AN ASSESSMENT OF THE IMPLEMENTATION OF THE GLOBAL COUNTER-TERRORISM FRAMEWORK IN SOUTH AFRICA

by

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ABSTRACT

The world is experiencing a general rising threat of terrorism. Some regions of the world have experienced more cases than others but no country in the world can claim to be immune. As such each country has a responsibility to protect its citizens, guests and installations against the risk of terrorism. This is done by having policy instruments in place and implementing them effectively to the benefit of the citizens and guests of the country.

South Africa promulgated the Protection of Constitutional Democracy against Terrorism and related Activities Act in 2004 to criminalise acts of terrorism. This investigative and exploratory study seeks to establish how South Africa brought into effect its counterterrorism legal instruments and the challenges experienced during the implementation phase as well as to assess whether or not the policy has achieved the intended outcomes in the eyes of practitioners.

Strengths and weaknesses are identified and recommendations to enhance the current instrument are proposed.

Declaration

I declare that this report is my own, unaided work. It is submitted in partial fulfilment of the requirements of the degree of Master of Management (in the field of Security) in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in any other university.

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Kgeng Rethabile Ntsalong

November 2020

Dedication

This paper is dedicated to my wife Palesa, my daughters Letlotlo and Rearabiloe. Thank you, Palesa, for encouraging me and holding things together at home while I was absent trying to complete this project.

To my mum, thanks for the inspiration.

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LIST OF ABBREVIATIONS

ANC	African National Congress
AU	African Union
AWB	Afrikaner Weerstand Beweging
ConCourt	Constitutional Court
CT	Counter Tterrorism
CTC	Counter Tterrorism Committee
CTED	Counter tTerrorism Executive Directorate
CTITF	Counter Tterrorism Implementation Task Force
DPCI	Directorate for Priority Crimes Investigation
IS	Islamic State
ISS	Institute for Security Studies
MTSF	Medium Term Strategic Framework
MEND	Movement for the Emancipation of the Niger Delta
NPA	National Prosecuting Authorityies
OAU	Organisation of the African Union
PAC	Pan Africanist Congress
PAGAD	People Aagainst Gangsterism Aand Drugs
PCLU	Priority Crimes Litigation Unit
POCDATARA	Protection of Constitutional Democracy Against Terrorist and Related Activities
SA	South Africa
SCA	Supreme Court of Appeals
SADC	Southern African Development Communityies
SAHRC	South African Human Rights Commission
SALC	South African Law Commission
SAPS	South African Police Service

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SARPCCO	Southern African Regional Police Chiefs Cooperation Organisation
TBVC	Transkei Bophuthatswana Venda Ciskei
UK	United Kingdom
UN	United Nations
UNHRC	United Nations Human Rights Council~~ommission~~
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
US	United States ~~of America~~

Chapter 1

General Introduction

1.1 Introduction

South Africa (SA), as a member state of the United Nations (UN) and the African Union (AU), is obliged to implement specific measures to combat terrorism which include the strengthening of measures against terror financing, to cooperate with other states against international terrorism, and to implement resolutions passed by the UN Security Council (UNSC) relating to the combating of terrorism. The guiding principles and regulations are found in UNSC Resolution 1373 of 2001, together with the OAU Convention and the Protocol to the Convention of 2004 on preventing and combating terrorism, which was signed in 1999 and ratified by SA in 2002.

Consequently, SA had to domesticate those global and regional legal instruments. The question is how were they brought into effect, how were they implemented and whether or not they are effective for the nature of the terror problem in SA.

Terrorism as a phenomenon is a contentious issue that has led to multilateral forums being unable to agree on a common definition. This leads to different understandings and interpretations. However, there seems to be some consensus on elements that constitute acts of terror. A simple *Oxford Dictionary* definition of terrorism is “the use of violent action in order to achieve political aims or to force a government to act”. Various academic and legal definitions will be explored later.

Based on information in the public domain, there is an indication of a general rising threat of the risk of terrorism in the world. The question of interest is whether SA applies itself adequately in implementing instruments meant to protect its citizens against terrorism and whether the threat of terrorism is perceived as real. According to the Global Terrorism Database (National Consortium for the Study of Terrorism and Responses to Terrorism, 2019), there were 2729 terrorist incidents worldwide in 2006, which is the year the

UN adopted the Global Counterterrorism Strategy. In 2010, that number rose to 4782 and in 2014 the number was a staggering 16 818. This shows an upward trend in the risk of terrorism worldwide.

Subsequent to SA having handled the urban terror attacks by People Against Gangsterism and Drugs (PAGAD) in the 1990s, it would appear that the new risk may be of transnational terrorism. Transnational terrorism occurs when perpetrators, supporters or victims of a terror act concern more than one country (Enders, Sandler & Gaibulloev; 2011). This obviously has a bearing on migration.

With migration on the rise, SA cannot claim to be immune to such acts. Schmid (2016), in a study on migration and terrorism, found that the arrival of large refugee populations could increase the risk of terror attacks in the receiving country if not properly handled. Furthermore, data examined by Enders et al. (2011) suggest that shocks in domestic incidents of terrorism can spill over to transnational terrorism. The Global Terrorism Index estimates the global economic impact of terrorism in 2017 to be $52 billion (Institute for Economics and Peace [IEP], 2018).

When looking at the question raised above on whether or not there is a threat of terrorism in SA, a few incidents in the recent past are relevant. The US embassy has issued travel advisories for US travellers to SA as a result of terror-related threats. It has furthermore closed its embassy on a few occasions due to similar threats (Ewi & Els, 2015).

Furthermore, it was rumoured that Samantha Lewthwaite, commonly known as the white widow, who was said to be related to conspirators of the Westgate Mall attack in Nairobi Kenya, had stayed in SA and even fraudulently obtaining South African documents (Potgieter, 2014). This also raises questions on the readiness of SA to counterterrorism.

In 2015, a teenager was detained and offloaded from an aircraft in Cape Town International Airport. She was believed to be travelling to join the Islamic State (IS) in Syria (Kempen, 2016).

In the recent past, South African courts have dealt with at least three widely known cases of terrorism (Fabricius, 2018). In addition, one individual has been successfully prosecuted and convicted on terror-related charges and their appeal was also later dismissed. The latest case in 2018 saw communities in KwaZulu-Natal asking questions as insecurities set in due to several incidents that took place prior to the arrests of a number of individuals, the majority being foreign nationals involved in terror-related acts. These incidents will be further interrogated in detail in later chapters of this paper.

This again raises the question as to whether SA has adequate instruments to counterterrorism, whether these are adequately implemented and whether they are supported by the supposed complementary instruments such as immigration laws and other complementary laws. The study will seek to investigate how the global counterterrorism legal framework has been domesticated in SA. It will also examine the implementation challenges in relation to the framework. Finally, it will assess the suitability of this framework for the type of terror-related problems experienced in SA.

1.2 Problem Statement

According to Tsie (1996) and Aeby (2018), as a result of the relative stability of the Southern African Development Community (SADC) as a region and SA in particular, having not faced a major terror incident (Ewi & Els, 2015), little is known about the effectiveness of SA's legal instruments and how the global legal instruments were brought into effect in SA. Secondly, because of the nature and sensitivity of the terrorism terrain, little is known about the implementation challenges faced when bringing global legal instruments into effect in SA and whether or not these instruments are indeed adequate to address the terror problem if experienced in SA.

Views advanced in a UN Counterterrorism Implementation Task Force (CTITF) report on a workshop looking into regional implementation of the UN Counterterrorism strategy in Southern Africa, of which SA forms part, are that the implementation of counterterrorism policies suffers from haphazard institutional arrangements, which include the fact that "multiple counterterrorism focal points operate from their respective ministries", which presents a problem in providing a holistic view of the state regarding countering approaches (UN, 2011).

Characteristics of good policy (n.d.) states that if policies are to meet the requirement of being a "good" policy they should be sound, complementary, logical and flexible. There should be no inconsistency between them which may cause confusion and they should be understandable to the people who are supposed to implement them (Characteristic of good policy, n.d.).

In 2004, SA promulgated the Protection of Constitutional Democracy against Terrorist and Related Activities Act (POCDATARA) while the UN Global Strategy to counterterrorism was adopted in 2006 with the biggest terror challenges of the world becoming a reality thereafter. Prior to the founding of IS, the world had not dealt with the challenge of mass migration to join a designated terror organisation which held territory of that size. Many affected countries adjusted their laws to make provision for the criminalisation of such acts, developing strategies and plans that spell out in detail the responsibility of each stakeholder in preventing terrorism and the actions to take should the terror act occur. Apart from the policies in the public domain, SA has not demonstrated readiness through the development of strategy of plans should an act of terror take place in SA (Cachalia, 2010).

The problem is further compounded by the disjuncture in the implementation of what should be complementary laws, for example immigration laws that should assist POCDATARA in managing migration, thus minimising the creation of fertile environment for recruitment and radicalization. Schmid (2016) found that migrant communities of people coming from countries that experience civil war and terrorism could become places where terror attacks are conspired. Furthermore, it has been found that children of migrants not

properly integrated in host country communities may, in a search for identity, look up to jihadists as role models. The underdevelopment of cyber policies, as identified by Sutherland (2017), also creates an environment for potential radicalization as content for self-radicalization has become freely available on the internet.

The above demonstrates that countering terrorism requires a multifaceted approach from various stakeholders. That being the case, careful coordination with clear mandates for each stakeholder is required. This thus raises the question of whether the promulgation of POCDATARA was followed by a sound strategy and plan.

When assessed individually South African laws and policies appear to be effective. Commentators (Brynard, Cloete, & De Coning, 2011; Sebola 2014) in the public policy implementation domain have diagnosed the problem of delivering services to citizens as lying with the implementation of the actual policies. The outcome of those badly implemented policies then becomes problematic.

The rise in terrorism in the world implies that no country should be complacent when dealing with such a risk. Although research conducted has shown that the threat of terrorism in SA was relatively low until the recent rise of insurgency Mozambique, it is important for the country to explore ways of positioning itself to mitigate the risk of terrorism (Frank & Reva, 2016:5).

In the past, SA faced many incidents of domestic terrorism but that was before POCDATARA was promulgated. At the time, other legal instruments were used to charge the perpetrators. SA first tested the POCDATARA when successfully prosecuting Henry Okah, a Nigerian citizen living in SA. He was accused of planning and executing an act of terror that saw car bombs exploding and killing people in Nigeria (Schoeman, 2016). The POCDATARA is currently again in court in the case of the State vs the Thulsie twins, who attempted to leave the country to join IS and also showed intent to find targets and execute terror activities in SA (Fabricius, 2018). In

addition, in Verulam in KZN incidents of sectarian violence between Shia and Sunni Muslims seem evident.

Investigations into such matters are conducted by various practitioners who may have different mandates in the law enforcement value chain. The police will seek to collect and preserve evidence and charge the accused through the law; the prosecution services will apply the law to prosecute the accused in court through the evidence produced by the police; the intelligence services will seek to maintain national security by preventing the acts from being committed, forewarning all stakeholders by providing timely intelligence; while International Relations will through their mandate seek to observe obligations stemming from conventions and protocols entered into by the country and to provide a platform of cooperation with other countries. These individuals are guided by the same policy and legislation but by different organisational mandates. Another challenge that could be posed by the law is that evidence of the commission of a crime is often left at the place where the crime is committed; with transnational terrorism being on the rise one needs to determine whether the law is fit for purpose in its current form. Accordingly, it is important to investigate whether the law was passed to comply with pressure from the United Nations Security Council Resolution (UNSCR) 1267 post 9/11 without making it unique to address South African problems or whether all this was considered prior to promulgation.

In this respect, the key piece of legislation in SA, the POCDATARA, which was passed in 2004, has never been updated. This is worrying given the fact that the dynamics of terrorism are ever changing (Ali, Nzau, & Khannenje, 2019), the thinking around terrorism is changing and the challenges experienced then would likely be different in the terrain presently. The Covid-19 pandemic has brought a new set of challenges to the world and, as such, to countering terrorism initiatives. It might be too early to assess the impact of Covid-19 on countering terrorism but the Counterterrorism Executive Directorate (CTED) has already identified both the potential short- and long-term effects on countries' responses that are affected by this pandemic.

The assumption would be that the POCDATARA is outdated and requires a level of review or update in order to address the challenges that are prevalent currently. Accordingly, the law might require updating and more emphasis should be placed on the strategy guiding the implementation. To test our assumption we will explore how the global legal instruments were brought into effect in SA, what the implementation challenges experienced were and whether or not South African legal instruments are adequate to address the terror problem as experienced in SA.

1.3 Purpose Statement

The purpose of this research is to investigate how SA domesticated a global counterterrorism framework, to explore the challenges experienced in the implementation of the framework, and finally, to examine if the South African legal instruments are adequate to address terror problems as experienced in SA.

1.4 Research Question

The fundamental research problem covered by this study is captured in the following research question: How did SA bring into effect the global counterterrorism legal framework in domestic policy and what challenges are experienced in the implementation thereof as perceived by practitioners.

This leads to three sub-questions:

i. How did SA bring the global legal framework relating to counter terrorism into effect locally?
ii. What challenges have been encountered in the implementation of this framework?
iii. To what extent have the policy intentions been successfully accomplished?

1.5 Impact of the Research

Terrorism is a crime that is easily ignorable because in SA acts of terror are not a daily occurrence. The devastation of an act of terror, however, is larger than the many incidents that are given attention. The presence of appropriate legislation is therefore necessary to ensure there measures are in place to criminalise and prosecute those who might engage in such acts. The voices of those who are charged with the responsibility of enforcing the legislation are often unheard and forgotten. It is thus important to understand the perspective of the executors of the law and understand from their point of view the strengths and the weaknesses of this law.

There has been a notable rise in academic work on the misgivings related to the domestication of counterterrorism laws in the continent of Africa (Whitaker, 2007). It has been found that more often than not countries base their terror laws on United States of America (US) and United Kingdom (UK) law and at times they are imposed, often resulting in a lack of sensitivity to the social context of the country (Njoku, 2017).

This research sought to find how SA brought into effect the global legal frameworks and whether or not it promulgated laws that are suitable for the terror problems prevalent in SA. The findings will assist in understanding the perceptions of practitioners and what influences varying views on the topic.

1.6 Conclusion

In this chapter the overall aim of the study was explained. The problem statement as well as the purpose statement was presented. The broad research question was presented together with the sub-questions which the study sought to address, and finally, the significance of the study was discussed. The literature review will be presented in following chapter.

Chapter 2

Literature Review

2.1 Introduction

A terror attack is an act that is generally not ignorable and the impact is devastating to the public. Security agencies should be on the alert at all times to ensure that such acts do not take place under their watch. Naturally, such investigations do not take place in the public domain because the perpetrators of such acts act in secret. It is not the intention of this research to judge whether SA is succeeding or failing to curb such acts as the authorities are the only credible sources of such information and it generally remains classified. We can assume by having witnessed no major terror attack that the authorities are succeeding. However, this also raises the question of whether or not there is a threat to SA.

The purpose of this literature review is to explore the general conceptual discourse on terrorism, briefly describe the South African security environment in relation to counterterrorism, as well as explore the practical discourse on counterterrorism laws, strategies and approaches and the contemporary developments in the field of counterterrorism approaches and strategies. Lastly, in concluding the review, the emerging themes in the literature will be explored.

The literature was in the main sourced from the databases of Wits University. Due to the developing nature of the literature in this domain no time limit was set. Some of the literature categorised as grey source literature was sourced from conference discussion documents, working papers and departmental documents, including publications by the Institute for Security Studies (ISS), in particular on issues related to SA.

2.2 Defining Terrorism

After reviewing past and present literature, one can argue that historically terrorism has been an undefinable concept for which lawyers could not find an appropriate legal definition. Baxter (1974, as cited in Walter, 2003) states: "We have cause to regret that a legal concept of terrorism was ever inflicted upon us. The term is imprecise, it is ambiguous and above all, it serves no operative legal purpose". In 1997, a renowned International lawyer wrote: "Terrorism is a term without legal significance. It is merely a convenient way of alluding to activities, whether of States or individuals widely disapproved of and in which either the methods used are unlawful or the targets protected, or both" (Higgins, 1997, as cited in Walter, 2003).

To date there is no global consensus on the definition of terrorism since one person's terrorist is another person's freedom fighter. However, Ganor (2002) argues that one needs to differentiate between freedom fighters and terrorists by means of their targets. According to him, terrorists will target civilians and freedom fighters fighting a guerrilla war will target security personnel or government installations. This would be a useful argument but the limitation is when unintended targets fall victim. The United Nations has resorted to giving guidelines on what the definition as crafted by each Member State in their domestic law should include. According to the United Nations (United Nations, 2006b) the definition should include the following:

> (a) Recognition, in the preamble, that State use of force against civilians is regulated by the Geneva Conventions and other instruments, and, if of sufficient scale, constitutes a war crime by the persons concerned or a crime against humanity;
>
> (b) Restatement that acts under the 12 preceding anti-terrorism conventions are terrorism, and a declaration that they are a crime under international law; and restatement that terrorism in time of armed conflict is prohibited by the Geneva Conventions and Protocols;.
>
> (c) Reference to the definitions contained in the 1999 International Convention for the Suppression of the Financing of Terrorism and Security Council resolution 1566 (2004);

(d) Description of terrorism as “any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act”.

According to the OAU Convention on the Prevention and Combating of Terrorism (African Union, 1999), a terrorist act means:

(a) any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:
    (i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
    (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
    (iii) create general insurrection in a State.
(b) Any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in paragraph (a) (i) to (iii).

Another attempt to define terrorism was made by Sandler and Enders (2007) who state: “Terrorism is the premeditated use or threat to use violence by individuals or subnational groups against non-combatants to obtain a political, religious, or social objective through the intimidation of a large audience beyond that of the immediate victims.”

Regardless of the definitions and the disagreements thereof the common thread is that terrorism relates to the use of violence with the aim or the potential to harm civilians, cause panic and disorder in communities and

advance the interests of the perpetrators. The threat of terrorism is real and the consequences are devastating, thus countries ought to have policies in place to prevent, combat and deal with the consequences of terrorism. What is of importance, however, is that the policy position should be sensitive to the realities of the specific environment for which it is meant and not dictated by the world superpowers while not solving the problems in that particular environment.

2.3 The History and Description of South Africa's Security Environment Relating to Terrorism

The history of the South African security environment cannot be adequately described without contextualising it to the pre-democratic period. During the apartheid era the security apparatus was geared to protect the regime rather than citizens at large. At the time, various laws were promulgated in SA which were often to the detriment of civil liberties and the rule of law. This included the 1967 Terrorism Act which included a detention provision with no time limit (Schönteich, 2002). The Act defined a terrorist as a person who acted "with intent to endanger the maintenance of law and order" or took action to "incite, command, aid or encourage another person to commit such an act and various other acts including causing hostility between Whites and other inhabitants of the Republic" (Terrorism Act, 1967). However, the act was used to target members of organisations viewed as opposing the regime (Horrell, 1978, p. 473). Organisations such as the African National Congress (ANC) and the Pan Africanist Congress (PAC) were banned and declared terrorist organisations. Wholesale arrests of individuals were conducted and many perished in prison giving rise to opposition against the Act. A judicial commission of enquiry appointed by the state president in 1979 with the mandate to examine the then legislation for fitness for purpose of protecting internal security found otherwise. In the commission's report the following sentiments were expressed:

> In the long run, security legislation by itself can be no guarantee of the maintenance of law and order in the country. Laws designed to combat or to

> contain unrest and violence cannot remove the circumstances that give rise to unrest and violence. After all, it is known that the existing security laws have not put an end to unrest and violence (Rabie Commission, 1981).

The internal security of SA continued to deteriorate from the 1980s to the 1990s owing to opposition to the apartheid regime. The law was repealed in 1991.

During the democratic era, SA has faced three significant challenges, one being a right-wing group of individuals who performed extremist activities. The second was the issue of citizens with alleged links to international terror organisations and foreigners using South African travel documents locally and abroad (Botha, 2011; Solomon, 2014). The third related to the seemingly growing support for terror organisations like IS by South Africans, including attempts to join them abroad (Schoeman & Cachalia, 2017).

2.3.1 The Right Wing

Right wing groups date back to the apartheid times. Their ideology is a mixture of Calvinist religion, some elements of prophecy and a strong sense of having a right to their own republic (Schoeman & Cachalia, 2017). The most prominent and active group was the Afrikaner Weerstandsbeweging (AWB). These groups took part in a number of bomb attacks against black communities or those who held liberal views during the apartheid era (Schönteich & Boshoff, 2003). Other significant activities of these groups were the attacks during the build up to the 1994 elections, the Worcester bombings in 1996, as well as the bombings of railway lines and a mosque in 2002 (Schoeman & Cachalia, 2017). Some were arrested and prosecuted successfully in what is known as the Boeremag trial held in 2013. However, it should be noted that those acts took place before the promulgation of the current counterterrorism law which was promulgated in 2004.

2.3.2 PAGAD

PAGAD an acronym for People Against Gangsterism and Drugs, started in the mid-nineties and which gained prominence in 1996 (Hough, 2000) as a movement that sought to stand against the social problems related to drugs and gangsterism in Cape Town communities. The group then transformed into a vigilante group and eventually targeted public places rather than the initial target of gangsters and drug dealers (Schoeman & Cachalia, 2017). PAGAD is thought to have been influenced by Qibla, an aspirant Islamic revolutionary organisation established in the 1980s and inspired by the Iran revolution (Hough, 2000). The group started terrorising communities with shootings and bombings; in the four years between 1996 and 2000 the group carried out approximately 472 attacks (Schoeman & Cachalia, 2017).

2.3.3 International Terrorism

Post-democracy SA has dealt with a few incidents in relation to individuals linked to international terrorism organisations. This to some extent led various analysts to posit that SA is being used as a launching pad for training, planning, financing and committing acts of terrorism in other countries (Solomon, 2012; Schoeman & Cachalia, 2017). This is due to the fact that some individuals sought in other countries for terror-related crimes have been found in SA and South African identity and travel documents have been found linked to individuals who committed or attempted to commit acts of terror in other parts of the world. These individuals range from Khalfan Khamis Mohammed, notorious for the American embassy bombings in 1998 in Nairobi and Dar es Salaam, Saud Menon, Ebrahim Tantoush, Haroon Rashid Aswat, Samantha Lewthwaite, Mohammed Yassar Gulzar, Fazul Abdullah Mohammed to Henry Okah, who are all suspected of either committing or attempted to commit acts of international terror either from SA (Schoeman, 2016) or using South African travel documents in target countries (Botha, 2011).

Furthermore, there are cases where South Africans have been arrested in Al Qaeda safe houses and others reportedly deported from Turkey en route to IS territories (Schoeman & Cachalia, 2017). This has led to a number of changes in visa requirements from various countries relating to the South African passport and a number of travel advisories and warnings of possible terror attacks in SA by countries such as the US, UK and Australia. Recently, the attacks on mosques in Verulam (KwaZulu-Natal province) and Malmesbury (Western Cape province), which were widely reported in the media as terror attacks (Davis, 2018), have been under investigation. This places pressure on the South African government to be seen to be taking steps to prevent citizens from feeling unsafe due to the proximity of the terror threat.

Additionally, the escalation of insurgency in the Cabo Delgado region of Mozambique and the subsequent recognition of the Mozambique Government as dealing with terrorism brings about a new threat to SA. This results from the proximity and possible neighbourly intervention in the context of SADC and executing the SADC counterterrorism strategy. There have already been reported warnings issued to SA by supposed IS structures against intervention in Mozambique.

2.4 Practical Discourse on CT Strategies and Approaches

2.4.1 Global Instruments

Global counterterrorism instruments have been developed by the UN over the last half century, with over 16 conventions against acts of terrorism being negotiated over the years. A day after the 9/11 attacks in the US, the United Nations Security Council (UNSC), seemingly pressured by the US, adopted resolution 1368, which invoked the right of self-defence against terror attacks in an unprecedented manner (Von Einsiedel, 2016). This created a legal avenue for the US to invade Afghanistan. Subsequent to UNSCR 1368, the Security Council adopted resolution 1373, which imposed obligations that

were legally binding on member states to cooperate against international terrorism. In 2006, the United Nations Global Counter-Terrorism Strategy (UN, 2006a) was unanimously adopted by all member states. In recent years the work of the UN in the counterterrorism sphere has been to create norms for member states, and support capacity building and sanctions mandated by the Security Council against individuals or states found to support terrorism (Von Einsiedel, 2016).

The strategy was adopted in September 2006. The unanimous adoption of the strategy was the first time that all member states agreed to a common strategic and operational approach to combat terrorism. The strategy rests on four pillars which address four areas of concern; namely, the conditions conducive to the spread of terrorism; preventing and combating terrorism; building states' capacity and strengthening the role of the United Nations; and ensuring human rights and the rule of law (UN, 2006b).

According to the Global Terrorism Database (National Consortium for the Study of Terrorism and Responses to Terrorism, 2019), there were 2729 terrorist incidents worldwide in 2006 which is the year the UN Global Counter-Terrorism Strategy was adopted. In 2010, that number rose to 4782 and in 2014 the number was a staggering 16 818. Most of these incidents were attributed to IS and Al Qaeda having gained momentum from the wars in the region, particularly Iraq, Syria and Yemen (UN, 2016a).

Between 1999 and 2015 the UN took 26 resolutions relating to terrorism and related activities, eight of which were taken after 2012 when the IS began its rampage.

These counterterrorism instruments did not come without criticism. The binding nature of the resolutions, especially 1373, was criticised by member states as being imposed without member states' buy in. The US also seemingly used these regimes to advance their own interests which delegitimised the true intentions of the regimes and the fact that sanctions imposed were seen to infringe human rights as there was no recourse for sanctioned individuals including those claiming to be wrongfully sanctioned (Von Einsiedel, 2016).

At the last review of the Global Counter-Terrorism strategy the views were split as Megally (2018) notes. Non-governmental organisations (NGOs) are critical of the fact that states' capacities to bring counterterrorism instruments to effect was the major issue being discussed but little was said about the human rights dimension during counterterrorism efforts. The issue of returning foreign terrorist fighters also seemed contentious. A stand-out criticism, however, was the fact that the review seems to place little emphasis on measuring the impact of the strategy.

2.4.2 Continental Instruments

African countries under the umbrella body of the Organisation of African Union (OAU) agreed on continental instruments to counterterrorism. However, many countries have been slow to adopt and implement those instruments. During the time of the OAU, African leaders were in consensus that countering terrorism requires efforts to address factors favouring its spread. The collective continental efforts in countering terrorism started in 1992 when leaders of member states pledged to fight the phenomena of extremism and terrorism.

The pace of progress was slow, however. It took a further seven years until the OAU passed a convention that required member states to criminalise terrorist acts under their domestic laws in 1999. In 2002, the African Union (AU) adopted the AU plan of action on prevention and combating terrorism. Subsequently, the AU established the Peace and Security Council as a body with the aim of coordinating and harmonising continental efforts to prevent and combat all aspects of international terrorism. In 2011 the AU endorsed the African model law on counterterrorism. This shows progress and willingness on the part of the AU to pursue mechanisms to counter the scourge of terrorism in the continent. The problem, however, seems to be the reluctance of member states to ratify the AU strategy. According to the Institute for Security Studies a large percentage of member states has not ratified the AU policy and the main players, especially those currently

experiencing the scourge in their countries, are among those who have not ratified it (Allison, 2016). Allison's (2016) view can be assumed to imply that countries currently experiencing the scourge of terrorism would be better off if they ratified the AU policies. However, the AU policies seem to be based on policies adopted from the West which are not necessarily effective in Africa. Njoku (2017) makes an interesting observation while arguing against the lack of sensitivity that Western policies show to the realities and dynamics of African countries. He cites arguments from various authors, positing that countries like Kenya, Uganda, Nigeria and SA seem to have adopted laws aligned to the US position post 9/11. Even countries that had terror laws prior to 9/11 like Uganda seem to have reviewed their laws in alignment with the US Patriotic Act. However, all the countries named above with the exception of SA have experienced serious terror-related incident after adopting these laws, which may be reflective of the regional stability that SA experiences.

In 2015, SADC developed its own regional strategy which creates a platform for acting collectively against acts of terror in the interests of regional stability (Chikohomero, 2020), which is now relevant with the threat of insurgency in Mozambique. It should be noted that the effectiveness of the strategy is yet to be put to the test considering that SADC has been relatively stable compared to other regions in Africa.

2.4.3 Emergence of Insurgency in Mozambique

As per section 2.4.2, the relative historical stability of the SADC region is likely to be overturned by the existing insurgency in northern Mozambique and thus regional stability will be threatened.

An IS-linked group called Ansar al Sunnah has expressed ambitions to replace the government of Mozambique with one based on Sharia law and principles (Jacobs & Isbell, 2020). The group emerged within the Mwani ethnic group residing in Cabo Delgado (Morier-Genoud, 2018) and started to launch notable violent attacks in October 2017 (Bussotti & Torres, 2020). Their main grievance was economic marginalisation in the presence of non-

residents of the region, who exploit resources in their area without providing jobs or other economic opportunities for them (Matsinhe & Valoi, 2019; Morier-Genoud, 2018).

Information pointing to the risk of Islamic extremism has been available to the Mozambican government since 2010 (Bussotti & Torres, 2020). However, the government did not consider this a strategic risk, preferring to focus on protecting the Mozambican channel (Bussotti & Torres, 2020). As such, the risk of radicalization (a concept that will be discussed in detail in section 2.4.5) and potential extremist violence were ignored in the poorest region of the country, which is fertile ground for radicalization (Matsinhe & Valoi, 2019).

For a long time the government supressed information about the real problem in Cabo Delgado (Jacobs & Isbell, 2020; Matsinhe & Valoi, 2019). The government opted for a military response and has not enjoyed support from citizens in its approach (Jacobs & Isbell, 2020). This is because human rights were suspended in the area (Matsinhe & Valoi, 2019), as a result of a late desperate military response which also turned local civilians against the military. Up to this point (November 2020), a military response has been unable to suppress the activities of the insurgents.

An IS-linked, violent extremist ideology is now openly active in the region, threatening regional stability. This open activity could embolden supporters in the region to go and fight, or start their own internal struggles against their own governments. This has potential for both Islamophobia and xenophobia which are drivers of instability.

Both the region and its individual countries therefore need to accurately measure their risk, adjust their policies and strategies, and implement effective measures to address not only the IS-linked insurgency in northern Mozambique, but also their internal dynamics.

2.4.4 South Africa's Legal Instruments

SA's legal instruments stem from its obligations under UNSCR 1373 which requires all member states to take necessary measures to prevent terror

financing and to criminalise active or passive assistance of terrorism in their respective countries in the quest to combat the scourge of terrorism (Cachalia, 2010; Rifer, 2005). Consequently, SA developed the POCDATARA; this together with the Financial Intelligence Act and related laws like those related to firearms control and explosives are used as instruments to criminalise terrorism in the country and make provision to enable the state to freeze the assets of individuals who are financing terror related acts.

The aim of POCDATARA:

> To provide for measures to prevent and combat terrorist and related activities; to provide for an offence of terrorism and other offences associated or connected with terrorist activities; to provide for Convention offences; to give effect to international instruments dealing with terrorist and related activities; to provide for a mechanism to comply with United Nations Security Council Resolutions, which are binding on member States, in respect of terrorist and related activities; to provide for measures to prevent and combat the financing of terrorist and related activities; to provide for investigative measures in respect of terrorist and related activities; and to provide for matters connected therewith (RSA, 2004).

The legal instruments are meant to criminalise the commission of the act of terrorism but, ideally, it should not reach a point where those acts are committed. Measures need to be in place to act prior to the commission of acts as a preventative measure. Acts of terrorism bring devastation to the victims and insecurity to those who are affected and thus should be prevented prior to commission rather than prosecuting the perpetrators.

There are, however, critics of the law who argue that SA has adequate laws to prosecute any crime committed. The view advanced is that distinguishing terrorism as a particular crime serves no purpose other than to stigmatise and label people as terrorists. The argument is that those people would have committed acts such as assault, public violence, malicious damage to property, intimidation, murder, sedition and treason that could be prosecuted by other laws in existence in statute books of the country (Schönteich, 2000) which are adequate to deal with such crimes (Cachalia, 2010).

To reduce the production of new potential terrorists these instruments should address an issue that is a catalyst for the production of terrorists. This issue is radicalization. While the criminalisation of terrorism leads to the imprisonment of perpetrators, it does little to address the ideological stance held by the perpetrator that led them to eventually commit the acts of terrorism.

Prosecution and incarceration have their own disadvantages. Because they deal with the symptoms and not the illness, experience has shown that when you incarcerate people with radical views you create fertile ground in prison for them to radicalize others and increase in number (Botha, 2008). This necessitates the development of strategy that will combat the underlying causal factors that lead to terrorism. Factors such as social exclusion, poor or autocratic governance, foreign occupation and perceptions of lack of political or economic prospects can create an environment conducive to radicalization. This study is particularly focused on bringing laws into effect as part of an implementation process with strategies that deal with the root causes of terrorism being considered. As a sub-theme of policy issues on counterterrorism, radicalization and counter radicalization are identified as an important consideration in counterterrorism approaches.

2.4.5 Radicalization

Radicalization can be viewed as a deliberate process of increasing willingness to use violence in order to obtain political or religious goals (Slootman & Tillie, 2006).

With the growing prominence of the internet, radicalization in its cyber form has infiltrated the entire world (Botha, 2008; Thompson, 2011). When coming up with strategies to counter radicalization, countries should not neglect cyber radicalization and those who perpetrate such acts (Omotoyinbo, 2014).

With regard to SA, Solomon (2014) opines that there is growing evidence that radical Islamism is growing in the country, and that a military approach is no longer an appropriate response. A broader approach is consequently advocated which includes non-state actors (Van Nieuwkerk, 2020).

Given the fact that the world has now become a large community connected by a network of computers (internet), radicalization, recruitment and resource sharing can happen with ease, being difficult to trace and thus making it easier for perpetrators (United Kingdom, 2009). This is due to certain highly encrypted communication software available to just about everyone. Therefore, radicalization and the dissemination of terrorist material can happen from anywhere in the world. Various national counterterrorism strategies identify the internet as one of the biggest challenges in combating the dissemination of material and the communication means of terrorists. This also creates a grey area in distinguishing between home grown terrorism and internationally motivated terrorism. Following the military defeat of IS in the caliphate, countries are facing a growing problem of returning citizens who had migrated to IS territories (Speckhard, Shajkovci, & Yayla, 2017). These individuals, some of whom are women and children, have been exposed to extreme violence and have developed hatred for what they deem to be the enemies of IS, which may include their home countries. As they return to their home countries it is important to have measures in place to support them and reintegrate them back into society. Van der Heide and Geenen (2017) suggest that the children should be distinguished by age and attitude to determine the extent to which they have accepted the norms of a terrorist organisation. Receiving countries should institute measures that can assist to deradicalize these individuals in a tailored manner (Van der Heide & Geenen, 2017) as part of the reintegration process. Furthermore, it is important as part of their strategy to institute counter radicalization programmes.

However, there is a different view, i.e. that the rise of extremism does not lie with radicalization, recruitment or resentment but elsewhere with suggestions such as inclusive democracy as an antidote to violence (Tschudin et al., 2018, cited in Van Nieuwkerk, 2020).

2.4.6 Counter Radicalization

Counter radicalization aims to fill the vacuum within which citizens can be radicalized. Ideologues often exploit genuine social issues that their targets can identify with. Young people especially often fall victim to this in their quest to seek their identity in the meaning of the instrument used for radicalization, be it a religious or political text. This aspiration is exploited by radical individuals and groups to further their agenda and thus lead the youth to radicalism (Abbas & Siddique, 2012). SA in particular is confronted with the challenges of poverty, unemployment and inequality; this combined with an influx of foreign nationals who carry the violent ideology and come from conflict areas can be of high risk to the country.

Countering radicalization requires cooperation between government and society. On the side of government the genuine issues need to be addressed. There is consensus in the literature that factors such as social inclusion, increasing trust and confidence in society, increasing trust and confidence in politics and strengthening religious defences are important in countering radicalization efforts (Abbas & Siddique, 2012; Slootman & Tillie, 2006).

Counter radicalization efforts should provide a counter narrative to that of the terrorist, who seeks to plant an ideology justifying terrorism in the name of religion. Cooperation between government and all communities in identifying issues that may lead to radicalization and sincere engagement through dialogue are necessary to close the gap between these issues. However, Fabricius (2016), borrowing from the work of Armitage and Botha, states that it is better to prevent radicalization than to attempt to cure it. Preventative measures would be best deployed by implementing relevant policies and strategies.

However, as Dechesne (2011, p. 290) states, “there is still insufficient insight into what really motivates people to de-radicalise” and there is insufficient data showing the success of de-radicalization programmes which form part of

the preventative pillars of counterterrorism strategies. There is also a gap with regard to the methods and techniques that should be used to assess interventions and evaluate the impact of counter-radicalization interventions (Feddes & Gallucci, 2015; Horgan & Braddock, 2010).

2.5 Policy Implementation

It has been observed that modern states govern through public policy, which is the overall framework through which government actions to deliver public services are undertaken (Cochran & Malone, 2014), thus it would follow that success and failure are equally as a result of such policies. The aim policy implementation is a quest to achieve the goals of a policy as designed in the policymaking process.

Brynard (2005) observed a limitation in understanding the meaning and scope of implementation. He opines that in the early days, policy implementation was viewed as a mere administrative task which led to the policy implementation complexities being ignored.

Heidbreder (2017) posits that compliance is a limited focus on the analysis of policy implementation. According to Steunenberg and Toshkov, 2009), policy implementation is a process that encompasses both an initial stage of transposing the resolutions ratified into national legislation, which equates to the legal implementation and the subsequent application in practice of such mechanisms by national administrative authorities, which is the final implementation. In reality, policy implementation is predominantly analysed by taking compliance as a conceptual starting point. Heidbreder (2017) further argues that compliance has an inherent top-down and state-centred bias, but a characteristic of multilevel implementation is that policies are formulated on the supranational level but implemented and enforced at the lower levels. As such, full compliance involves the subsequent enforcement of the rules by national agencies and bureaucrats. Legal implementation is a prerequisite condition for successful implementation; if it is not written into law it will not be implemented.

In the context of this paper the policy position stems from UN resolutions, UN counterterrorism strategy and AU conventions and strategies, as well as ratification in South African law. Those resolutions and strategies will ultimately be implemented by practitioners in member states who are many levels below the initial level of policy definition.

In terms of counterterrorism, the national threat perceptions which influence the prioritisation of implementation measures versus the administrative culture and institutional capacity are also hindrance factors.

A classical view is that policy implementation is often affected by three significant factors, i.e. the clarity of the policy goals, the complexity of the implementation process and the extent to which the policy is resourced (Rein, 1983). Policy implementation should, however, be accompanied by an implementation plan or strategy which spells out the action steps to be taken to ensure the translation from policy to practice.

As such, an element of this paper seeks to assess whether SA has moved past legal implementation to final implementation.

2.6 Emerging themes in the literature

The themes that emerged from the literature relate to the difficulty in defining and understanding terrorism since it is such a contested concept. There is consensus on the elements which constitute an act of terror but not on who can be defined as a terrorist. There is also much debate on whether a state can be said to be engaged in terrorism against its citizens or engaging in acts of state security. There are similarities in the strategies of countries which have made their counterterrorism strategies public. However, there is also a concern that many countries keep these strategies out of the public domain, which reflects on the fact that the softer approaches, which are essentially complementary to state efforts, carried out by non-state actors like NGOs, are still not central to strategies. Literature exists regarding various approaches to deradicalization (Barkindo & Bryans, 2016; Horgan, 2008;

Horgan & Braddock, as 2010 cited in Barrelle, 2010) which are concerned with removing the radical mindset of an individual in an attempt to rehabilitate and reintegrate them into society. There is consensus that force alone will not be sufficient (Barkindo & Bryans, 2016) and that a multilateral approach is best for countering terrorism. However, there is an emerging argument in academia that cooperation is necessary; however, counterterrorism approaches need to pay attention to the unique dynamics of each state.

The perceptions of those who have to implement the various strategies and enforce the law are still few and far between. In SA, very little has been written on how law enforcement agencies perceive the laws that enable them to do their work. Although much has been written about the domestication of counterterrorism laws at the time they were introduced, little is known about the challenges faced during implementation and how the policy has fared in the environment to date.

2.7 Conclusion

In concluding this review there is clear evidence of the difficulty or lack of consensus in defining terrorism. While there is consensus on the elements that constitute an act of terror, such as committing murder, hostage taking, targeting non-combatants, coercing states to act or refrain from acting and spreading fear among the population (UN, 2018), there is no agreement on who can be defined as a terrorist as the objective seems to be playing a major role in justifying some such acts. There is also much debate on whether a state can be said to be engaged in terrorism against its citizens or to be engaging in acts to ensure state security. While there are similarities in countries' strategies which made their counterterrorism strategies public, there is also a concern that many countries keep these strategies out of the public domain, which reflect on the fact that the softer approaches which are essentially complementary to efforts by non-state actors like NGOs, are still not central to strategies. Literature on the various approaches to deradicalization (Horgan, 2008; Horgan & Braddock, as 2010 cited in

Barrelle, 2010; Barkindo & Bryans, 2016) which are concerned with removing the radical mindset of an individual in an attempt to rehabilitate and reintegrate in to society. There is consensus that force alone will not be sufficient (Barkindo & Bryans, 2016) and that a multilateral approach is best for countering terrorism.

Chapter 3:

Research Methodology

3.1 Introduction

The study assessed the way in which SA brought into effect the global counterterrorism framework in domestic policy and explored the challenges experienced in the implementation of the framework, and finally, to understand whether the framework is adequate for the current realities in SA.

This chapter will describe the research methodology used to achieve the objectives of the study. This will include explaining the research approach, concepts, paradigm and overall research design for the study. In this chapter the chosen methodology will be justified and explained.

Through a review of archival documents as primary sources, the legal transposition of global counterterrorism instruments to national law and the perceptions of practitioners concerning the mechanism to implement policy and strategy after the legal implementation were explored.

Accordingly, qualitative research methods were deemed most appropriate, as the ultimate aim was to understand these outcomes from the perspective of various practitioners within the different law enforcement agencies in SA. This fits into the description of qualitative research below.

> Qualitative research is concerned with understanding the processes and the social and cultural contexts which shape various behavioural patterns. It strives to create a coherent story as it is seen through the eyes of those who are part of that story (Wagner, Kawulich, & Garner, 2012).

3.2 Research Approach

National policy in general is a competence area of the state. However, there are researchers, lobbyists and other interest groups that seek to influence a policy position to advance certain interests of the group in question. This

makes policymaking a difficult balancing act, taking into consideration the different interests and finding what best suits the state in the interests of all. After passing the policymaking hurdle, implementation poses a second challenge. The success or failure of the implementation phase is what ultimately determines whether the policy reaches its intended outcome or not, factoring out the unintended consequences of policies which can occur.

According to Steunenberg and Toshkov (2009), the implementation of policies in this case (UN) is a process that encompasses both an initial stage, where ratified resolutions are transposed into national legislation (legal implementation), and the subsequent application in practice of such mechanisms by national administrative authorities (final implementation). Finally, full compliance involves the subsequent enforcement of the rules by national agencies and bureaucrats.

This particular study was conducted using an inductive approach to understand how SA domesticate the global legal framework, how has it worked so far, how law enforcement practitioners perceive the implementation process and what the perceived gaps and challenges are that are experienced in the process.

3.3 Research Strategy

The manifestation of terrorism creates fear, destruction, paranoia and various undesirable feelings which are contrary to outcome 3 of the Medium Term Strategic Framework (MTSF) of the state, which strives for the ideal that “[a]ll people in SA are and feel safe” (RSA, 2012). Various state entities are role players in achieving outcome 3, but their approaches differ, as do their views on the matter; thus, exploring the perspectives of role players will give a glimpse into whether SA practitioners have a coherent uniform view on issues of counterterrorism and the legal instruments available to them.

Interviews were conducted with relevant practitioners, making use of publicly available official documents and a case study of the first case in which the

POCDATARA was tested in South African courts. This case study demonstrates the application of law, notwithstanding the fact that the act was committed in another country.

3.4 Research Design

The research was conducted by means of a qualitative research study, which followed a descriptive and interpretive design, including an analysis of primary and secondary data, to investigate and provide evidence of how the domestication of global legal frameworks took place. It considered the realities of practitioners from different disciplines (legal practitioners, police and other law enforcement officials) and established the success/failure of implementation from the perspective of different stakeholders and archival documents. The study also considered the available literature as evidence of the implementation mechanisms. Finally, the research made use of the 7C protocol to analyse the data and present the findings on the outcome of the data.

3.5 Data Collection

Data were primarily collected by means of interviews with the sampled individuals, with documentary analysis being conducted to enhance the data collected. The documents included government's pronouncements on terrorism policy over the years, a case study of the first test case of the legislation based on court findings, conventions and treaties signed by SA, and available literature with applicability to South African dynamics. The researcher requested the participation of the sampled group and after their indication of willingness to participate, the researcher applied for and obtained permission from the relevant departmental authorities to interview the participants. It was indicated in the application that respondents' identities would be kept anonymous and that if respondents were not comfortable they could cease to participate at any time.

3.5.1 Primary data

Primary data were obtained from interviews with experts and practitioners involved in policy implementation. The interviews were semi-structured in order to have specific questions answered but still giving room to the interviewee to express themselves and give some form of in-depth explanation and share their experience if possible.

3.5.2 Secondary data

Secondary data included government leaders pronouncements, conventions and treaties to which SA is signatory, research outputs on the topic relevant to SA, legal documents and other relevant material like conference papers and lectures which enhanced the data.

3.5.3 Sampling

Owing to the nature of the study, purposive sampling was used. Semi-structured interviews were held with practitioners regarded as experts in the field and who use the legal instruments in carrying out their duties.

3.6 Data Analysis

Analysis involves the ways in which one makes sense of the data collected. Since this was a qualitative research exercise, qualitative data analysis was used. This type of analysis includes narrative analysis, thematic analysis, phenomenological analysis and discourse analysis. For this particular research study thematic analysis was used. This involves identifying themes or patterns in the data. As a result of the investigative and exploratory nature of the study and seeking to find different perspectives, themes had to be determined from different stakeholders in an attempt to understand their reality and their views on the policy implementation process. The emerging themes were coded as the interviews continued. The 7C protocol was used as a framework to guide the analysis.

The 7C protocol stems from a widely used 5C protocol which was introduced in the early 2000s by policy implementation scholars like Brynard (cited in Molobela, 2019). The variables are similar to those of the 5C protocol with an additional two variables, i.e. seven variables are used to analyse policy implementation, namely, content, context, commitment, capacity, clients and coalitions, communication and coordination (Molobela, 2019). Content relates to the content of the policy; the second variable, context, relates to the context in which the policy was developed, commitment relates to the commitment by all relevant stakeholders to the policy implementation process; capacity assesses whether or not the implementing authority has the capacity to actually implement the policy effectively; and clients and coalitions refer to the various parties affected by the policy and which could have an interest in and influence on the implementation process. The penultimate variable, communication, relates to ensuring intentions are communicated effectively to the implementers and stakeholders that are affected by the policy in order to have a common understanding of the policy intention and expected outcomes. Lastly, coordination results in the variables related to bringing everything and everyone together working in concert to implement the policy effectively as intended and as understood by all stakeholders (Molobela, 2019).

3.7 Validity and Reliability

Validity deals with the extent to which the test measures what it is supposed to measure (Wagner et al., 2012). To ensure validity one will seek to interview a diverse sample which has interest in the topic but also looks at the topic from different points of view, for example the prosecution service, police and other law enforcement practitioners. Furthermore, the validity of the research was enhanced by research material that considered including other countries' strategies that directly express a policy position.

Reliability estimates the consistency of your measurement. The interviews were conducted with practitioners who responded from in terms of their

professional practice, as well as internal protocols, which are similarly applicable to everyone who is in the same working environment, thus one could ask the next practitioner the same question and still receive a similar response.

The use of different materials (research papers, conference papers, policy documents, case studies) and data sources to triangulate the data received also gave an opportunity to cross check the data which also enhanced the validity and reliability of the data.

3.8 Ethical Considerations

Ethics is an issue that should be considered in every step of the research process (Wagner et al., 2012). Ethical considerations were taken into consideration in every step of this research. Issues of extremism often relate to personal, political and religious beliefs and the researcher was mindful of this and the sensitivity of the topic. This particular research aimed to address this on a policy level and was careful to navigate and even avoid issues that might have been sensitive to participants.

The researcher applied for and complied with all provisions for obtaining ethical clearance from Wits and conducted the research in a manner aligned to ethical requirements. Because the researcher interviewed government employees, formal permission was sought from the government departments involved prior to proceeding with the research. Only data available in the public domain were used for this study.

The participants in the research are seasoned practitioners whose views cannot be influenced by the researcher thus their perspective was recorded as they presented it.

No power relations were involved that would compel respondents to respond in a manner that would have influenced the researcher or influenced by the researcher to reach a predetermined conclusion or outcome, since the researcher had no personal interest in the outcome of the research.

Participants could elect to remain anonymous and pseudonyms were used when necessary to maintain anonymity. Considering that some of the participants are practitioners who are or have been active in some of the investigations it was crucial to respect and maintain anonymity where this was required by the participant. Participants were informed that their participation was voluntary and they could elect to opt out at any given time if they felt uncomfortable with further participation. Additionally, the supervisor's contact details were made available to the participants in case they needed to raise concerns about the study. The participants were also given assurance that information obtained would only be used for the purpose of this research.

3.9 Limitations

The research focused on the legal transposition of the global legal framework, and the general local implementation and challenges, only as found in legal documents, as perceived by law enforcement and legal experts. The views of other stakeholders, for example NGOs, the public at large who might be victims or beneficiaries of the law are not reflected in this research.

The purposive sampling of the participants might also be a limitation because the sampled group formed part of a working group which may not have been as diverse in views as compared to a national sample, which might have had move diverse views informed by different geographic locations and dynamics. Nevertheless, it should be noted that the sampled group oversees the national function and has knowledge of the developments across the country.

3.10 Conclusion

In this chapter the research method utilised to conduct this study was described. The limitations of the study were also explained, including the hindrances experience during the research process.

Chapter 4

Presentation of Results

4.1 Introduction

The aim of this chapter is to present the results of the collected data. The data consisted of responses to questions asked during the interviews conducted by the researcher, as well as the archival documents and grey source documents available to the researcher.

The research study sought to answer a broad question: How did SA bring into effect the global counterterrorism legal framework in domestic policy and what challenges were experienced in the implementation thereof, as perceived by practitioners? This broad question was divided into sub-questions which were then consolidated into one holistic answer.

Interviews were conducted with seven respondents working on counterterrorism-related matters. The responses do not include the views of members of the South African Police Service (SAPS), who had indicated interest in participating in the research, as no response was received when seeking permission from their employer to interview them. It was also envisaged that personnel from the Department of International Relations and Cooperation (DIRCO) would also participate; however, they indicated that they viewed their role as facilitators rather than subject matter experts, and as a result were reluctant to give their views.

4.2 Presentation of Data

The results of the research expose a different view on the common assumptions that many may hold. The more the researcher engaged on this topic the more intriguing it became and the more curious the researcher was to speak to more people to understand their views. However, the study had to end somewhere and, thus, the views of practitioners, supported by

documentary evidence on how SA brought the global counterterrorism legal framework into effect and the challenges experienced in the implementation phase to date, are discussed below. Each sub-question will be answered individually.

4.2.1 How did South Africa bring the Global Counter-Terrorism Legal Framework into effect locally?

All seven participants unanimously stated that SA brought the global counterterrorism legal framework into effect by promulgating the POCDATARA in 2004. However, the views of the participants varied when it came to what sparked the process of drafting the new terrorism law. The views varied from the Boeremag problem, as proposed by participant E, the PAGAD issue, South Africans being found in Al Qaeda safe houses abroad and terror suspects fleeing to SA, and SA being unable to act due to an absence of enabling legislation. However, the majority of participants advanced the view that SA brought this legal framework into effect as a result of international obligations created by the pressure exerted by the US on the United Nations (UN), which led to UNSCR 1373/2001 following the 9/11 attacks in the US.

Participant F is quoted as follows:

> *It was as a result of pressure from the United States in particular, in their "axis of evil", "with us or against us" discourse following 9/11, and their influence in the United Nations. At the time South Africa had no discernible terror threat if you exclude the Right Wing, which is conceptualised more through a subversion and treason lens rather than terror. While the discourse of Al Qaeda being a global threat was pervasive there was nothing at the time that suggested the organisation was a threat to South Africa and its immediate interests.*

According to an appraisal done by the South African Human Rights Commission (SAHRC) in 2003 on the South African Anti-terrorist Bill of 2002, the terrorism law-making process was sparked by the PAGAD problem in the Western Cape. In reaction to the upsurge in violence, the SAPS conducted research, and drafted and submitted the draft Bill to the South African Law

Commission (SALC) in 1999, in particular to the Project 105 (SALC, 2002) committee which was working on security legislation at the time. The draft Bill provided for detention without charge for up to 14 days for the purposes of interrogation (SAHRC, 2003).

A report by the SALC in 2002 provides a more accurate account of the origins of what we know as the POCDATARA. This is regarded as an authoritative document as it is a report to the then Minister of Justice and Constitutional Development, Dr P. M. Maduna, from the project team constituted to review and draft the Anti-Terror Bill, led by Madam Justice Y. Mokgoro. According to the South African Law Commission (SALC, 2002), the POCDATARA was born out of a request by the then Minister of Safety and Security in November 1995 for the SALC to undertake a review of South African security legislation. The Minister stated that the security legislation and similar Acts of the former Transkei, Bophuthatswana, Venda and Ciskei (TBVC) states should be repealed in view of the history and changed circumstances in SA.

In 1996, the Safety Matters Rationalisation Act was adopted, effectively repealing all security legislation in SA, but it made provision to leave section 54(1) and (2) of the Internal Security Act of 1982 in force (SALC, 2002). This section of the Act dealt with the offence of terrorism. The weakness of the provision in the Act was, however, the fact that it related to terrorism only in respect of the South African Government and its population. No provision was made to protect foreign officials, embassies, guests or interests of foreign states on South African soil.

The Commission worked on the Bill which led to Discussion Paper 92, which was released for public comment in August 2000 (SALC, 2002). There were varying views within the different security ministries regarding the inclusion of special provisions in the anti-terrorism laws, including detention for the purposes of questioning, with Intelligence said to be in favour but Safety and Security were not. These special provisions were not in line with the provisions of the Constitution and the implication of their inclusion would

have necessitated a constitutional amendment. The view that prevailed was that such provisions should be excluded.

The events of 11 September 2001 prompted the world to take stock of available measures to combat terrorism. On 28 September 2001, the UNSC adopted Resolution 1373, with comprehensive steps to combat international terrorism. Through that resolution a monitoring committee was established, and called on states to report their implementation progress within 90 days from the day the resolution was passed (UN, 2001).

Subsequent to these events, the then Minister of Safety and Security and Minister of Justice were quoted in the media expressing sentiments that the South African government was under pressure to implement Resolution 1373 (SALC, 2002). The Justice Minister further remarked that it was unthinkable that the South African Parliament would pass a law that was not in line with the Constitution and that they would not pass a terrorism law out of desperation (SALC, 2002). As a general comment on a letter sent by the South African permanent representative to the UN (UN, 2002), It was indicated that SA had no omnibus legal instrument combatting terrorism holistically, but provided an update on the impending anti-terrorism bill and legislation that was in use at that stage (UN, 2002).

The conceptualisation of the anti-terrorism regime was seemingly not an easy process. Even following the 11 September 2001 attacks and the passing of the UNSCR 1373, there were still questions on whether SA needed an anti-terrorism law or should rather use the available legal instruments to achieve a similar outcome (Schönteich, 2002). In response to the varying views regarding the necessity to draft a separate anti-terrorism law, and to ease tensions and reassure the part of the population that felt as if the law were targeting them, and for those who advocated for protection of human rights, an important question needed to be asked. This related to the sufficiency of existing legislative measures measured against the requirements set out in UNSCR 1373. The existing laws were examined and the finding was that they had shortcomings which had to be remedied. The

Commission proposed an omnibus act with extraterritorial jurisdiction in line with international conventions and also addressing terror financing.

The Commission acknowledged that SA was in favour of the OAU approach which was said to be a holistic and context-specific approach seeking to understand root causes. But SA was also a participant in UN deliberations on conventions and instruments for counterterrorism with an understanding that effectively all efforts would enhance cooperation (SALC, 2002).

An examination of speeches by South African leaders in different forums gives a glimpse of the country's approach to counterterrorism. Extracts of a statements and speeches given by the SA government leaders as read in (SALC, 2002) can be quoted as follows:

> "In the medium-term the challenge is to understand the root causes of these despicable acts and eradicate them worldwide."
>
> "South Africa's approach is informed by its values as a nation and government is of the full conviction that it is in the national interest."
>
> "Beyond this, we must act together to determine the issues that drive people to resort to force and agree on what we should do to eliminate these."

Participant B mentioned the following:

> *As South Africa we believe we need to look into the root causes and those root causes are embedded within socioeconomic issues and the exclusion of other interest groups within the broad framework of governing the world or governing countries. So it is important for us to look into causes and allow everyone to enjoy civil liberties in an equitable manner and by doing so we hope that no one could find reason to be part of terror organisations against this country.*

In a speech given by the then South African president to the UN in 2001, President Mbeki mentioned that socioeconomic deprivation coexisting with enormous wealth in other quarters of the world bred a deep sense of injustice, social alienation and despair, and a willingness [by those suffering socioeconomic deprivation] to sacrifice their lives as those people saw themselves as having nothing to lose (SALC, 2002). Schönteich (2000)

echoes these sentiments, saying that SA's approach to anti-terrorism policy is that terrorism should be combatted without sacrificing the civil liberties of citizens and the rule of law.

Extensive research was conducted by the Commission with Mr P. A. van Wyk designated as the researcher allocated to Project 105 (SALC, 2002). The research was predominately on how other countries crafted their terror laws and gave effect to the various obligations stemming from international conventions.

At the time, a number of international conventions on terrorism still had to be acceded to, signed or ratified by SA. However the following conventions had already been adopted (POCDATARA, 2004):

- Convention of Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention)
- Convention for the Suppression on Unlawful Seizure of Aircraft (Hague Convention)
- Convention for the Suppression on Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention)
- Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons
- International Convention Against the Taking of Hostages
- Convention on the Marking of Plastic Explosive for the Purpose of Identification
- Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation
- The International Convention for the Suppression of Terrorist Bombings
- International Convention for the Suppression of the Financing of Terrorism
- Convention on the Prevention and Combating of Terrorism adopted by the OAU

The following conventions had not yet been ratified at the time the law was drafted, but there was an expressed desire for SA to become party to them (POCDATARA, 2004) which subsequently transpired:

- Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf
- Convention on the Physical Protection of Nuclear Material
- Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation

4.2.2 What challenges have been encountered in the implementation of this framework?

The first question demonstrated how historical developments in SA, the various legal processes, demands and inputs by South African citizens and international obligations led to the birth of the POCDATARA. Regarding the implementation of policy, Heidbreder (2017) argues that policy implementation is predominantly analysed by taking compliance as a conceptual starting point. However, compliance also has a limited focus when it comes to analysing policy implementation. As a result, we have considered compliance but also borrow from Steunenberg and Toshkov's argument (2009) that the implementation of policy is a process that encompasses both an initial stage of transposing resolutions ratified into national legislation, which equates to legal implementation, and secondly, the subsequent application in practice of such mechanisms by national administrative authorities, which is the final implementation. Compliance would have been met on the legal implementation level even though final implementation would still be lacking.

Challenges experienced by practitioners will be explored to understand the implementation challenges since promulgation. These will include operational challenges, capacity building, coordination challenges, and legal challenges to the framework in general.

It is the view of six of the seven participants that SA does not perceive itself as a primary target for international terror groups. As a result,

counterterrorism does not rank high in priority compared to other competing challenges the country has to address.

The primary challenge expressed was the lack of agility of the law in the ever-changing environment of counterterrorism. One example given is that when the law was drafted the challenges of people leaving to join terror organisations in foreign countries, like IS in Syria, were not prevalent. As it stands, terror laws do not prohibit travel to identified terror hotspots and the evidence that is needed in order to build terror-related cases following the return of those individuals is often left on the battlefield. A piece of complementary legislation to assist in this matter would be the Foreign Military Assistance Act but that would also only come into effect if there were proof that an individual had participated in military activities (Regulation of Foreign Military Assistance Act 15 of 1998). According to interviewees who had a chance to interview some of the returnees, the general response of returnees was that they went to participate in humanitarian aid activities and, without proof to the contrary, they went free. Secondly, the lack of strong complementary laws and the enforcement of immigration, citizenship and laws governing the so-called informal financial sector and remittance platforms and their operators, form part of the weakness in successfully implementing counterterrorism laws and strategies. The view of participants A, B, D, E and F was that people involved in terror-related activities are now using sophisticated methods and technology, and this require laws and strategies to constantly address the realities as experienced on the ground and not to stagnate.

After the legal framework had been promulgated a strategy had to be drafted to implement the broad framework. According to participant A, the South African counterterrorism strategy of 2013 is not a public document but was drafted in line with the global counterterrorism strategy with five pillars, giving responsibility to different departments. For example, detection and understanding would be an intelligence function, while combating would generally be a police and the National Prosecuting Authority (NPA) function; two departments that work closely with one another. However, there are other preventative pillars which might require other departments such as the

Department of Home Affairs and the Department of Social Development. These departments do not generally see themselves as having a counterterrorism responsibility, which brings about the distance and the difficulty in implementing the strategy and the framework coherently. This, according to participant B, has resulted in challenges in bringing into effect the defensive risk management plans that are needed to enhance defensive mechanisms and the assessment of their effectiveness.

All participants except for one expressed the view that departments pull in different directions and are not addressing the matter on common ground. Participant F expressed the following view:

> *Different departments pull in different directions. There is no common position on how and if South Africa should deal with terror. Departments thus place their individual mandates, which may work against counterterrorism aims, above that of a coherent, national goal of countering terrorism.*

The inability of the departments responsible for national security to compel other departments to act hinders the successful implementation of policy significantly.

Participants C, D and E mentioned the issue of mandate creep which manifests itself in the operational space. This has a tendency to create confusion, competition and distrust amongst agencies because operational approaches differ especially when not properly coordinated. Participant C thought there should be a clear distinction between the functions of each department. Participant D, however, thought that counterterrorism should be operationally driven by one agency, addressing all issues rather than having civilian intelligence, police intelligence and sometimes defence intelligence, together with the Directorate of Priority Crimes Investigations (DPCI) all working on counterterrorism issues.

4.2.2.1 Training of Officials

The issue of training came out clearly from almost all participants as a hindering factor in the operational realm of implementation. Four participants indicated that their training was obtained is basically from experience rather than any formal or functional training. Participant D mentioned that in SA there is no institution that is sufficiently geared to provide counterterrorism training. The rest indicated that their counterterrorism training had been obtained from external countries which included India, the United Kingdom, Tanzania and Russia. Participant E expressed the opinion that owing to the lack of training their perceptions are based on experience over the years and that is how their views are formed. Participant B stated that local training helps to develop uniformity, whereas foreign training can assist in developing functional skills that are lacking. However, sending somebody to a foreign country to be taught the basics would be a waste of time and would bring confusion among the ranks.

This confusion also manifests in the operational level where a lack of policy certainty, influenced by conceptualisation, hinders cooperation with other countries as well. According to participant F, in the main, SA conceptualises terrorism as an external problem which does not emanate from or impact the country. It is largely thought of as an American or Western tool to further the foreign policy, hegemony and interests of the US and the West in other states. This perception is compounded by the US's tendency to designate as terrorists individuals or organisations with which it has political problems. This view was supported by participant E who said that the lack of policy certainty to aid practitioners in having a uniform view is frustrating because they sometimes find that they don't know how to address certain issues because the country has not pronounced on which organisation can be viewed as a terror organisation or not. Participant D rationalised these views by advancing a position that it is important to note that because of the historical connotation of terrorism in SA, this still largely has an influence when discussing terrorism in official fora. Participant B further added that the understanding of terrorism is not as a national question approached from the same point of view but from various framings, depending on the individual

history and influences. Additionally, the lack of basic training and a common doctrine amongst all practitioners exacerbates the situation.

There is, however, consensus among participants that the coordinating function among the different role players has significantly improved and is currently efficient. However, understanding the capacity to implement the legal framework requires one to understand the value chain from detection to prosecution. Various departments, namely, the different intelligence agencies, DPCI, NPA and any other government department, are deemed necessary to be involved in the process. Participant C mentioned that detection remains an intelligence function and some matters begin and end within the intelligence environment. This is done by the relevant agency, devising measures to disrupt or counter the threat in its inception stages. Hence, the number of cases dealt with in the courts does not necessarily represent the real extent of the problem. The legal process is technical and prosecution depends on the quality of evidence produced by investigations. Participant G maintained that a lot of evidence is required to prove motive and it is close to impossible at times to distinguish between various motives such as religious, political etc. This has proven to be a challenge in preparing cases for court. Participant G furthermore added that the motivation for a terror acts does not matter in the case of the victims of such an act. The participant further posited that the UNSC supports the view that any act of terrorism is unjustifiable regardless of the motivation. This informs the mooted proposal to remove the requirement to prove motive in SA's terrorism legislation.

Participants D and E view POCDATARA as a law that is also supposed to be a deterrent to acts of terrorism and thus argue that when other laws are used to prosecute perpetrators, the deterrence factor is lost. However, other participants feel that using other legal instruments helps to minimise the national threat level and removes the stigma of labelling people terrorists, captured by participant C as "*avoiding to create enemies that could be avoided*". This view is, however, objected to by participant A, stating that with terrorism cases you will need to prove political motive which requires more and is difficult to prove. It will take 10 years to build a case whereas if the

suspect were arrested with an illegal firearm you could easily put them away for five years on illegal firearm charges, and when the suspect comes back and continues with his previous activities, authorities will be ready to prosecute him for terror-related activities. But when the person commits murder they can get life imprisonment for murder, which is clear cut, rather than taking years to build a terrorism case by which time the person has been sitting in jail for so long that the judge can decide to let them go after numerous postponements. Participant C, however, introduces another challenge beyond prosecution and conviction. The participant maintains that besides the fact that most perpetrators walk free or get off lightly because of the investigative challenges leading to cases dragging on for years, those that have served sentences still go back to their activities again because the Department of Correctional Services does not deradicalize the offenders and as a result most go back to the existing radical communities unrehabilitated. However Participant B mentioned that the problem of deradicalization had been identified and work is being done on it with the aim of providing a counter narrative to those who are attracted to the radical narratives.

The issue of a “terrorism threat denial” across various sectors of government is seen as the primary reason for not filtering the implementation to lower levels by resourcing and capacitating lower structures. However, some participants rationalise this with a view that terrorism is not a problem as big as poverty, inequality, corruption, gender-based violence and crimes against children in SA.

4.2.3 To what Extent were the Policy Intentions of the Legal Instrument Accomplished?

In order to answer the above question, the following topics will be addressed:

- Initial intention of policy
- Evaluation by oversight bodies
- Cases dealt with since inception

- A case study where the legal instrument was challenged in the South African courts

4.2.3.1 The initial intention of the legal instrument

Anti-terrorism laws in SA were initially drafted during the security law reforms after the democratic government came into power. The 9/11 attacks in the US and the subsequent UNSCR 1373 of 2001 became a catalyst for the process. UNSCR 1373 also came with timelines and a monitoring committee to monitor progress. In order to assess the legislation as promulgated in SA it is best to assess how it fared under the scrutiny of the United Nations Security Council Counter-Terrorism Committee Executive Directorate (CTED).

The CTED was established in 2004 by UNSCR 1535 of 2004. It was established as a special political mission under the Counter Terrorism Committee (CTC) (UN, 2004). The CTED was established to revitalise the CTC's efforts to monitor effective implementation and enhance capacity building of states in the quest to comply with requirements of UNSCR 1373 (UN, 2004).

The CTED has oversight on member states' implementation of Security Council resolutions. They conduct country visits to assess the implementation progress.

4.2.3.2 Evaluation by oversight bodies

According to participant G, SA has so far received two country visits by the CTED. Participant G further pointed out that during the 2007 CTED compliance visit, it was found that SA's legislation was fit to serve as a model for other countries' legislation.

SA's legislation was used to a large extent as a model for SADC countries through the Southern African Regional Police Chiefs Cooperation Organisation (SARPCCO), according to participant G. A country report by SA to the UN speaks of harmonising legislation in the region. To that effect it

could be used as a model counterterrorism law for the region which the legal subcommittee of SARPCOO is mandated to draft. The draft was due to be considered by 2006 by the regional police chiefs (UN, 2006b). Prior to that, the Protocol to the OAU Convention on the Prevention and Combating of Terrorism was adopted in Addis Ababa by the Assembly of the African Union on 8 July 2004. In 2015, the SADC region adopted its counterterrorism strategy in Gaborone, Botswana.

The following problems were pointed out in during the 2018 CTED compliance visit to SA:

- Inconsistencies with the sentencing regime with a more severe penalty potentially being imposed for money laundering as opposed to terror financing. These should be rectified.
- Lack of reference to administrative sanctions for violating asset freezing orders pursuant to section 23(1)a or lack of any reference to administrative actions. This refers to the problem with obtaining asset freezing orders as well as the fact that they are not being adhered to. Participant G opined that there is not much you can do but sanction a person for not adhering to a court order.
- Clarification of the applicability of the *aut dedere aut judicare* principle, which states that you are obliged to either prosecute a terror suspect or hand them over to another entity to prosecute in relation to CT-related offences.

All conventions were considered until the law was passed but seven new international instruments have been passed which need to be provided for in the Act. The new instruments are, namely:

- The International Convention for the Suppression of Acts of Nuclear Terrorism, adopted by the United Nations General Assembly on 13 April 2005
- Amendments to the Convention on the Physical Protection of Nuclear Material 2005, adopted on 8 July 2005 by the Parties to the Convention

- The Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 2005, adopted on 14 October 2005 by the International Maritime Organisation
- The Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf 2005, adopted on 14 October 2005, by the International Maritime Organisation
- Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation 2010, adopted in Beijing on 10 September 2010
- The Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, adopted in Beijing on 10 September 2010

  The Protocol to Amend the Convention on Offences and Certain Acts Committed on Board Aircraft, adopted in Montreal on 4 April 2014.

4.2.3.3 Terrorism Cases

The Boeremag Trial

This matter relates to a series of offences committed in 2002 by 23 domestic terrorists. It should be noted that this matter took place before the POCDATARA was promulgated but it is included because it demonstrates the wisdom of lawmakers to leave sections of the Internal Security Act 74 of 1982 intact while security laws were repealed in the process of reform. It is also included here because it relates to a matter that involved POCDATARA later on.

The matter relates to a series of bombings which were carried out, resulting in death and serious injury to several people. The accused acquired explosives, firearms and ammunition and further committed acts of sabotage.

The accused were thus charged with treason, murder, attempted murder, terrorism and sabotage under the Internal Security Act 74 of 1982. They

were also charged with firearm and explosives-related offences (*S v Du Toit and others* (CC91/2003 [2004] ZAGPHC).

The matter took a decade in court with the trial commencing in May 2003 and concluding with sentencing in October 2013, with a total of 1280 days in court. This was after the state had called 162 witnesses, one of whom was cross examined for nine months. The defence called 50 witnesses and brought 53 bail applications.

Three of the accused died of natural causes during the trial. The remaining accused were convicted of high treason, with five also being convicted of culpable homicide and five of conspiracy to commit murder. They were sentenced to imprisonment ranging from five to 35 years. Leave to appeal was refused and the accused sought appeal to the UNHRC which the state opposed.

During the course of the trial in 2006, some accused escaped from the court building and a certain Bogaards and his wife harboured these escapees. The Bogaards were subsequently prosecuted and convicted of contravening section 11 of POCDATARA. The couple appealed their convictions and Bogaards' wife's was set aside. Bogaards' conviction and sentence were confirmed by the Supreme Court of Appeal (SCA), which however set aside conviction under POCDATARA because the offences in question were committed before commencement of the Act. The conviction was made under the Correctional Services Act. The matter was further taken on appeal to the Constitutional Court (CC) which confirmed the SCA conviction (*Bogaards v State* (CCT120/11 [2012] ZACC23).

State v Mustafa Mohamed

This matter involved an individual who was a founding member of the Imam Haroon Brigade (IHB), an organisation aligned to Al-Qaeda and opposed to the "Western policies" of the South African Government. The organisation later ceased to exist. The matter was dealt with in 2011.

The accused had acquired chemicals which could be used in the manufacture of explosive devices. The accused surrendered himself to police and the matter was dealt with by way of plea and sentence agreement. He received a suspended sentence of 10 years' imprisonment. The individual rehabilitated himself and obtained employment as a teacher in Saudi Arabia (*Minister of Safety and Security and Others v Mohamed* (A228/2009) [2010] ZAWCHC 388).

State v Kiratzidis and 2 others

The matter related to Kiratzidis, Vorster and Louw, who were members of a small domestic terrorist cell based in a rural community. They were charged with conspiring to detonate explosives at residences of members of the ruling party or at public venues used by African persons ("Witness recruited to 'terrorise blacks'", 2011). They were also charged with recruiting people to join the conspiracy and with possessing seven pipe bombs.

Louw was convicted of manufacturing explosives and sentenced to a fine of R50 000 and a suspended jail term. Kiratzidis was convicted of conspiracy charges and sentenced to 12 years' imprisonment in 2013. Vorster was convicted of the same charges but sentenced to five years' imprisonment.

State v Roach

This matter relates to an individual who sent emails from SA threatening to cause outbreaks of foot-and-mouth disease in the UK and US. The individual directed threats at the respective governments and demanded a ransom. The individual alleged they were a Zimbabwean farmer retaliating against the UK and US governments for loss of farms (Watney, 2017).

Upon arrest it was established that the individual was a local businessman who was trying to raise money to save his business and had no terrorism

intent or motive. He pleaded guilty to a charge of attempted extortion and was sentenced to seven years' imprisonment (*S v Roach,* RC 158/2011).

State v Trollip and 3 Others

This case is commonly known as the Mangaung case. The matter relates to a group of domestic terrorists who planned to attack the 2012 ANC elective conference held in Mangaung with mortars (Potgieter, 2012). The intention was to kill party leaders and thereby disrupt government.

The main charge was treason because all accused were South African citizens. Charges were withdrawn against one accused because of lack of evidence pertaining to the final attack. Another accused was found not fit to stand trial and committed to a mental institution. The third accused pleaded guilty to a charge of treason and was sentenced to eight years' imprisonment. The fourth accused pleaded not guilty and the matter went to trial. He was convicted of high treason and sentenced to 12 years' imprisonment.

State v Thulsies

In this case, twin brothers were charged with attempts to further the activities of IS and one count of fraud. They attempted on two occasions to join IS in Syria and/or Libya (Fabricius, 2020). The main offence is contravention of section 2 of POCDATARA related to plans to carry out attacks in SA, which had been incited by external IS operators. In addition, they were charged with solicitation of support for IS using Facebook.

Several charges relate to the acquisition of jihadist material containing information on how to poison people, manufacture explosives and handle firearms. The fraud charge relates to the acquisition of false Lesotho passports after the accused were twice prevented from joining IS using South African passports.

The matter is still in court and thus a ruling is not available.

State v Koekemoer

This matter is also a domestic terrorism case. The accused was arrested for domestic violence and his wife gave information on his involvement in terrorist activities. Subsequent seizure of explosives and documentary and digital evidence indicated planning of acts of terrorism.

The accused was charged under POCDATARA for planning of terrorist acts and possessing material useful for carrying out terrorist attacks.

The matter is still in court and thus a ruling is not available.

State v Del Vecchio and 3 Others

This matter relates to four accused arrested on a series of charges relating to the kidnapping, robbery and murder of an elderly couple. The matter is still in court ("Affidavit reveal chilling details", 2018).

State v Okah

This case relates to an accused who orchestrated bombings in Nigeria while residing in SA. The matter had a number of legal technicalities, thoroughly testing the POCDATARA, including the matter of the extraterritorial jurisdiction of the Act. The matter will be dealt with in detail as a case study in the next chapter.

4.3 Conclusion

In this chapter the data collected were presented in order to answer the research questions. Data presented came from interviews and archival documents related to the research. The data were used to demonstrate how SA brought into effect the counterterrorism laws and the challenges experienced in the implementation process, as well as to see how the legal instrument has fared so far in the overall counterterrorism policy framework

Chapter 5

The Henry Okah Case Study: Testing the POCDATARA

5.1 Introduction

The aim of this chapter is to present a case study of a court case in which the POCDATARA was applied and tested on all levels of the judiciary in SA in terms of its application.

The matter relates to Henry Okah, a Nigerian citizen who obtained permanent residence in SA and masterminded bombings in Nigeria. On one occasion the bombings took place while he was in Nigeria and on another occasion they took place while he was in SA. Table 5.1 below gives a chronological account of his activities from his first recorded movement in SA.

Table 5.1

Chronology of Okah's activities

Date	**Incident**
2001 October 28	First recorded travel to SA
2005	Suspected of gun running
2005	Emigrated to SA
2007 March 13	Granted permanent residence in SA
2007	Arrested, charged for treason and gun running
2009	Granted and accepts amnesty
2009	Returns to SA
2010 February	Travels to Benin and enters Nigeria illegally
2010 March	Plans, funds and executes bombings while in Nigeria
2010 September 30	Arrested in Johannesburg
2010 October 1	Abuja bombings take place
2010	Charged in SA under the POCDATARA
2013 January	Convicted on all charges
2013	Appeals in the SCA and sentence is reduced

2018	State and Okah petition the ConCourt
2019	ConCourt rules and reinstates High Court sentence and rules on the extraterritorial reach of POCDATARA

Source: (Own Construct)

5.2 Background

Mr Henry Emomotimi Okah is a Nigerian citizen and a permanent resident of SA. Okah was historically known to be a gun smuggler and a prominent leader of the Movement for the Emancipation of the Niger Delta (MEND). MEND is an organisation protesting against the Nigerian government in the belief that the government is generating vast sums of money from oil extracted from the Niger Delta, while the local people remain in poverty and the environment they rely upon for subsistence is degraded by the oil operations (Courson, 2011).

In 2007, Okah was arrested, prosecuted, found guilty and sentenced by the federal government of Nigeria on charges of treason and gun running (*S v Okah*, 2018 ZACC 3). In 2009, the Nigerian government implemented an amnesty intended to restore peace in the Niger Delta. Ukiwo (2011) posits that Okah was released due to pressure exerted by oil dependent countries, multinationals and the failure of the military approach against MEND. As a result, Okah accepted the amnesty offer and was released from prison. Subsequent to that, Okah returned to SA, where he had already obtained permanent residence on the basis of being a business owner in the country, and settled in Johannesburg. This is despite the fact that the South African Immigration Act of 2002 states that a person may be declared undesirable and not qualify for a permanent residence permit if they have previous criminal convictions without the option of a fine for conduct which would be an offence in SA (Immigration Act, 2002).

The majority of information used in this case study is extracted from court papers in the case *S v Okah*, 2011, in the South Gauteng High Court.

5.3 The Case

On 15 March 2010 two car bombings detonated successively in Warri, Nigeria. On 1 October 2010, a double car bombing took place in Abuja, Nigeria during the 50th Independence Day celebrations. Okah was suspected of being responsible and was charged in SA by the South African police. He was charged on with 13 counts under the POCDATARA. By virtue of the international instruments that SA is signatory to and the intentions of UNSCR 1373 to deny safe haven to those who plan, finance, facilitate or commit acts of terror, and since Nigeria did not request extradition, SA was obligated to prosecute. The Priority Crimes Litigation Unit (PCLU) of the NPA thus made a prosecutorial decision to prosecute him. As a result of the bombings, several people were killed (Salifu, 2014) in both incidents, a sizeable number of people were injured and damages were significant. Mr Okah pleaded not guilty on all counts with no plea explanation but chose to remain silent.

The State presented evidence of 32 witnesses, some of whom had worked under Okah's command to plan and execute the bombings. The witnesses provided compelling evidence to the court and corroborated each other's versions of events with minor differences (*S v Okah* (SS94/2011) [2013] ZAGPJHC 6).

The State presented evidence that Okah was the mastermind behind the bombings. It further presented evidence proving that Okah was the financier providing funds to purchase equipment for the bombing operations. Equipment bought included vehicles, explosives and timers. Okah further procured the services of an individual to create hidden compartments in vehicles where the explosives would be kept.

The State was also successful in proving to the court that the faceless purported leader of MEND, Jomo Gbomo, was actually Okah himself. A High Court in SA established that Okah was the mastermind and the financier in both bombings. As a result the High Court convicted him on all 13 counts and sentenced him to 24 years' imprisonment.

5.4 The Defence against the Case – Trial Court

The defence centred on denial of involvement by Okah in any terrorist activities. He claimed through his representative that the Nigerian Government was conspiring against him. One of the witnesses called by the state indicated that post amnesty there was a breakaway in MEND. One faction was working with Government to implement the Niger Delta agreement which brought about the amnesty agreement which included the disarmament of the militia. The other faction was known to be armed and linked to Okah.

Okah through his representative claimed that the other faction was working with Government to secure his downfall. However the court was not presented with any evidence supporting the existence of such a conspiracy.

The defence called just two witnesses, namely, the investigating officer Colonel Zeeman and an information technology specialist Mr Majekodumni. The defence strategy was seemingly aiming to discredit the witnesses and evidence led by the state.

Mr Okah invoked section 1(4) of the Act for the first time at the close of his trial to exempt himself from liability for bombings. The trial court held that it was misplaced, in light of the fact that Okah was granted and accepted amnesty therefore no further armed struggle was legitimate.

Section 1(4) of the Act provides:

> Notwithstanding any provision of this Act or any other law, any act committed during a struggle waged by peoples, including any action during an armed struggle, in the exercise or furtherance of their legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces, in accordance with the principles of international law, especially international humanitarian law, including the purposes and principles of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance

with the said Charter, shall not, for any reason, including for purposes of prosecution or extradition, be considered as a terrorist activity, as defined in subsection (1) (POCDATARA, 2004).

At the close of the trial Okah applied to the court to make three special entries on the record regarding alleged irregularities:

- The presence of a Nigerian State Security Services prosecutor, Mr Clifford Osagie, at the trial
- The failure of the State to inform Okah of his right to consular access of his country of citizenship
- The failure of a trial court to issue a letter requesting and securing evidence from witnesses in Nigeria.

The trial court refused the application for special entries and the SCA refused leave to appeal the matter, thus the matter was heard in the South African Constitutional Court (ConCourt).

5.5 In the Supreme Court of Appeal (SCA)

Mr Okah was granted leave to appeal against his conviction on counts 1 to 12 by the High Court on the basis of jurisdiction. Okah appealed his sentence at the (SCA) but the attempt to invoke section 1(4) was abandoned by his counsel.

The SCA ruled that because he was in SA when he planned and executed the Abuja bombings and in Nigeria at the time of the Warri bombings, he would be acquitted on four charges related to the Warri bombings. The SCA overruled the High Court on grounds that the Act (POCDATARA) establishes only limited jurisdiction over acts committed outside SA. The SCA replaced the 24 years' imprisonment the High Court imposed with a 20-year sentence (*Okah v S and Others* (19/2014) [2016] ZASCA 155).

The State appealed against the conclusion of the SCA regarding the narrow jurisdictional reach and sought to reinstate the Warri bombing convictions and reinstate the sentence imposed by the High Court.

Okah also sought leave to appeal four issues, namely:

- The High Court's refusal to exempt him from culpability for the bombings
- Its refusal to make three special entries on the record of the proceedings during trial.

Okah claimed that these omissions on the part of the trial court rendered his trial unfair. As a result of both appeals from the State and Okah, the ConCourt consolidated both applications into one hearing. In summary, the issues before the ConCourt were as follows:

- Whether or not South African courts have jurisdiction under section 15(1) of the Act to try alleged offences beyond the financing of an offence that occurred outside SA.
- Whether Mr Okah qualified for exemption under section 1(4) of the Act
- Whether the High Court wrongly refused to make three special entries on the record.

5.6 Findings of the ConCourt

After interrogating issues before the court, the ConCourt made its decision and made the following order:

- The appeal by the State was upheld, while the order of the SCA upholding Okah's appeals was set aside, effectively dismissing his SCA appeal.

- Okah's application for leave to appeal regarding a section 1(4) exemption was dismissed.
- The application for leave to appeal regarding the special entry on failure to inform Okah of his right to consular access was granted.
- The appeal against his entire conviction on the basis of the special entry was dismissed.
- The remaining portion of the application for leave to appeal regarding the special entries was dismissed.

Effectively, the ConCourt found that the South African courts have the jurisdiction to try extraterritorial terrorism matters. Okah's initial sentence by the trial court was also reinstated.

5.7 Conclusion

The Henry Okah matter proved that POCDATARA as a legal instrument was properly drafted and imbued with extraterritorial reach. It further proved that its standing could prevail even when challenged in the highest court in South Africa. However Okah's prosecution also demonstrated that through the extraterritorial reach of POCDATARA, South Africa can be placed in a difficult position of imported risks; Okah was a security problem of Nigeria prior to immigrating to South Africa. However, Nigeria expressed that they would not be seeking his extradition, as such South Africa was then compelled by the *aut dedere aut judicare* principle, discussed in chapter 4, to prosecute him in South Africa where he was found guilty and sentenced to a prison term.

Though the prosecution was a success the Okah matter left important lessons for South Africa when dealing with matters of such a nature.

On the positive side, the matter demonstrated that success in counter terrorism prosecutions can be achieved through international cooperation given the level and nature of cooperation that existed between the South African and Nigerian Governments.

The victory also demonstrated that South Africa will not tolerate to being used as a launching pad for terror attacks elsewhere in the world.

The Constitutional court ruling on the Okah matter will likely carry significant weight in the position to be taken when reviewing POCDATARA. The matter illustrated that actual policy implementation is important in realising the strengths and weaknesses of a policy position. The Okah matter was the test case in prosecuting an individual for terror related activities which were committed in another country. Had the matter failed in court, South Africa would have had to take a very different look at its counterterrorism legal instruments.

On the negative side, the extraterritorial nature of the laws drew South Africa into dealing with a security problem which was not theirs in the first place and in turn inherited a security risk as MEND threatened South African businesses in Nigeria. Therefore, judicial victories are not always national security victories.

The matter further exposed the lack of proper vetting processes in granting permanent residence in South Africa. Okah was already of security concern in his country of origin yet was granted permanent residence.

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Chapter 6

Analysis of the research

6.1 Introduction

The aim of this chapter is to present the findings and make sense of the information generated from the data collection effort. The analysis will capture participants' answers to questions in the quest to answer the overall research question.

The study sought to investigate how SA domesticated a global counterterrorism framework and explore the challenges experienced in the implementation of the framework, and finally, to examine whether the South African legal instruments are adequate to address the terror problems as experienced in SA.

6.2 Findings

The findings presented in this section are based on the data collected during the research and will be discussed in two forms. Firstly, a general discussion will be ensue and, secondly, analysis through the lens of the 7C protocol of policy implementation will be conducted.

6.2.1. How did South Africa bring the Global Legal Framework relating to Counterterrorism into Effect Locally?

From the data collected from interviews it is apparent that officials hold the unanimous view that the global counterterrorism legal framework was brought into effect by promulgating POCDATARA in 2004. However, there are different views on what necessitated the new terrorism law. The issue of international obligations brought about by the events of 9/11 and the subsequent UNSR 1373 of 2001 are strongly believed to be the driver behind the promulgation of POCDATARA. This exposes the lack of historical knowledge behind the process which brought about terror law; the risk being

that the application of these laws may be seen as advancing an interest of a foreign power rather than having ownership and defending the law as South African, especially by those charged with enforcing the law. The facts behind South African terrorism laws are that the process began in 1995 before the PAGAD urban terror problems and way before the 11 September 2001 incident in the US.

The consultative process of lawmaking in SA and the difficult balance between protecting citizens against terrorism, preserving civil liberties and ensuring the law will pass the constitutionality test, as well as the intensive research that was conducted, is what led to the process taking a decade to conclude. The pressure exerted after the promulgation of UNSCR 1373 of 2001 can be viewed as a catalyst for the process but not the reason behind why the process began.

The data show that Discussion Paper 92 was released for public comment in August 2000 to elicit views from the public. In addition, the data show that SA believed that understanding and eliminating, or minimising, the root causes or drivers of terrorism is the best way of countering terrorism. It was further illustrated through data collected that SA had already signed or ratified 10 conventions or protocols and had expressed a desire to be party to three more which were related to counterterrorism internationally.

6.2.2. What Challenges have been Encountered in the Implementation of this Framework?

From the data the following challenges were identified:

Terrorism Threat Perception

The data obtained from officials strongly suggest that SA does not perceive itself as a primary target of international terror groups. This threat perception is said to be advanced by decision-makers and is contrary to the views of practitioners on the ground. According to literature, this is what might have caused the situation in Mozambique to escalate to the current level.

Agility of the Law

The data suggest that officials perceive the law to be stagnant while the challenges and dynamics in the field of terrorism are ever changing. This places officials in a position where certain acts cannot be easily prevented or prosecuted because the law is silent on them as they have become problematic following the promulgation of the law. The fact that citizens traveling to identified terror theatres are not being prohibited by law presents a challenge to officials.

Disjuncture between Departmental Mandates versus Counterterrorism Aims

Departments that do not generally perceive themselves to have a counterterrorism mandate often pull in different directions from those directly involved in counterterrorism. There seems to be no common position on how SA should deal with terror-related matters across the various departments of the state. In addition, there is seemingly no guiding principle that collectively binds all departmental approaches to terrorism matters.

Capacity Building

According to participants, SA has legal experts who interpret-terrorism related legal issues but they are not sufficient as terrorism is not prioritised at the moment. Given the fact that SA has not had few terror-related cases, very few prosecutors would have had a chance to deal with such cases and those that have are specialists in the field. There are also disagreements between legal practitioners and other law enforcement officials regarding prosecutorial decisions, for example terror suspects arrested with an illegal firearm for terror-related activities would be charged with the possession of an illegal firearm and not necessarily charged with terror-related activities. This according to officials does not deter future potential terror actors.

The capacity to enforce immigration laws and conscientize immigration officials with regard to migration-related terror risks is still lacking. With

immigration structures strengthened the risk of dangerous terrorists on South African soil is significantly reduced.

Control of Money Exchanges

There appears to be insufficient control and capacity dedicated to controlling money exchanges and those operating them, especially those used for remittances. These are seemingly taken advantage of by terrorists for moving money for their nefarious acts.

Human Capacity Development

Practitioners agree that there are some brilliant counterterrorism minds within the legal fraternity, law enforcement and academia but they are few and far between and their efforts are seldom coordinated. A lack of common training was also identified among practitioners. Practitioners strongly believe that foundational training up to intermediary level should be provided locally and only specialised and advanced training should be sourced abroad. However, officials indicated that among their ranks some had received their initial training abroad but this did not provide a proper, uniform understanding and conceptualisation among the ranks. The lack of a local institution geared to proper training also came out strongly.

The view was expressed that varying views on and conceptualisations of terrorism might be a result of a lack of common training and varying personal experiences among individuals.

Lack of deradicalization programmes

Although not strongly advanced, an important view relates to the deradicalization or rehabilitation of terror offenders in correctional facilities. It does not help to prosecute and sentence individuals for terror-related offences only to turn them into heroes after their release while they are still harbouring the same ideologies.

6.2.3. To what Extent have the Policy Intentions been Successfully Accomplished?

When the policy was first conceptualised it was part of a bigger project to review security laws in the country after the new government came into power. Global events such as the 9/11 attacks and the subsequent UN Resolution 1373 also became catalysts for the process. The intention was to have an all-encompassing terrorism law in SA and this was achieved by the eventual promulgation of POCDATARA in 2004. The legal instrument was deemed fit by oversight bodies and there has never been an acquittal on any matter that ran its course in the courts relating to terrorism to date. The instrument was tested in the apex court of the country and was found to be sufficient. Thus we can say that the initial intention of the legal instrument has been successfully accomplished. The challenge has proven to be the implementation lower down in the structures. In addition, one may arguably state that the policy has succeeded because SA has not seen a major terror attack. However, this may also be attributed to the general regional stability which is currently under threat by developments in Mozambique.

6.3 Analysis in Terms of the 7C Protocol

Content

The content of POCDATARA is regulatory in nature. It is meant to criminalize acts of terrorism and prescribes punishment for those in contravention. Molobela (2019) argues that policy content is affected by principles and objectives and, if those are unclear, the implementation process becomes difficult. In terms of POCDATARA the objectives are clear.

Context

The internal context of POCDATARA related to the fact that the country had changed politically and some of the laws needed to change to reflect the new era. In the past, counterterrorism laws were used to suppress political opinions that were against the apartheid government and did not have the

extensive reach required to deal with international terrorism. In terms of the international context, events such as the 9/11 attacks and UN resolutions which were binding to member states prescribed certain requirements to be met by the legal instruments of each member state. Within that context, SA was obliged to be compliant.

Commitment

The South African government was committed to reviewing old laws and came up with a new anti-terrorism law. This is evidenced by the fact that the review process began shortly after the new government came into power and was not prompted by any external events at the time. A team was constituted and resources were committed to getting the lawmaking process underway. However, it can also be argued that the commitment was to complying with international obligations and may not necessarily have been effectively implemented domestically.

Capacity

Molobela (2019) posits that capacity building is a critical element of policy implementation and further states that capacity building comprises tangible elements like human capital, finance, technology and material resources combined with intangible elements like leadership commitment, motivation and endurance. According to Segaria and Ramos (2018, in Molobela, 2019), building institutional capacity should be an initial step in the implementation process. In SA, the lawmaking process had good capacity, but capacity to effectively implement the instrument on the lower levels was inadequate and this problem still persists to date. Collected data reveal that issues like training, counteracting technological advances, converting intelligence into evidence, together with acquiring battleground evidence, remain a challenge. All participants indicated capacity to be a prevailing issue.

Clients and Coalitions

The custodian of terror legislation is the SAPS and everyone living or visiting SA is a client. In this particular instance it can be argued that the client in the lawmaking process was the Minister of Justice who requested a review of all the security laws of the country. This legislation is intended to serve and protect South Africans, visitors and installations both locally and foreign owned and, given that terror is global problem, coalitions have been formed with the UN, AU, regional actors and the general South African population.

As with any other policy that affects the public, the Bill was sent for public comment. Subsequently, public engagement took place and varying views were obtained on the content and whether or not SA needed an exclusive anti-terror law or whether the available instruments were sufficient.

Communication

Communication is an important tool as it provides clarity on the intention of the policy and the application thereof. Effective communication quells anxiety and provides assurance to the community, especially those who are opposed to the policy approach. In the case of POCDATARA there are various examples of speeches by government officials explaining the need for an omnibus piece of legislation to address terrorism, as well as the international obligations that have to be met, including the need for the law to satisfy the constitutional requirements. The communication aspect was demonstrated consistently during the law making process. During the implementation phase, communication has seemingly dwindled to a point where even practitioners are not clear on the policy position in the country when it comes to certain aspects of counterterrorism. There are, however, good communication channels interdepartmentally, although sometimes it is seemingly difficult to reach consensus, as departmental mandates are placed above counterterrorism interests because of the lack of clear policy position being communicated to implementers on the ground.

Coordination

Coordination plays an important role as it has to bring all variables together to perform in concert for a common outcome or objective. According to officials, coordination seems to be a strength in SA when it comes to counterterrorism. While the existing interdepartmental coordinating structures are seemingly effective especially within the security cluster, the challenge has proven to be activating those departments that perceive themselves as not having a counterterrorism responsibility.

6.4 Recommendations

The aim of the study was to investigate how SA brought the global counterterrorism legal framework into effect locally through the eyes of the officials in order to understand whether the framework has worked as intended, and what implementation challenges were experienced along the way from promulgation to the present.

The recommendations made below are made purely on the basis of the data collected during the study and the perceptions of officials who participated. From the data it would appear that the challenges were experienced mainly during the implementation phase and, as such, the following recommendations are made:

Agility of the Law

POCDATARA has been proven to hold its own when tested even in the highest court of the land and was viewed by global oversight bodies as fit to be used as a model for regional partners in crafting their legislation. However, practitioners feel that there is a disparity between the amount of time that elapses between reviews of the law and the general global escalation in the threat level, as well as particular issues related to the prohibition on travel to identified terror theatres which are not provided for in the Act. As such, it is recommended that regular reviews and adjustments are made as the need arises due to changes in the global and local manifestation of terrorism.

Reviewing of public policy is an elaborate process which is time consuming but necessary. The custodian of POCDATARA is the SAPS; as such the review process would need to be initiated by them following comparative studies of legal developments in other countries, operational needs and compliance with global instruments. The following stakeholders would ideally need to be consulted during the review process:

- The Justice, Crime Prevention and Security Cluster for inputs by officials and endorsement by the political principals who will present and collectively defend the Bill in Parliament.
- Academia for inputs through credible research conducted in their sphere
- Civil society who might represent an affected interest group.

Once the bill is drafted it is would need to be sent for public comment, as required by legislation, where all affected parties could air their views for consideration by legislators.

Adoption and Communication of Policy Position

A clear policy position when it comes to counterterrorism needs to be adopted and communicated effectively. This will define roles and responsibilities and all departments will act towards a common objective, avoid mandate creep between departments and clarify counterterrorism responsibility for those departments who are ignorant of such responsibilities. Once that is done there will be a need to build capacity in line with each responsibility given to each department. This includes human capital development in terms of training, development in terms of technology and generally building effective structures to implement the policy intentions adequately.

6.5 Further Study

One may be quick to criticize government on not being clear on counterterrorism policy and not building effective structures; however, it needs to be asked to what extent terrorism is a problem in SA and what measures need to be put in place to mitigate the risk if the risk exists. This

study was limited to the lawmaking process and the implementation of policy in the eyes of officials. Nevertheless, there is room to explore the overall governmental approach to counterterrorism which includes non-state actors.

Secondly, training or foreign foundational training in counterterrorism in solving local problems with investigations or converting intelligence into evidence and with integration within the ranks, is lacking. Another area of study that could be explored is the effectiveness of the policy framework in the eyes of non-state actors like NGOs and academics.

Thirdly, an assessment of the congruence between continental/regional legal instruments and South African legal instruments could add value by exploring the extent of alignment or otherwise.

6.6 Conclusion

The threat of terrorism is real and no country is immune; as such, all countries need to have effective strategies, both defensive and offensive, to quell the risk of terrorism on their shores. It is furthermore an obligation of member states of bodies such as the UN to have a coherent legal framework against terrorism. In this report, an attempt was made to demonstrate how SA brought into effect the global counterterrorism legal instrument locally. However, legal implementation is only the first step in the implementation phase; final implementation occurs when officials on the ground have adopted the framework and brought it to life in their day-to-day functions. The legal implementation of this policy in SA has proven to be a success. However, the road to final implementation would appear to be uphill, as perceived by the officials who participated in this study. All is not gloom and doom, however, since the legal instrument has proven to be effective as no acquittal exists under the instrument to date. There are, however, a few identified areas where adjustments are necessary. There are also lessons learnt during the implementation phase. Although terrorism seems to be lagging behind in the list of challenges facing the country, and as a result counterterrorism initiatives not prioritised, there is seemingly good work being

done behind the scenes and that can give South Africans some confidence and a sense of comfort.

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