reference to section 24, includes a member of the South African National Defence Force employed in co-operation with the South African Police Service in terms of section 201 (2)(a) of the Constitution in the prevention and combating of crime and maintenance and preservation of law and order within the Republic, as contemplated in section 19(1) of the Defence Act, 2002 (Act No. 42 of 2002).

b. Arrest

There are no specific provisions providing police with enhanced powers of arrest. However, the creation of numerous new terror related offences has the potential to legitimise police attention and possibly arrests in regard to behaviour where it would not previously have been warranted. This is not a concern on its face but it should be kept in mind in terms of implementation particularly given the history of abuse occurring in the South African Police Service.⁹

c. Detention/custody

The original Anti-Terrorism Bill 2000 drafted by the South African Police Service allowed for the detention of persons for the purposes of interrogation for up to 14 days. This provision was much criticised by human rights organisations and it was removed and replaced with the Canadian model of investigative hearings. These hearings are provided for in Section 22 of the PCDT Act 2004.

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- Section 22 ‘investigating powers’ provides that when the National Director has reason to believe that any person is in possession of information or property which may have been used or may have facilitated the commission of an offence, he or she shall have the power to institute an investigation prior to the commencement of civil or criminal proceedings under the authority of the Director of Public Prosecutions and in terms of the provisions of Chapter 5 of the National Prosecuting Authority Act 1998.
 - The relevant Chapter 5 of the *National Prosecuting Authority Act 1998* provides:
 - That the Investigating Director or authorised person may, once they have obtained a warrant, for the purposes of an inquiry at any reasonable time and without prior notice or with such notice as he or she may deem appropriate, enter any premises on or in which anything connected with that inquiry is or is suspected to be, and may inspect, examine, take copies of or seize items (Section 29(1)).
 - Section 29(2) mandates that standards of decency be observed in conducting this search including a person’s right to privacy, security and dignity.
 - Section 29(7)(a) allows any person who acts on authority of a warrant to use ‘such force as may be reasonably necessary to overcome any resistance against the entry and search of the premises, including the breaking of any door or window of such premises, provided that such person shall first audibly demand admission to the premises and state the purpose for which he or she seeks to enter such premises’.
 - Section 29(10) allows for search and entry without a warrant.

d. Use of force

See the above section regarding detention and custody.

e. Immunity


There are no specific provisions with respect to immunity in the PCDT Act.

f. General

Relevant to expanding police powers in emerging anti-terror legislation is the creation of new terror related offences that may legitimate police attention where it was not previously warranted.

The PCDT Act 2004 creates a general offence of terrorism, and offences relating to terrorist activities, such as recruitment, assistance to commit terrorist activities, and the facilitation of terrorist activities. Section 3 of the PCDT Act 2004 creates ‘offences associated or connected with terrorist activities’ and contains a broad definition of the offence.

Section 3(2) of the PCDT Act 2004 provides that a person who, for example, “solicits support for or gives support to an entity”; or provides or offers to provide a weapon; or provides, receives or participates in training that is connected with engagement in a terrorist activity and who knows or ought reasonably have known or suspected that their action was connected with a terrorist activity will be guilty of an offence.



The PCDT Act 2004 also provides for specific offences including the following:

- Financing of terrorism - Section 4;
- Terrorist bombings - Section 5;
- Hijacking of aeroplanes, fixed platforms, and ships - Sections 9, 6, 10 respectively;
- Hostage-taking - Section 7;
- Offences related to causing harm to internationally protected persons - Section 8;
- Harboursing or concealing a suspected terrorist – Section 11;
- Terrorism hoaxes – Section 13; and
- Threat, attempt, inducement, or aiding or abetting of the commission of an offence under the Act – Section 14.

In regard to the creation of these new terrorism related offences, the Act therefore “equips the law enforcement agencies in the Republic to effectively deal with both international and domestic terrorist activities”.¹⁰ Rather than serve to narrow and specify the scope of the offences, however, the wide definitions might be seen to incorporate a string of otherwise tenuously connected activities within the offence and hence bring a wider range of people and activities under the legitimate surveillance of police.

4. Examples

Anti-Terrorism Training for Police: The South African Government in March 2006 organized a four-week multinational Anti-Terrorism Training Program in Pretoria, which brought together police from South Africa and eleven other African countries to teach methods for combating terrorism.

National Counter-Terrorism Centre in South Africa: Ronnie Kasrils, Minister of Intelligence, announced that the government had decided to set up a national counter-terrorism centre to bring together the work of all those from the intelligence and security services who were fighting terrorism. The centre will include staff from the National Intelligence Agency, the South African Secret Service, the South African Police Service's Crime Intelligence Division and Defence Intelligence, as well as the Financial Intelligence Centre.¹¹

Financial Intelligence Center: The government's Financial Intelligence Center, established in 2003, received 15 757 suspicious transaction reports between 1 April 2004 and 31 March 2005.

Link: <http://allafrica.com/stories/200701240232.html>

¹ In the absence of internationally accepted definitions of the terms “terrorism”, “terrorist” and “terrorist act”, in this report these terms refer to either the definition as enshrined in the country’s legislation, or the common use of the term. The use and meaning of these terms is addressed in CHRI’s report “Stamping Out Rights: The impact of anti-terrorism laws on policing” (2007).

² See *Nine-year process to get anti-terror law draws to an end in South Africa* <http://www.peace.ca/antiterrorlegislationafrica.htm>.

³ United States State Department (2005) *Country Report – South Africa*: <http://www.state.gov/g/drl/rls/hrrpt/2005/61593.htm>.

⁴ Ibid.

⁵ See Privacy International (2004) *Terrorism Profile – South Africa*: http://www.privacyinternational.org/article.shtml?cmd%5B347%5D=x-347-66677#_ftn1.

⁶ Annette Hübschle (2005) ‘South Africa’s Anti-Terror Law: Among the Least Restrictive?’ *African Security Review* 14(4), p. 107.

⁷ COSATU (2005) *Secretariat Report to the Third Central Committee*, Johannesburg, August 15-18, p. 39.

⁸ See South African Police Service (2005) *The General Offence of Terrorism and Related Offences According to South African Legislation*: http://www.saps.gov.za/docs_publications/journal/aug05/terrorist_attacks.htm.

⁹ See Independent Complaints Directorate (2006) *Annual Report 2005/2006* 'Part 3: Investigation of Complaints' for details of acts of police violence and brutality throughout the reporting period:

<http://www.icd.gov.za/reports/index.html>.

¹⁰ South African Police Service (2005) *The General Offence of Terrorism and Related Offences According to South African Legislation*: http://www.saps.gov.za/docs_pubs/publications/journal/aug05/terrorist_attacks.htm.

¹¹ Chiara Carter (2004) 'SA Spooks Gear up for War on Terror', *The Sunday Independent*, 24 October, http://www.iol.co.za/general/news/newsprint.php?art_id=vn20041024121715889C972642&sf.