



AFRICAN HUMAN RIGHTS POLICY PAPER 6

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*Brenda Mwale*



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## INTRODUCTION

Over the past decade, many States in the Southern African Development Community (SADC) have introduced or amended existing anti-terrorism legislation and policies to prevent, deter, and punish acts of terrorism within their jurisdictions. In many cases, these laws contain broad definitions of 'acts of terrorism' and proscribe different terrorist-related offences, including any form of 'support to' terrorists or terrorist organizations. While there is a legitimate aim in preventing and punishing these acts, humanitarian and human rights actors are concerned that these broad provisions can adversely affect principled humanitarian activities. These concerns are especially pronounced in situations of armed conflict where humanitarian actors work to protect and assist victims of armed violence in areas that terrorist groups may control.

In the absence of explicit international humanitarian law (IHL) savings clauses (provisions that exclude acts that occur in the context of an armed conflict which are in conformity with IHL) or humanitarian exemptions (provisions which exclude the humanitarian activities of impartial humanitarian organizations from the scope of legislation), broad counterterrorism provisions can be interpreted or applied in a way that construes humanitarian activities as unlawful support or assistance to terrorist acts or groups.

Counterterrorism laws and provisions can affect humanitarian action in many ways. In 2021, in its statement to the Sixth Committee during the 76th Session of the United Nations General Assembly, the International Committee of the Red Cross (ICRC) explained that counterterrorism measures

can negatively impact humanitarian action when they prohibit the direct and indirect provision of economic resources to listed

individuals and entities, or include IHL – authorized humanitarian activities as a form of prohibited support. This in turn can have unintended consequences, such as prohibiting impartial humanitarian organizations such as the ICRC from repairing water infrastructure, tending to the wounded, or helping vaccinate populations against COVID-19.<sup>1</sup>

The ICRC further observed that ‘when various forms of contact with listed persons and groups are prohibited outright’, the organization ‘may be prevented from visiting detained persons, facilitating the release of detainees, providing training on IHL, or reuniting missing persons with their families – all humanitarian activities mandated by the Geneva Conventions and IHL.’<sup>2</sup> Moreover, humanitarian organizations could be prosecuted for

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1 ‘ICRC calls on States to ensure counter terrorism measure do not negatively impact humanitarian action’, at: <https://bit.ly/3WkSTDW> (accessed 15 April 2023).

2 Ibid.

providing impartial humanitarian relief to those *hors de combat*, including suspected terrorists.<sup>3</sup> In some instances, humanitarian organizations risk loss of funding when accused of ‘supporting’ groups designated as terrorist organizations. These are some of the unintended adverse consequences that might result from a State’s intention to proscribe support to terrorism.

To mitigate these tensions, explicit IHL savings clauses and humanitarian exemptions are required. In the SADC region, different jurisdictions respond to these tensions in a number of ways. A few States have exempted conduct committed in an armed conflict from their definitions of terrorism, and several others have exempted humanitarian activities from the scope of specific terrorism offences. In most instances, however, States include

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3 This risk is clearly exacerbated by the lack of a single, universally accepted definition of terrorism in the global counterterrorism treaties.

situations of armed conflict in their definitions of terrorism but do not provide for any IHL savings clause or humanitarian exemptions in their counterterrorism laws. That said, in such cases, it is difficult to find cases in open source where humanitarian actors have been arrested, charged, or prosecuted for terrorism or other terrorism-related offences while conducting purely humanitarian activities. But it could certainly occur in the future. Against this background, this research looks at the extent to which IHL saving clauses and humanitarian exemptions are addressed in the anti-terrorism legislation of each of the 16 SADC Member States.



## A REVIEW OF ANTI-TERRORISM LEGISLATION IN SADC MEMBER STATES

Angola has enacted a number of counterterrorism laws that facilitate implementation of the international treaties on terrorism. In 2017, Angola enacted a Law on Prevention and Fight against Terrorism, its main counterterrorism legislation. The law provides that terrorism consists of a series of predicate offences committed with a view to prejudicing the functioning of State institutions, compelling government conduct, provoking a state of terror in the population, or intimidating a section of the population.<sup>4</sup> Law 19/17 specifically exempts participation in peaceful action in the exercise of fundamental human

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4 Art. 23(1), Lei No. 19/17 de 25 de Agosto – Lei Sobre a Prevenção e o Combate ao Terrorismo.

rights from the scope of its application.<sup>5</sup> However, the law does not contain any IHL savings clause or humanitarian exemption and its definition of terrorism does not specifically address situations of armed conflict.

At the end of 2019, the government approved a new law on the Prevention and Combat of Money Laundering, Financing of Terrorism and Proliferation to align the country's prevention and repression policies with international recommendations and best practices. In 2020, Law 38/20 approved a new

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5 Art. 5(1), Lei No. 19/17 de 25 de Agosto: 'O disposto na presente Lei não se aplica à conduta individual ou colectiva de pessoas em manifestações políticas, movimentos sociais, sindicais, religiosos, de classe ou de categoria profissional, direccionados por propósitos sociais ou reivindicatórios, visando, de modo pacífico, contestar, criticar, protestar ou apoiar, com o objectivo de defender direitos, garantias e liberdades fundamentais.'

Penal Code, which criminalizes the international crimes of genocide and crimes against humanity, as well as the crimes of terrorism and international terrorism. It contains a different definition of terrorism, as follows:

**Criminal acts aimed at provoking a state of terror in the general public, in a group of people or individuals ... irrespective of political, philosophical, ideological, racial, ethnic, or religious considerations of or of any other nature that may be invoked.<sup>6</sup>**

Similar to Law 19/17, the above definition does not cover situations of armed conflict nor does it include an exemption for humanitarian activities.

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6 Art. 297(1), 2020 Penal Code of Angola.



Botswana's legal framework on terrorism and counterterrorism is governed by the Counterterrorism Act of 2014. The Act provides for measures to prevent and combat acts of terrorism, including its financing, and establishes the Counterterrorism Analysis and Fusion Agency. It provides a broad definition of what constitutes an 'act of terrorism' as

*any act or omission in or outside Botswana which is intended to advance a political, ideological or religious cause, or by its nature or context, may reasonably be regarded as being intended to intimidate or threaten the public or a section of the public, or compel a government or an international organisation to do or abstain from doing any act, or to adopt or abandon a particular position, and which*

- (a) endangers or is likely to endanger the life, physical integrity or freedom of any person, any number or group of persons;*

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| <p>(b) <i>causes or is likely to cause serious injury or death to any person;</i></p> <p>(c) <i>causes or is likely to cause damage to property, natural resources, environmental or cultural heritage;</i></p> <p>(d) <i>disrupts any public service, the delivery of any essential service to the public or creates a public emergency, including —</i></p> <p style="padding-left: 20px;">(i) <i>disrupting the provision of police services, civil defence and medical services,</i></p> <p style="padding-left: 20px;">(ii) <i>disrupting or causing damage or destroying any computer system or the provision of services directly related to communication infrastructure, banking and financial services, utilities, transportation or key infrastructure;</i></p> <p>(e) <i>creates a general insurrection in</i></p> | <p><i>Botswana;</i></p> <p>(f) <i>involves the use of explosives or other lethal devices;</i></p> <p>(g) <i>involves the use of, or transportation of NBC weapons;</i></p> <p>(h) <i>involves the handling of, or use of radioactive or nuclear material;</i></p> <p>(i) <i>interferes with the operation of, damages a nuclear facility, or does anything directed against the nuclear facility, in a manner which releases or risks to release radioactive material;</i></p> <p>(j) <i>causes damage to a ship or vehicle, or is likely to endanger the safe navigation of a ship on inland or international waters;</i></p> <p>(k) <i>causes damage to a fixed platform or is likely to endanger the safety of the fixed platform;</i></p> | <p>(l) <i>causes damage to any aircraft or aerodrome, or is intended to or is likely to cause damage to any air navigation facility or endanger the safety and lives of persons and property, affect the operations of air services or undermine the confidence of the public in the safety of civil aviation; or</i></p> <p>(m) <i>involves prejudice to public security or national defence; and includes —</i></p> <p style="padding-left: 20px;">(i) <i>seizure of property, natural resources, environmental or cultural heritage,</i></p> <p style="padding-left: 20px;">(ii) <i>hijacking of an aircraft, ship or vehicle,</i></p> <p style="padding-left: 20px;">(iii) <i>taking of hostages,</i></p> <p style="padding-left: 20px;">(iv) <i>the intentional murder or kidnap of an internationally protected person, or the execution of a violent attack upon the official premises,</i></p> |
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*the private accommodation or the means of transport of that person, which attack is likely to endanger his or her person or liberty, or*

- (v) *any promotion, sponsorship, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organising, or procurement of any person, with the intent to commit any act referred to in paragraphs (a) to (m) (iv);*

For the purpose of acts that disrupt public services or delivery of essential services or create public emergencies, the 2014 Act explicitly exempts any advocacy, protest, dissent, demonstration, or industrial action from the definition of terrorism. To fall within this exemption, however, the act in question should not have been intended to damage property, endanger a

person's life, result in any serious bodily harm, or create risk to human health or public safety.<sup>7</sup>

In 2017, the Eastern and Southern Africa Anti-Money-Laundering Group (ESAAMLG)<sup>8</sup> carried out a mutual

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7 S. 2(2), Counter-Terrorism Act, Act No. 24 of 2014: 'Any protest, demonstration or stoppage of work shall not be considered as an act of terrorism if it is not intended to, cause a person's death or endanger a person's life or result in any serious bodily harm, damage to property, natural resources, environmental or cultural heritage; or create a risk to human health, or to public safety.'

8 The ESAAMLG is a Financial Action Task Force (FATF)-style regional body that subscribes to the global standards to combat money laundering and financing of terrorism and proliferation. The FATF develops and promotes policies to protect the global financial system against money-laundering, terrorist financing, and the financing of proliferation of weapons of mass destruction. The members of the ESAAMLG 'have committed themselves to the effective implementation and enforcement of the internationally

evaluation of Botswana to assess its anti-money laundering and counterterrorism financing measures. Its report noted that Botswana had not domesticated some elements of the International Convention for the Suppression of the Financing of Terrorism (1999 Terrorism Financing Convention).<sup>9</sup> In particular, the definition of an 'act of terrorism' under the 2014 Counterterrorism Act did not criminalize the offence of 'carrying out any other act with the intention to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed

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recognized FATF recommendations against money-laundering and the financing of terrorism. See ESAAMLG, 'Anti-money laundering and counter-terrorist financing measures: Botswana Mutual Evaluation Report', May 2017, 1. See also the ESAAMLG website at: (accessed 1 May 2023).

9 ESAAMLG, 'Anti-money laundering and counter-terrorist financing measures: Botswana Mutual Evaluation Report', 123.

conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act' as provided under Article 2(1)(b) of the 1999 Convention).<sup>10</sup>

In 2018, Botswana enacted the Counterterrorism (Amendment) Act<sup>11</sup> to address the deficiencies identified in the Mutual Evaluation Report.<sup>12</sup> The Amendment Act expanded the definition of 'acts of terrorism' to encompass situations of armed conflict. Accordingly, the Amendment Act provides that any act or omission which 'causes or is likely to cause serious bodily injury to a person

not taking an active part in hostilities in a situation of armed conflict' is deemed as an 'act of terrorism'.<sup>13</sup> Nonetheless, despite Botswana's amendment addressing the deficiency, the law does not exempt conduct in the context of an armed conflict that respects international humanitarian law from its counterterrorism measures.

Likewise, counterterrorism provisions in the 2014 Act and 2018 Amendment Act do not include an IHL savings clause or humanitarian exemption and could pose challenges to humanitarian action. Notably, Section 14 of the 2014 Counterterrorism Act prohibits soliciting or inviting support for a terrorist group<sup>14</sup> and arranging a meeting to either support a terrorist group or further its activities or to address the group, which can be problematic for legitimate humanitarian activities. For this offence, there is one

defence: a person has to prove that he/she did not have a 'reasonable cause to believe that the address ... would support a terrorist group or further its activities'.<sup>15</sup> Although not a humanitarian exemption, it can be applied to the humanitarian context, especially in cases where dialogue and negotiations are required between humanitarian actors and terrorist groups to secure access to civilians and discuss how best to protect them. But even in such cases, the burden of proof would still be on a humanitarian actor to provide evidence that it had no grounds to believe that the address would support a terrorist group or further its activities. This means that they would still be subject to arrest, questioning by law enforcement, and potentially even criminal proceedings.

In 2022, Botswana enacted the

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10 Ibid.

11 Counterterrorism (Amendment) Act No. 9 of 2018.

12 See ESAAMGL 'Anti-money laundering and counter-terrorist financing measures: Botswana 1st Enhanced Follow-up Report & Technical Compliance Re-Rating April 2019', April 2019, 9.

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13 Subsection (aa).

14 S. 14, 2014 Counterterrorism Act.

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15 S. 14(4), 2018 Counterterrorism (Amendment) Act.

Counterterrorism (Amendment) Act<sup>16</sup> to continue the establishment of the country's Financial Intelligence Agency to analyse information received from other sources in order to establish suspicious transactions. The Act also does not contain any clauses exempting humanitarian action from the application of its provisions, nor does it make any reference to IHL.

Comoros criminalizes terrorism in its Penal Code. Article 255 of the Code broadly prohibits terrorism and acts of terrorism as follows:

The term 'terrorism' refers to all acts of violence (attacks, hostage-taking, etc.) committed to create a climate of insecurity, to blackmail a government, to satisfy hatred towards a community, a country or a system.

Also an act of terrorism is one that is related to an individual or collective undertaking aimed at seriously disturbing

public order by intimidation or terror, the fact of introducing into the atmosphere on the ground, in subsoil or in waters, including those of the territorial sea, a substance likely to endanger human or animal health or the natural environment.

The Penal Code defines a 'terrorist' as to include any person who commits or attempts to commit a terrorist act by any means, directly or indirectly, illegally and deliberately. The definition also includes those who: (1) participate as an accomplice in terrorist acts; or (2) organize terrorist acts or instruct others to commit them. Where a person participates in or organizes such acts, to violate the law the participation and organization must contribute to the commission of a terrorist act by a group of persons acting for a common purpose and must be either intentional or must occur knowing the group's intention to commit a terrorist act. The above definitions do not exempt humanitarian action from the application of the provisions. In this regard, Comoros'

counterterrorism framework does not include any IHL savings clause or humanitarian exemption. It is also not specified whether the crime of terrorism applies in a situation of armed conflict.

In 2002, the Democratic Republic of Congo (DRC) adopted a Military Criminal Code which contained legal provisions on countering terrorism. The Military Code broadly criminalizes 'terrorism' as follows:

Constitute acts of terrorism, when related with an individual or collective enterprise whose purpose is to seriously disturb public order through intimidation or terror, the following offences:

1. Intentional attacks on the life or physical integrity of the person, kidnapping and sequestration of the person as well as that the hijacking of aircraft, ships or any other means of transport;
2. theft, extortion, destruction, degradation and deterioration;
3. The manufacture, possession, storage,

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16 Act No. 11 of 2022.

acquisition and disposal of machines,  
lethal devices, explosives or other  
biological or toxic weapons or weapons  
of war.

In 2004, DRC adopted Law No. 04/016 of 19 July 2004 to provide a framework to prevent, detect, and suppress money laundering and the financing of terrorism as predicate offences carried out individually or in connection with a group whose aim is to seriously disturb public order through intimidation or terror. In April 2021, the Action Group against Money Laundering in Central Africa<sup>17</sup> published a Mutual Evaluation Report to assess DRC's compliance with the 40 FATF recommendations and the effectiveness of its anti-money laundering/counterterrorism financing system. It

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17 The Action Group against Money Laundering in Central Africa is 'an FATF-Style Regional Body (FSRB) that promotes policies to protect the financial system of member states against money laundering and the financing of terrorism'.

recommended the revision of Law No. 04/016 to remove the requirement that a terrorist act involves action which 'seriously disrupts public order through intimidation or terror'<sup>18</sup> According to the Action Group, the characterisation of a terrorist act as one which should achieve serious disruption was 'not consistent with the purpose of [combating the financing of terrorism]'.<sup>19</sup>

In December 2022, on the instigation of the FATF and GABAC, Law 22/068 of 27 December 2022 on money laundering and weapons of mass destruction was adopted and promulgated. Despite providing for an improved definition of terrorism in the financing law, there are no exceptions for humanitarian organizations or their

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18 Action Group against Money Laundering in Central Africa 'Anti-Money laundering and counter-terrorist financing measures Democratic Republic of Congo (DRC) Mutual Evaluation Report (April 2021), 67.

19 Ibid., 108.

operations. The impact of lack of these exemptions is evident in situations where humanitarian workers in DRC have been both charged and convicted of terrorism-related offences. Thus, in reporting on its 2021 activities, Médecins Sans Frontières stated that its staff in DRC had been convicted of the offence of 'facilitating contacts with groups considered criminal or terrorist'.<sup>20</sup>

In 2008, the Kingdom of Eswatini enacted the Suppression of Terrorism Act to provide for measures to detect, suppress, and deter terrorism, as well as punish all forms of terrorist acts and those perpetrating or assisting them. In 2017, parliament amended the Act to, among other things, replace the definition of 'terrorist act'. It now defines a terrorist act

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20 F. Bouchet-Saulnier, 'International Activity Report 2021. The regrettable new normal: Navigating humanitarian action in counter-terrorism settings', Médecins Sans Frontières, at: (accessed 2 June 2023).

is as follows:

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| <p>(1) <i>an act or omission which constitutes an offence under this Act or within the scope of a counterterrorism Convention; or</i></p> <p>(2) <i>an act, attempted action or threat of action which -</i></p> <p style="margin-left: 20px;"><i>a. causes or is intended to cause death or bodily injury;</i></p> <p style="margin-left: 20px;"><i>b. causes or is intended to cause serious damage to property;</i></p> <p style="margin-left: 20px;"><i>c. endangers the life of any person;</i></p> <p style="margin-left: 40px;"><i>(i) In creates a serious risk to the health of the public or a section of the public;</i></p> <p style="margin-left: 20px;"><i>d. involves the use of firearms or explosives;</i></p> <p style="margin-left: 20px;"><i>e. involves releasing into the environment or distributing</i></p> | <p style="margin-left: 40px;"><i>or exposing the public, or any part of the public, to</i></p> <p style="margin-left: 20px;"><i>(i) any dangerous, hazardous, radioactive or harmful substance;</i></p> <p style="margin-left: 20px;"><i>(ii) any toxic chemical; or</i></p> <p style="margin-left: 20px;"><i>(iii) any harmful microbial or other biological agent or toxin;</i></p> <p style="margin-left: 20px;"><i>f. is designed or intended to disrupt any computer system or the provision of services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;</i></p> <p style="margin-left: 20px;"><i>g. is designed or intended to disrupt the provision of essential emergency services such as police, civil defence or medical services; or</i></p> <p style="margin-left: 20px;"><i>h. constitutes the intentional taking of a</i></p> |
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*hostage.*

The above acts must be committed ‘for a political, religious or ideological purpose’ with an intent to intimidate the public or a section of the public; compel a government or an intergovernmental organisation to do or refrain from doing any act; or bring about the overthrow by force or violence, of a lawful government. Nonetheless, the Act provides that acts which disrupt any services and are committed in pursuance of a protest, demonstration, or stoppage of work do not fall within the meaning of a terrorist act provided they are not intended to result in any of the harms or risks referred to in paragraphs (a), (b), (c), or (d) of subsection (2), namely: physical violence, damage to property, or the causing of a broader risk to health.

When the 2008 Suppression of Terrorism Act was enacted, it had no humanitarian exemptions. But an amendment to the Act in 2017 introduced just such an exemption. This change to the law was

introduced a year after the judgment of the High Court in *Maseko v. The Prime Minister of Swaziland & Ors*<sup>21</sup> in which it held that certain sections of the Act unconstitutional for infringing on certain rights guaranteed in the Bill of Rights. One of the provisions declared unconstitutional was Section 11(1), which prohibits soliciting and giving support to terrorist groups for terrorist acts. The section read as follows:

*A person who knowingly, and in any manner –*

*(a) solicits support for, or gives support to, any terrorist group, or*

*(b) solicits support for, or gives support to, the commission of a terrorist act,*

*commits an offence and shall, on conviction, be liable to imprisonment for a term not*

*exceeding 15 years.*



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<sup>21</sup> *Thulani Maseko v. The Prime Minister of Swaziland & Ors* (2180/2009) [2016] SZHC 180 (16 September 2016).

grounds; no questions of humanitarian exemptions arose before the High Court. Nevertheless, the 2017 Suppression of Terrorism (Amendment) Act included a new clause to the above provision on soliciting and giving support to terrorists. Section 11(3) of the Act provides that ‘registered organizations engaged in essential humanitarian aid projects, are exempted from the provisions of this section.’<sup>22</sup> In this regard, Eswatini’s humanitarian exemption is limited to the offence of soliciting and giving support to terrorist groups; the exemption does not extend to other acts of terrorism. While the humanitarian exemption is clear, the Amendment Act does not include an IHL savings clause.

The Kingdom of Lesotho’s legal regime for countering terrorism consists of

22 S. 11(3), 2017 Suppression of Terrorism (Amendment) Act.

provisions in both the Penal Code<sup>23</sup> and a dedicated Prevention and Suppression of Terrorism Act.<sup>24</sup> As in the case of the Democratic Republic of Congo, Lesotho’s two laws define terrorism differently. On the one hand, the definition of terrorism in the Penal Code reflects almost verbatim the one set forth in Mauritius’ 2002 Prevention of Terrorism Act (described later in this paper). Section 96 of the Penal Code provides that:

*Any person who does or threatens or omits to do anything that is reasonably necessary to prevent an act which -*

*(a) may seriously damage a country or an international organization;*

*(b) is intended or can reasonably be regarded as having been intended to-*

*(i) seriously intimidate a*

23 2010 Penal Code Act.

24 Prevention and Suppression of Terrorism Act, 2018 Act 3 of 2018.

*population;*

*(ii) unduly compel the Government or an international organization to perform or abstain from performing any act;*

*(iii) seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organization; or*

*(iv) otherwise influence the government, or international organisation; and*

*(c) involves or causes -*

*(i) attacks upon a person’s life which may cause death;*

*(ii) attacks upon the physical integrity of a person;*

- (iii) *kidnapping a person;*
- (iv) *extensive destruction to the Government or public facility, a transport system, an infrastructure facility including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;*
- (v) *the seizure of an aircraft, a ship or other means of public or goods transport;*
- (vi) *the manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of biological*

*and chemical weapons;*

- (vii) *the release of dangerous substance, or coming of fires, explosives or floods, the effect of which is to endanger human life;*
- (viii) *interference with or disruption of the supply of water, power or any other fundamental natural resource, the effect of which is to endanger life, commits an offence of terrorism.*

The only difference between Lesotho's Penal Code and the Mauritius Prevention of Terrorism Act is in the description of the nature of the act. Whereas Lesotho's Penal Code criminalizes an act, threat, or omission to do 'anything that is reasonably necessary to prevent an act', the Mauritius Prevention of Terrorism Act only criminalizes an act.

On the other hand, Lesotho's Prevention

and Suppression of Terrorism Act focuses on fewer actions that are considered as terrorist acts. It thus defines a 'terrorist act' as an act or omission which:

- (a) *endangers the life of another person;*
- (b) *involves death or serious bodily injury to a person;*
- (c) *violates physical integrity of freedom of a person;*
- (d) *involves damage to national key points, property, natural resource or the environmental cultural heritage, whether public or private;*
- (e) *creates a serious risk to the health or safety of the public or a section of a public;*
- (f) *involves the use of weapons;*
- (g) *involves introducing into environment, distributing or*

- exposing the public to any—(i) dangerous, hazardous, radioactive or harmful substance; (ii) toxic chemical; (iii) microbial or other biological agent or toxin;*
- (h) *involves serious disruption to any system or the provision of services directly related to essential infrastructure;*
- (i) *involves the manufacture, acquisition, possession, development, transportation, transfer and use of nuclear, chemical or biological weapons and their means of delivery, and is carried out with the aim of, or by its nature and context is reasonably regarded as being aimed at— (i) intimidating or causing fear among members of the public or section of the public; (ii) compelling a government or an international organisation to do, or refrain from doing, any act; (iii) advancing a*

*political, ideological, religious, or other cause.*

There are two exceptions to the above definition. First, an act or omission will not be regarded as terrorist under subsection (aa) of the Act if it is committed as part of an advocacy, protest, demonstration, dissent, or industrial action and is not intended to result in any harm mentioned in paragraphs (b), (c), (e) or (f). Second, any act or omission which ‘occurs in a situation of armed conflict and is, at the time and in the place it occurred, in accordance with rules of international law applicable to the conflict’ is not included in the definition a ‘terrorist act’.<sup>25</sup>

Lesotho’s IHL savings clause is explicit: it exempts from the scope of its definition of terrorism any act or omission committed in the context of an armed conflict and which complies with international humanitarian

law. Unlike a number of the SADC Member States (e.g., Botswana, DRC, Madagascar, Malawi, Mozambique, and the Seychelles) which cover situations of armed conflict in their definition of terrorism but do not include an exemption, Lesotho’s law carves out an explicit humanitarian exemption for armed conflicts. Nonetheless, efforts should be made to reconcile the definitions of terrorism under the Penal Code Act of 2010 (which does not contain any exemption) and the 2018 Act (which contains a clear and specific exemption).

Madagascar enacted Act No. 2014-005 of 17 July 2014 on combating terrorism and transnational organized crime which defines a ‘terrorist act’ as ‘any act that constitutes an offence under the universal conventions and treaties on terrorism.’ The definition also includes ‘any other act intended to cause death or serious bodily harm to a civilian or other a person who does not take a direct part in hostilities in a situation of armed conflict, when, by

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25 S.2, Prevention and Suppression of Terrorism Act, 2018 Act 3 of 2018.

its nature or context, this act is intended to intimidate the population or compel the Government or an international organization to perform or refrain from performing any act.<sup>26</sup>

Although the definition of terrorism refers to situations of armed conflict, it does not specifically exempt lawful acts conducted in such situations from the application of the definition. Moreover, humanitarian action is not exempted from the application of any of the Act's provisions.

Malawi did not have a dedicated legislative framework to counter terrorism until late 2022. It amended the Penal Code Act in December 2022 to include detailed provisions on terrorism. Section 2 of the Penal code (amendment) act defines terrorism as:

*(a) an act or omission whether committed in or outside Malawi,*

*which constitutes an offence within the scope of the United Nations counterterrorism conventions; and*

*(b) an act, or threat of action in or outside Malawi which—*

*(i) involves serious bodily harm to a person;*

*(ii) involves serious damage to property;*

*(iii) endangers the life of a person;*

*(iv) creates a serious risk to the health or safety of the public or a section of the public;*

*(v) involves the use of firearms or explosives;*

*(vi) involves releasing into the environment or any part thereof, or distributing or exposing the public or any part thereof, to any*

*dangerous, hazardous, radioactive or harmful substance; any toxic chemical; or any microbial or other biological agent or toxin;*

*(vii) is designed or intended to disrupt any computer system or the provision of services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;*

*(viii) is designed or intended to disrupt the provision of essential emergency services such as police, civil, defence or medical services;*

*(ix) prejudices national security or public safety; or*

*(x) involves participating in*

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26 Art. 1, 2014 Counterterrorism Act.

*the activities of a terrorist group, including the supplying of information or material resources, or the funding of its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group, and is intended, or by its nature and context, may reasonably be regarded as being intended, to intimidate the public or a section of the public; or compel a government or an international organization to do, or refrain from doing, an act; or seriously destabilize or destroy the fundamental, political, constitutional, economic or social structures of a country or an international organization, and for the purpose of advancing a political, ideological, or religious cause; but does not include an act which disrupts any services,*

*and is committed in pursuance of a protest, demonstration or stoppage of work, as long as, and as long as only, the act is not intended to result in any harm referred to in this paragraph.*

Thus, similar to Botswana, Eswatini, and Lesotho, Malawi exempts acts, which disrupts any services, but are committed as part of a protest, demonstration, or stoppage of work, provided the acts do not result in any harm referred to in the above definition. This is, though, a narrow exemption given the breadth of the provisions in paragraph (b), especially subparagraphs (vii) and (viii).

The definition of terrorism under the Penal Code (Amendment) Act does not cover acts conducted in armed conflict. However, previously, the 2006 Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act covered situations of armed in its definition of ‘terrorist financing’ as

*directly or indirectly providing or accumulating funds or other goods, or attempts to do so, with the intent that the funds be used or knowledge that the funds will be used in whole or in part to commit ...*

*(b) any act intended to cause the death of or serious bodily injury to any civilian or any other person not directly involved in a situation of armed conflict if, by virtue its nature or context, such act is intended to intimidate a population or compel a government or international organization to perform or refrain from performing an act of any kind.<sup>27</sup>*

*Although the Act covers situations of armed conflict in the context of financing of terrorism, there are no humanitarian exemptions under the law.*

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27 S. 2, Money Laundering, Proceeds of Serious Crime Terrorist Financing Act No. 11 of 2006.



Mauritius has passed a number of legislative acts to support its counterterrorism efforts. However, none of these laws contains humanitarian exemptions or an IHL savings clause. In 2002, the parliament enacted the Prevention of Terrorism Act—the primary law on the countering of terrorism—whose definition of terrorism was later repeated almost verbatim in Lesotho's Penal Code (see above). The definition in the 2002 Act reads as follows:

*'act of terrorism' means an act which —*

*(a) may seriously damage a country or an international organisation; and*

*(b) is intended or can reasonably be regarded as having been intended to—*

*(i) seriously intimidate a population;*

*(ii) unduly compel a Government or an international organisation to perform or abstain from*

- performing any act;*
- (iii) *seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation; or*
- (iv) *otherwise influence such Government, or international organisation; and*
- (c) *involves or causes, as the case may be—*
- (i) *attacks on a person's life which may cause death;*
- (ii) *attacks on the physical integrity of a person;*
- (iii) *kidnapping of a person;*
- (iv) *extensive destruction to a Government or public facility, a transport system, an infrastructure facility,*

- including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;*
- (v) *the seizure of an aircraft, a ship or other means of public or goods transport;*
- (vi) *the manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;*
- (vii) *the release of dangerous substance, or causing of fires, explosions or floods, the effect of which is to endanger human life;*

- (viii) *interference with or disruption of the supply of water, power or any other fundamental natural resource, the effect of which is to endanger life.*

According to Section 6 of the Act, any person who 'in any manner or form' supports an act of terrorism or solicits for support to a proscribed organization commits an offence. The term 'support' includes instigating the cause of terrorism, the offering of material or moral assistance, or the provision of financial or other related services. A potential problem is that the broad language of proscribing 'any manner or form' of support carries the risk of humanitarian action itself being interpreted as providing direct or indirect support to terrorist groups. This challenge might present itself, for instance, when a humanitarian actor needs to assist an injured fighter who is *hors de combat*, in accordance with international humanitarian law. Material support in this

situation would mean that a humanitarian actor providing medicine might be indirectly assisting a fighter's subsequent return to hostilities.<sup>28</sup>

That notwithstanding, in 2003, Mauritius enacted the Convention for the Suppression of the Financing of Terrorism Act to give effect to the 1999 Terrorism Financing Convention. While Section 2(1) (b) of the 1999 Convention criminalizes the carrying out of 'any other act with the intention to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict', Mauritius does not include this offence in its law nor does it refer to situations of armed conflict. Similarly, the connection to an armed conflict is not included in the 2016

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<sup>28</sup> See also e.g., Humanitarian Practice Network (HPN) 'Counter-terrorism laws and regulations: What aid agencies need to know' (2014) 8, available at: <https://bit.ly/41ODWLO> (accessed 5 May 2023).

Prevention of Terrorism (Amendment) Act.

In Mozambique, Law 13/2022 establishes the legal framework on the prevention, repression, and combatting of terrorism and proliferation of weapons of mass destruction. Article 12 of Law 13/2022 defines acts of terrorism as

**acts intended to cause death or grievous bodily harm, committed against civilians or anyone who does not take a direct part in hostilities in a situation of armed conflict, with the aim of provoking a state of terror in the general public, or in a group of people or private individuals, to intimidate the population or force a Government or an international organization to act or refrain from engaging in a specific act.**

The specific acts are as follows:

*(a) a crime against the life, physical integrity, or liberty of persons.*

*(b) a crime against the security of transport*

*and public or private communication, including computer, telegraph, telephone, radio, or television.*

*c) a crime of malicious production of common danger, through fire, explosion, release of radioactive substances or toxic or asphyxiating gases, floods or avalanches, building collapse, contamination of medicine, food, and water intended for human consumption, or the spread of disease, plague, harmful plants, or animals.*

*(d) an act that destroys or makes it impossible to operate or diverts from its normal purpose, permanently or temporarily, totally or partially, the means intended for the supply and satisfaction of the population's vital needs.*

*e) research for the purpose of developing nuclear, biological, radiological, or chemical weapons.*

*(f) a crime involving the use of nuclear energy, firearms, biological, radiological, or*

*chemical or explosive devices, incendiary means of any nature, or packages or letters containing particularly dangerous devices or substances, where, by their nature or their context, they are capable of seriously affecting the country or the population they are intended to intimidate.*

*g) sabotaging the operation of, or seizing with violence or serious threat to a person, or using cybernetic mechanisms transport, ports, airports, railway or bus stations, health or highways, health or laboratory establishments, educational establishments, sports facilities, public facilities or places where there are essential public services, installations for the generation or transmission of energy, military and paramilitary installations, oil and gas exploration refineries or processing facilities, installations of credit institutions and their service networks;*

*h) to set fire to, plunder, destroy or detonate means of transportation or any public or private property.*

The definition of terrorism and the specific acts listed above do not cover situations of armed conflict nor do they include an IHL savings clauses or humanitarian exemption.

In addition to the broad definition of terrorism, the law provides for broad provisions that criminalize support to terrorism. Article 25 provides that any person who joins or supports a terrorist group, whether personally or through another person, by providing information or material or financial means shall be liable to a prison sentence of between 16 and 20 years. Given that the provision does not include any exemption, it is broad enough to encompass humanitarian support.

In 2014, Namibia enacted the Prevention and Combating of Terrorist and Proliferation Activities Act to provide for the offence of terrorism, measures to prevent and combat it, and measures to give effect to international conventions to

which Namibia is a party. It also includes measures to prevent and combat the funding of terrorism and other incidental matters. Under the 2014 Act, 'terrorist activity' means

*a) any act committed by a person with the intention of instilling terror and which is a violation of the criminal laws of Namibia and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, or group of persons, or which causes or may cause damage to public or private property, natural resources, the environment or cultural heritage and is calculated or intended to –*

*(i) intimidate, instil 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;*

*(ii) disrupt any public service, the delivery*

*of any essential service to the public or to create a public emergency;*

*(iii) create general insurrection in a State; or*

*b) any act which constitutes an offence within the scope of, and as defined in one of the [global terrorism] treaties*

*(c) 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) or (b);*

*(d) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organisation to do or to abstain from doing any act; or*

*(e) the payment of ransom to designated persons or organisations, except where such payment is approved or authorised by any government to secure the safety of a national of that country.*

Although the definition does not cover the conduct of hostilities or include an IHL savings clause, a number of provisions contain relevant humanitarian exemptions. First, any person who provides ‘humanitarian or civilian assistance aimed at relieving the plight of civilians in an area of armed conflict’ is exempt from the provisions which prohibit the rendering of foreign military assistance to foreign States or organisations. The Act does not consider foreign military assistance as a terrorist act, but provides under section 21 that

*A person within Namibia or elsewhere who offers to render any foreign military assistance, other than humanitarian or civilian assistance aimed at relieving the plight of civilians in an area of armed*

*conflict, or any mercenary activities or related services to a foreign state, organ of a state, group of persons or other organisation or person, unless –*

*(a) in the execution of State powers; or*

*(b) he or she has been granted authorisation to offer such assistance in terms of section 49, commits an offence and is liable to a fine not exceeding N\$100 million or to imprisonment for a period not exceeding 30 years, or to both such fine and such imprisonment.*

Second, upon receipt of a designation or sanctions list, the Minister responsible for foreign affairs can prevent the entry into or transit through Namibia of designated persons with the exception that the entry into or transit through Namibia is for the fulfilment of *inter alia* humanitarian purposes.<sup>29</sup> Third, and relatedly, foreign

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<sup>29</sup> Section 1 of the Prevention and Combating of Terrorist and Proliferation

nationals are exempt from expulsion from Namibia for purposes of repatriation to their countries where their presence in Namibia is required for 'fulfilment of ... medical, safety or other humanitarian purposes'.<sup>30</sup> This exemption relates to the deportation of persons working on behalf or at the direction of a designated person or organization for terrorist purposes. Fourth, bunkering services for a vessel or aircraft (where refuelling is done during passage or flight) may not be denied where such services are necessary for humanitarian purposes.<sup>31</sup> This

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Activities Act, 2014 provides that a sanction list 'means a list established and maintained by or under the authority of the Security Council comprising persons, groups, undertakings, entities, or countries subject to United Nations sanctions which are enforcement measures, not involving the use of arms'.

30 S. 26(b)(ii), 2014 Prevention and Combating of Terrorist and Proliferation Activities Act.

31 S. 34(6), 2014 Prevention and Combating of Terrorist and Proliferation Activities

exemption is beneficial for humanitarian organizations as such services, where necessary, can facilitate access to those who need humanitarian assistance and provide the means to deliver aid.

Counterterrorism measures in the Seychelles are governed by the 2004 Prevention of Terrorism Act,<sup>32</sup> which criminalizes terrorism and other related offences. The Act has not applied any exemption from its counterterrorism provisions with respect to humanitarian activities. In terms of Section 2 of the Act, a terrorist act is defined as an act which:

- (a) involves the death of, or serious bodily harm to, a person;
- (b) involves serious damage to property;

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Act.

32 Prevention of Terrorism Act, 2004 (Act 7 of 2004).

- (c) endangers a person's life;
- (d) creates a serious risk to the health or safety of the public or a section of the public;
- (e) involves the use of firearms or explosives;
- (f) involves releasing into the environment or any part thereof or distributing or exposing the public or any section thereof to— (i) any dangerous, hazardous, radioactive or harmful substance; (ii) any toxic chemical; (iii) any microbial or other biological agent or toxin;
- (g) is designed or intended to disrupt any computer system or the provision of services directly related to communications

- infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;
- (h) is designed or intended to disrupt the provision of essential emergency services such as police, civil defence or medical services;
- (i) involves prejudice to national security or public safety;

and is intended, or by its nature and context may reasonably be regarded as being intended, to—

- (i) intimidate the public or a section of the public; or

- (ii) seriously destabilise or destroy the religious, political, constitutional, economic or social institutions of a country, or an international organisation; or
- (iii) compel a government or an international organisation to do, or refrain from doing, any act

The Act further provides that acts which ‘disrupt any service’ and which are ‘committed in pursuance of a protest, demonstration or stoppage of work’ are not deemed as terrorist acts as long as they do not intend to result in harm referred to in paragraphs (a), (b), (c), or (d).

In 2021, parliament enacted the Prevention of Terrorism (Amendment)

Act<sup>33</sup> to amend various sections of the 2004 Act. Notably, the 2021 Amendment Act listed terrorist activities which fall under the global terrorist conventions into the definition of ‘terrorist acts’ under the 2004 Act. In the same year, parliament enacted the Prevention of Terrorism (Second Amendment) Act, 2021, pursuant to the Financial Action Task Force (FATF) recommendations on financing of terrorism.<sup>34</sup> In terms of the definition,

33 Prevention of Terrorism (Amendment) Act, 2021 (Act 8 of 2021).

34 In its 2018 Mutual Evaluation Report (MER), the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) observed that Seychelles had either only partially met or not met at all certain technical criteria for the FATF Recommendations on the financing of terrorism. See ESAAMLG, ‘Anti-money laundering and counter-terrorist financing measures: Seychelles Mutual Evaluation Report’, September 2018. See also Seychelles, Prevention of Terrorism (Second Amendment) Bill, 2021 (Bill No. 66 of 2021) and Prevention of Terrorism (Second Amendment) Act, Act 64 of 2021.

Section 2 of the 2004 Act was amended to include situations of armed conflict. Thus, 'terrorist act' covers

any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organisation to do or to abstain from doing any act.

The Prevention of Terrorism Act criminalizes not only terrorist acts but also the provision of support to terrorism. It is also an offence for any person to 'knowingly and in any manner' solicit support for a terrorist group or to the commission of a terrorist act.<sup>35</sup> Unlike Eswatini, which amended its law to exempt registered organizations engaged in essential humanitarian aid projects from the provisions of this offence, the

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35 S. 10 (1).



Seychelles does not include such an exemption.

In 2022, South Africa enacted the Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Act, which amended its primary counterterrorism law: the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004. The 2022 Amendment was enacted with the stated purpose of, among other things, deleting, amending, and inserting specific definitions to align the 2004 Act with international legal instruments.<sup>36</sup>

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36 A 'terrorist activity' is defined therein as: [any act] committed in or outside the Republic, which— (i) involves the systematic, repeated or arbitrary use of violence by any means or method; (ii) involves the systematic, repeated or arbitrary release into the environment or any part of it or distributing or exposing the public or any part of it to— (aa) any dangerous, hazardous, radioactive or harmful substance or organism; (bb) any toxic chemical; [or] (cc) any microbial or other biological agent or toxin; or

One of the deleted sections was an IHL

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(dd) any weapon of mass destruction in terms section 1 of the Non-Proliferation of Weapons of Mass Destruction Act, including those with dual-purpose capabilities as defined in section 1 of the Non-Proliferation of Weapons of Mass Destruction Act, or any substance, mixture of substances, product or material contemplated in section 2(1) of the Hazardous Substances Act; (iii) endangers the life of, or violates the physical integrity or physical freedom of, or causes serious bodily injury to or the death of, any person, or any number of persons; (iiiA) is calculated to overthrow the government of the Republic or any other government; (iv) causes serious risk to the health or safety of the public or any segment of the public; (v) causes the destruction of or substantial damage to any property, natural resource, or the environmental or cultural heritage, whether public or private; (vA) causes the destruction of or substantial damage or interference to an information infrastructure or any part thereof; (vi) is designed or calculated to cause serious interference with or serious disruption of an essential service, facility or system, or the delivery of any such service, facility or system, whether public or private, including, but not limited to— (aa) a system used for, or by, an electronic system, including an information system;

savings clause. According to Section 1(4) of

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(bb) a telecommunication service or system; (cc) a banking or financial service or financial system; (dd) a system used for the delivery of essential government services; (ee) a system used for, or by, an essential public utility or transport provider; (ff) an essential or critical infrastructure [facility], information infrastructure, or a critical infrastructure complex; or (gg) any essential service designated as such in terms of the Labour Relations Act, 1995 (Act No. 66 of 1995), or essential emergency services, such as police, medical or civil defence services; (vii) causes any major economic loss or extensive destabilisation of an economic system or substantial devastation of the national economy of a country; [or] (viii) creates a serious public emergency situation or a general insurrection in the Republic[,]; or (ix) is the offence of— (aa) unlawful access in terms of section 2 of the Cybercrimes Act; (bb) unlawful interception of data in terms of section 3 of the Cybercrimes Act; (cc) unlawful interference with data or a computer program in terms of section 5 of the Cybercrimes Act; (dd) unlawful interference with a computer data storage medium or a computer system in terms of section 6 of the Cybercrimes Act; (ee) unlawful acquisition, possession, provision, receipt or use of a password,

the 2004 Act [with emphasis added]:

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access code or similar data or device in terms of section 7 of the Cybercrimes Act; (ff) unlawful use or possession of a software or hardware tool for purposes of committing the offences listed in items (aa) to (ee); or (gg) cyber extortion in terms of section 10 of the Cybercrimes Act, which is committed with the intention to facilitate or to commit an act referred to in subparagraphs (i) to (viii) of this paragraph, whether the harm contemplated in subparagraphs [(a)](i) to (vii) is or may be suffered in or outside the Republic, and whether the activity referred to in subparagraphs (ii) to [(viii)] (ix) was committed by way of any means or method; and (b) which is intended, or by its nature and context, can reasonably be regarded as being intended, in whole or in part, directly or indirectly, to— (i) threaten the unity and territorial integrity of the Republic; (ii) intimidate, or to induce or cause feelings of insecurity within the public, or a segment of the public, with regard to its security, including its economic security, or to induce, cause or spread feelings of terror, fear or panic in a civilian population; [or] (iii) unduly compel, intimidate, force, coerce, induce or cause a person, a government, the general public or a segment of the public, or a domestic or an international organisation or body

**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**

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or intergovernmental organisation or body, to do or to abstain or refrain from doing any act, or to adopt or abandon a particular standpoint, or to act in accordance with certain principles[.]; or (iv) further the objectives of an entity engaged in terrorist activity, whether the public or the person, government, body, or organisation or institution referred to in subparagraphs (ii) or (iii), as the case may be, is inside or outside the Republic; [and (c) which is committed, directly or indirectly, in whole or in part, for the purpose of the advancement of an individual or collective political, religious, ideological or philosophical motive, objective, cause or undertaking;] Notwithstanding any provision in any other law, [and subject to subsection (4),] a political, philosophical, ideological, racial, ethnic, religious or any similar motive, shall not be considered for any reason, including for purposes of prosecution or extradition, to be a justifiable defence in respect of an offence of which the definition of ‘terrorist activity’ forms an integral part.’

**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, ... shall not, for any reason, including for purposes of prosecution or extradition, be considered as a terrorist activity.**

To fall under the exemption in section 1(4), three conditions had to be met. First, the act must have been committed during a ‘struggle waged by peoples’. Second, the struggle must be ‘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’. Third, the act must have been ‘in accordance with the principles of international law, especially international humanitarian law’.<sup>37</sup> In this respect, acts that violate international humanitarian law were not exempt from

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37 See *S v. Okah* [2018] ZACC 3, para. 44.

prosecution. In *S v. Okah* [2018] ZACC 3, the Constitutional Court of South Africa thus held that indiscriminate bombings carried out by the accused violated IHL and hence did not qualify for exemption under Section 1(4). The court noted that:

One of the cornerstones of international humanitarian law is the obligation to distinguish between combatants and civilians and between military objectives and civilian objects. Military action may not directly target civilians, nor may it be taken with indifference to the effects on the civilian population. Furthermore, particular means and methods of warfare may be unlawful because they are, either by their nature or use, indiscriminate.<sup>38</sup>

In its submission to the Portfolio Committee on Police on the Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Bill (prior to its enactment as law), the ICRC called for the retention

<sup>38</sup> Ibid., para 49.

of section 1(4) in the 2004 Act and the inclusion of a humanitarian exemption clause. However, the humanitarian exemption argument was not accepted, and the Select Committee on Security and Justice on Public Participation explained that the deletion was a recommendation in the FATF Mutual Evaluation Report.<sup>39</sup> Despite these arguments, deleting Section 1(4) means that South Africa no longer mitigates the tensions between IHL and the law's counterterrorism provisions, which could negatively affect humanitarian

<sup>39</sup> According to the FATF report, a minor deficiency existed in South Africa's definition of 'terrorist and related activities' which excluded acts committed in an armed struggle. See Report of the Select Committee on Security and Justice on Public Participation: Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Bill [B15B – 2022] (National Assembly – sec. 75), dated 12 December 2022, 37. See also Financial Action Task Force 'Anti-money laundering and counter-terrorist financing measures in South Africa' (2021), 224.

action.

In 2002, Tanzania enacted the Prevention of Terrorism Act<sup>40</sup> to provide for comprehensive counterterrorism measures, to prevent and cooperate with other States in the suppression of terrorism, and to address related matters.<sup>41</sup> Section 4(2) has a broad definition of terrorism:

*A person commits terrorist act if, with terrorist intention, does an act or omission which–*

- (a) may seriously damage a country or an international organization; or*
- (b) is intended or can reasonably be regarded as having been intended to– (i) seriously intimidate a population; (ii) unduly compel*

<sup>40</sup> Prevention of Terrorism Act (POTA) No. 21 of 2002.

<sup>41</sup> As set out in the Preamble to the 2002 Act.

a Government or perform or abstain from performing any act; (iii) seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of country or an international organization; or (iv) otherwise influence such Government, or international organization; or

- (c) involves or causes, as the case may be– (i) attacks upon a person's life which may cause death; (ii) attacks upon the physical integrity of a person; (iii) kidnapping of a person.

An act is also considered as terrorist under Section 4(2) if it –

- (a) involves serious bodily harm to a person;  
(b) involves serious damage to property;  
(c) endangers a person's life;

- (d) creates a serious risk to the health or safety of the public or a section of the public;  
(e) involves the use of firearms or explosives;  
(f) involves releasing into the environment or any part of it or distributing or exposing the public or any part of it to– (i) any dangerous, hazardous, radioactive or harmful substance; (ii) any toxic chemical; (iii) any microbial or other biological agent or toxin;  
(g) is designed or intended to disrupt any computer system or the provision of services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;  
(h) is designed or intended to disrupt the provision of essential emergency

services such as police, civil defence or medical services;

- (i) involves prejudice to national security or public safety, and is intended, or by its nature and context, may reasonably be regarded as being intended to– (i) intimidate the public or a section of the public; (ii) compel the Government or an international organization to do, or refrain from doing, any act, and is made for the purpose of advancing or supporting act which constitutes terrorism within the meaning of this Act.

There is no IHL savings clause or humanitarian exemption in the above definition. Moreover, some of the counterterrorism provisions in the Act are crafted in a way that could impede humanitarian action. For instance, the Act broadly prohibits soliciting and giving support to terrorist groups to commit

a terrorist act<sup>42</sup> and rendering support to terrorism.<sup>43</sup> Under the Act, ‘support’ means and includes the following:

- (a) *instigation to the cause of terrorism;*
- (b) *offering of material assistance, weapons including biological, chemical or nuclear weapons, explosives, training, transportation, false documentation or identification;*
- (c) *offering of or provisions of moral assistance, including invitation to adhere to a proscribed organization*
- (d) *the provision of, or making available such financial or other related services to a terrorist, group or entity which is concerned with terrorist act;*

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42 S. 18, 2002 Prevention of Terrorism Act.

43 S. 7, 2002 Prevention of Terrorism Act.

- (e) *dealing directly or indirectly, in any property that is owned or controlled by or on behalf of any terrorist or any entity owned or controlled by any terrorist, including funds derived or generated from property owned or controlled, directly or indirectly, by any terrorist or entity owned or controlled by any terrorist; or*
- (f) *entering into or facilitating, directly or indirectly, any financial transaction related to a dealing in property referred to in paragraph (e).*

In addition to criminalizing support to terrorism, the Act prohibits the arranging of meetings in support of terrorist groups. It is thus an offence to arrange, manage or assist in arranging or managing a meeting to support a terrorist group, further its activities or to be addressed by a person

belonging to a terrorist group.<sup>44</sup> These provisions apply without exception.

Zambia enacted its Anti-Terrorism Act in 2007<sup>45</sup> to prohibit terrorism and provide measures to detect and prevent terrorist activities and related matters. In 2018, the National Assembly repealed the 2007

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44 S. 26(1), 2002 Prevention of Terrorism Act: ‘Every person who arranges, manages or assists in arranging meetings or managing a meeting which he knows is (a) to support a terrorist group; (b) to further the activities of a terrorist group; (c) to be addressed by a person who belongs or professes to belong to a terrorist group, ... is guilty of an offence and shall on conviction be liable to imprisonment for a term not less than ten years and not more than fifteen years.’ While a terrorist group is not defined in the Act, an ‘international terrorist group’ means ‘a person or group of persons or an organization not being a citizen of Tanzania or whose origin is outside Tanzania and who or which is suspected to have committed any of the offences referred to under subsection (1) [of Section 12].’

45 2007 Anti-Terrorism Act (Act No. 21 of 2007).

Act and enacted the Anti-Terrorism and Non-Proliferation Act — the primary law governing terrorism in Zambia. Section 2(1) of the 2018 Anti-Terrorism Act defines ‘terrorism’ as follows:

*an act or omission in or outside Zambia that is intended, or by its nature and context, may reasonably be regarded as being intended to intimidate or threaten the public or a section of the public or compel a government or an international organisation to do, or refrain from doing, any act, and is made for the purpose of advancing a political, ideological or religious cause and which—*

- (a) constitutes an offence within the scope of a counterterrorism convention listed in the Second Schedule;*
- (b) causes or is intended to cause death or serious bodily harm to a person;*
- (c) causes or is intended to cause serious damage to private or public*

*property;*

- (d) endangers a person’s life;*
- (e) creates a serious risk to the health or safety of the public or a section of the public;*
- (f) involves the use of firearms or explosives;*
- (g) involves the release into the environment or any part thereof or distributing or exposing the public or any part thereof to any dangerous, hazardous, radioactive, harmful substance, toxic chemical, microbial or other biological agent or toxin;*
- (h) is designed or intended to disrupt any computer system or the provision of services directly related to communications, infrastructure, banking or financial services, utilities, transportation or other essential infrastructure or services;*

- (i) is designed or intended to disrupt the provision of essential emergency services such as police, civil defence or medical services;*
- (j) causes serious risk to national security;*
- (k) causes damage to a vessel or is likely to endanger the safe navigation of any vessel on inland or international waters; and*
- (l) causes damage to any aircraft or airport, is intended or likely to cause damage to any air navigation facilities or endanger the safety and lives of persons and property, affect the operations of air services or undermine the confidence of the public in the safety of civil aviation and “terrorist act” shall be construed accordingly.*

The definition does not contain an IHL savings clause. But the 2018 Act provides

for a humanitarian exemption limited to bunkering services. Section 48 (10) of the Act exempts any officer of customs from refusing any bunkering services to be provided where it is necessary for humanitarian purposes. According to the Act, refusal of bunkering services can occur where there are reasonable grounds to suspect a UN Security Council resolution or sanctions violation, or where a search or inspection is refused.

Zimbabwe has enacted specific laws to combat terrorism. The definition of terrorism is found under the Criminal Law (Codification & Reform) Act of 2005 which defines terrorism alongside insurgency, banditry, sabotage (and without disaggregating the different concepts). Section 23(1) of the Act provides that:

*Any person who, for the purpose of*

*(a) causing or furthering an insurrection in Zimbabwe; or*

*(b) causing forcible resistance to the Government or the Defence Forces or any law enforcement agency; or*

*(c) procuring by force the alteration of any law or policy of the Government; commits any act accompanied by the use or threatened use of weaponry with the intention or realising that there is a real risk or possibility of*

*(i) killing or injuring any other person; or*

*(ii) damaging or destroying any property; or*

*(iii) inflicting substantial financial loss upon any other person; or*

*(iv) obstructing or endangering the free movement in Zimbabwe of any traffic on land or water or in the air; or*

*(v) disrupting or interfering with an essential service;*

*shall be guilty of insurgency, banditry, sabotage or terrorism, whether or not any purpose referred to in paragraph (a), (b) or (c) is accomplished.*<sup>46</sup>

In 2007, the Suppression of Foreign and International Terrorism Act (Chapter 11:21) was enacted to provide for 'the suppression of foreign and international terrorism, including mercenary activities'.<sup>47</sup> The 2007 Act does not define the term 'terrorism' but notes that any word not defined in the Act and to which meaning has been provided in the Criminal Law Code shall have the same meaning as when used in the Terrorism Act.<sup>48</sup> In this regard, the definition of terrorism can be derived from Section 23(1) of the Criminal Code above.

Nonetheless, the Preamble to the 2007

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46 S. 23(1), Criminal Code of Zimbabwe.

47 Preamble, 2007 Suppression of Foreign and International Terrorism Act.

48 S. 2(2), Criminal Code of Zimbabwe.

Terrorism Act includes an exemption on acts committed during an armed struggle that are carried out in accordance with IHL principles. It stipulates that

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 Co-operation among States in accordance with the said Charter, shall not, for any reason, including for the purposes of extradition or prosecution, be considered a terrorist activity;

The Preamble mirrors the now deleted Section 1(4) of the 2004 South African Protection of Constitutional Democracy

Against Terrorist and Related Activities Act. However, it is important to note that, for Zimbabwe, the IHL savings clause is contained in the Preamble, not in an operative section of the Act. Nonetheless, Zimbabwe's Interpretation Act stipulates that preambles to legislation form part of an enactment and 'may be used as aids to the construction of the enactment'.<sup>49</sup> This indicates that the above IHL saving clause may be used to interpret the meaning of terrorism in Zimbabwe.

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<sup>49</sup> S. 6, Interpretation Act (Chapter 1:01).

## TRENDS, GAPS AND CHALLENGES IN THE SADC REGION

Overall, SADC member states have made significant efforts to amend or revise their legal anti-terrorism frameworks by adopting comprehensive counterterrorism laws or including detailed counterterrorism provisions in their penal codes. Most of the amendments or revisions have been adopted recently for different ends. First, in the case of Eswatini, an amendment to the Suppression of Terrorism Act was made pursuant to a declaration by the High Court in *Maseko v. The Prime Minister of Swaziland and ors*<sup>50</sup> that certain sections of the Act were unconstitutional because they infringed on certain rights guaranteed in the Bill of Rights. Second, for South Africa, the Protection

of Constitutional Democracy against Terrorist and Related Activities Act 2004 was amended to align it with international instruments adopted at the time of the implementation of the Act. Third, and of particular note, Botswana, the Democratic Republic of Congo, Seychelles, and South Africa amended some of their respective counterterrorism provisions pursuant to recommendations of the FATF and other FATF-styled regional bodies to ensure that their definitions of terrorism comply with the UN Terrorist Financing Convention.

Despite the amendments, it is generally the case that the majority of the 16 SADC Member States have broad definitions of terrorism which, in most cases, refer to extensive lists of offences which are vague and ill-defined. For instance, Mozambique criminalizes ‘a crime of malicious production of common danger’, and an ‘act that destroys or makes it impossible to operate or diverts from its normal purpose, permanently or temporarily, totally or

partially, the means intended for the supply and satisfaction of the population’s vital needs’. The DRC criminalizes ‘theft, extortion, destruction, degradation and deterioration’ when committed to seriously disturb public order through intimidation or terror. Further troubling is the cases where terrorism is defined differently in two pieces of legislation (e.g., Lesotho and the DRC), posing significant challenges to the just application of the laws. Of the 16 Member States, only Angola and Comoros have suitably narrow definitions of terrorism.

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50 *Thulani Maseko v The Prime Minister of Swaziland & Others* (2180/2009) [2016] SZHC 180 (16 September 2016)



of ‘terrorism’ and ‘support’ of terrorist acts varies across these jurisdictions.

Where states have included IHL savings clauses, humanitarian activities are explicitly exempted from the scope of their definition of ‘terrorism’ (as in the case of Lesotho and Zimbabwe). In instances where States have humanitarian exemptions, two approaches exist. First, exemptions have been made with regard to certain offences, such as soliciting and giving support to terrorist groups for terrorist acts (e.g., Eswatini) or rendering foreign military assistance to foreign States or organisations (e.g., Namibia). Second, humanitarian activities have been exempted from certain restrictive counterterrorism measures. For instance, Namibian law permits the entry into or transit through Namibia of a designated person for humanitarian reasons. To take

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recommendations of the FATF and other FATF-styled regional bodies.

another example, bunkering services may be permitted for humanitarian purposes (although such services can be denied if reasonable grounds exist to suspect a violation of a Security Council resolution or sanctions is occurring). Nonetheless, while the potential impact of the lack of exemptions is clear, it is difficult to find cases in open source across the SADC region where courts have considered the scope of humanitarian exemptions.

Meanwhile, some governments are moving to tighten their counterterrorism provisions, to the exclusion of humanitarian exemptions. The example of South Africa’s 2022 Amendment Act is illustrative of the debates on exemptions for humanitarian organizations. In this case, efforts to include humanitarian exemptions were perceived to conflict with counterterrorism financing laws. The Department of Police responded to the concerns of the public on the Protection of Constitutional Democracy

Against Terrorist and Related Activities (POCDATARA) Amendment Bill by noting that the FATF:

*wants South Africa to narrow down the scope of the terrorist financing offence in Section 4 in its comparison to the requirement of Article 2 of the Terrorism Financing Convention. Open-ended reference to humanitarian organisations would open the door to terrorist entities impersonating such organisations.*<sup>52</sup>

Thus, while humanitarian organizations describe the challenges faced by the lack of exemptions for their work, governments not only amend their laws to comply with FATF requirements for fears of greylisting but also cite the risks of humanitarian organizations being used for terrorism. The effect of this is that principled humanitarian action continues to be threatened with criminal sanction and access to humanitarian aid

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52 See: <https://bit.ly/3lrG1GC> (accessed 1 May 2023) [added emphasis].

potentially restricted, with the obvious negative impacts upon those who are at greatest need of it. Given that most of the counterterrorism laws in the SADC region do not include an IHL savings clause or humanitarian exemption, amendments to those laws are urgently needed to ensure that impartial humanitarian assistance is protected in situations where IHL applies.

At the international level, most of the SADC Member States have ratified one or more of the international conventions relating to terrorism. Significantly, 14 of the 16 States have ratified the International Convention for the Suppression of Terrorist Bombings and 13 have ratified the International Convention for the Suppression of Acts of Nuclear Terrorism, both of which exempt the acts of armed forces during an armed conflict where that

conduct is governed by IHL.<sup>53</sup> None of the 16 SADC Member States has entered a declaration on humanitarian exemption clauses.<sup>54</sup>

Regionally, although SADC developed a Regional Counter Terrorist strategy and Action Plan, it is difficult to find

information on IHL saving clauses or humanitarian exemptions. Nonetheless, SADC Member States, being also Member States of the African Union, supported the African Model Law on Counter Terrorism, which reaffirms the need to combat terrorism in accordance with international law, including international humanitarian law, and includes provisions protecting humanitarian work. It does so in two ways. First, it excludes ‘acts covered by international humanitarian law, committed in the course of an international or non-international conflict by government forces or members of organized armed groups’ from the definition of ‘terrorist acts.’<sup>55</sup> Second, it protects the provision of humanitarian assistance in the context of engaging or associating with terrorist groups, when

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53 As of mid-August 2023, Angola and Zimbabwe had not ratified the International Convention for the Suppression of Terrorist Bombings. In addition, as of 11/08/2023, Angola, Tanzania and Zimbabwe had not ratified the International Convention for the Suppression of Acts of Nuclear Terrorism. See, Article 19(2) of the International Convention for the Suppression of Terrorist Bombings; adopted on 15 December 1997; entered into force, 23 May 2001; Article 4(2) of the International Convention for the Suppression of Acts of Nuclear Terrorism; adopted on 13 April 2005; entered into force, 7 July 2007. See treaty status at: <https://bit.ly/3qqwHNT>; and <https://bit.ly/47GdXua>.

54 For details of all the declarations and reservations, see the UN Treaty Section entry at: <https://bit.ly/3qqwHNT>.

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55 S. 4(xi)(c), The Model Anti-Terrorism Law, endorsed by the 17<sup>th</sup> Ordinary Session of the Assembly of the African Union, Malabo, 30 June–1 July 2011.

this is done in an impartial manner.<sup>56</sup> This is consistent with the approach in recent international counterterrorism treaties, such as the Terrorist Bombings Convention and the Nuclear Terrorism Convention to which a large majority of the 16 SADC Member states are party.

It is worrying that little attention has been given to this topic at the SADC regional level. While States generally condemn terrorism in their international statements, they hardly mention the impact of counterterrorism measures on humanitarian action. Nonetheless, some stakeholders have emphasized the need for SADC states to adhere to IHL in countering terrorism. For instance, in 2021, a regional webinar for SADC Member States on human rights and the rule of law in preventing and countering terrorism, violent extremism, and transnational organized crime highlighted the need

for Member States to ensure respect for IHL.<sup>57</sup> Similarly, a decade earlier in 2011, participants in a workshop on the regional implementation of the United Nations Global Counter-Terrorism Strategy in Southern Africa, organized by the Counter-Terrorism Implementation Task Force Office, had welcomed the General Assembly and the Security Council's emphasis on the need for States to adhere to international law in general and IHL in particular in their counterterrorism laws and measures.<sup>58</sup> Given these calls, there is a clear need for open dialogue, cooperation, and information sharing between governments, humanitarian organizations, and other stakeholders such as the FATF on the risks and challenges

humanitarian organisations face.

## CONCLUSIONS AND RECOMMENDATIONS

It is clear that tensions that arise between counterterrorism legislation and measures and humanitarian action can negatively impact humanitarian operations in several ways. In fact, very few States in the SADC region have adopted exemptions in their counterterrorism laws and criminal codes. (These are summarized in Section 6 of this report.) Where States have included exemption clauses provisions, they are limited to certain offences or measures.

It is, however, important to note that SADC Member States, being also Member States of the African Union, supported the African Model Law on Counter Terrorism, which reaffirms the need to combat terrorism in accordance with international law, including international humanitarian law, and includes provisions

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<sup>56</sup> S. 9(5).

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<sup>57</sup> See: <https://bit.ly/3YzuNGS>.

<sup>58</sup> Summary and Conclusions Workshop on the Regional Implementation of the United Nations Global Counter-Terrorism Strategy in Southern Africa, Windhoek, 5–6 October 2011, at: <https://bit.ly/3YuEfeB>, 10.

protecting humanitarian work when engaging or associating with terrorist groups in an impartial manner.<sup>59</sup> Thus, the range of criminal laws without an exemption reviewed in this study do not conform to the model provisions. In this regard, the lack of clear humanitarian exemptions in most SADC Member States demonstrates the importance of pursuing the incorporation of legislative carve-outs in the anti-terrorism laws of these States. This research, therefore, provides an opportunity to propose a number of measures which can be taken by States and humanitarian organizations, and other stakeholders (notably the FATF), as outlined below.

#### **4.1.1 Open dialogue**

There is a need for open dialogue between

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<sup>59</sup> S. 9(5), African Model Law on Counter Terrorism.

different humanitarian organizations and relevant governmental bodies in SADC countries on the impact of broad counterterrorism laws on humanitarian work. Clearly, an aim should include raising awareness on the challenges that humanitarian organizations and those who need their assistance may face, particularly during armed conflict. In the course of open dialogue, humanitarian organizations should also aim to get a common understanding of the relevant factors that policy makers consider when deciding on whether a humanitarian exemption should be included in counterterrorism laws. In so doing, humanitarian organizations and policymakers can discuss in an informed manner on how to mitigate these tensions.

#### **4.1.2 Monitoring, investigating and reporting**

While the need to exclude humanitarian

activities is clear, cases in the SADC region where a humanitarian actor was arrested, charged, or prosecuted of a terrorism offence while conducting purely humanitarian activities are currently rare. Moreover, despite the chilling effect on humanitarian action, there is little evidence, in terms of caselaw, of how counterterrorism laws have directly impacted humanitarian action in the SADC region. As a result, humanitarian organizations should ensure that they monitor, investigate, and report the impact of such laws in the countries they operate in and bring any concerns to the relevant authorities.

#### **1.1.3 Engagement with the SADC Regional Counter-Terrorism Centre**

Possible forums for exploring the need for humanitarian exemptions in the SADC region include the SADC Regional

Counter-Terrorism Centre, which was established in 2022 to ensure enhanced coordination, strengthen partnerships, and foster timely response to terrorism and violent extremism within the SADC region. As a regional centre on countering terrorism, it should reiterate the need for SADC Member States to comply fully with international law, including international humanitarian law, and gear its discussions towards a regional policy to shape counterterrorism measures in Member States. To this end, it should host a regional roundtable to discuss national and regional trends on the impact of counterterrorism laws on humanitarian action and identify effective approaches to ease the tensions. In addition, the Centre should facilitate national training for law enforcement and judicial officers on the prosecution of terrorism in accordance with international law.

#### **4.1.4 Regional expert meetings**

Humanitarian organizations can benefit from setting up expert meetings and invite humanitarian organizations, experts, and policy makers in the region to discuss the issues faced in the SADC region and elaborate a report on the debates that took place during the meeting. Such a forum could provide a safe space to exchange ideas and develop a strategy on how to engage with States and persuade them to reform their laws. For advocacy purposes, the report and recommendations of the meeting could be submitted to the SADC Regional Counter-Terrorism Centre for its consideration.

#### **4.2.1 Creating a space for open dialogue**

Governments should encourage and facilitate open dialogue with humanitarian organizations in which they both define

the scope of the challenges at hand and propose suitable solutions. To facilitate such dialogue, it is important to create an open and free environment where humanitarian organizations can speak freely about their challenges.

#### **4.2.2 Review and amend anti-terrorism laws**

After holding a dialogue with humanitarian organizations, States should conduct an in-depth assessment of the likely or unintended impacts of counterterrorism measures on humanitarian action with an aim to amend their laws where necessary. In addition to explicit IHL saving clauses, legal provisions proscribing ‘soliciting’, ‘giving’, ‘rendering’, or ‘inviting’ support for a terrorist group should include an explicit exemption for impartial humanitarian activities. In the event that states do not review or amend their laws, judges — who are tasked with interpreting these laws

— should clarify that only humanitarian activities which are undertaken in armed conflict in accordance with IHL do not amount to supporting a terrorist group. The reasoning of the South African Constitutional Court in *S v. Okah* [2018] ZACC 3 that acts that violate IHL are not exempt from prosecution is a good example of such judicial interpretation. In addition to harnessing the role of judges, where applicable, States could provide explanatory notes to their counterterrorism provisions.



#### **4.2.4 Law enforcement training and appropriate interpretation of the law**

As noted in the introductory paragraphs, many of the broad counterterrorism provisions can be interpreted in a way that can adversely impact humanitarian action. Thus, training law enforcement personnel on the scope of counterterrorism laws and their application could relieve the tensions on interpretation. Besides, there is a need for counterterrorism legal cases to adjudicate on what constitutes 'legitimate' humanitarian action' in relation to armed conflicts related to or in connection with terrorist groups.<sup>61</sup>

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61 See D A Lewis, 'Humanitarian Exemptions from Counter-Terrorism Measures: A Brief Introduction' in *Proceedings of the Bruges Colloquium: Terrorism, Counter-Terrorism and International Humanitarian Law, 17th Bruges Colloquium* (20–21 October 2016), 150.

Given the influence of the Financial Action Task Force (FATF) in assessing counterterrorism financing laws of States, it should reiterate that measures to counter terrorism taken by all States should comply with international law. In addition, both the FATF and FATF-style regional bodies should avoid pressuring states into amending counterterrorism provisions in a way that could negatively impact humanitarian action.

For policy reforms, the SADC Secretariat—responsible for implementing decisions of SADC policy—should collaborate in the fight against terrorism in the region. Both the Secretariat and the Centre should build the capacity of SADC Member States to combat terrorism and support the implementation of SADC's Regional Counter Terrorism Strategy in a way that does not impede humanitarian action. They can do so in at least three ways. First, by providing legislative advice on how to mitigate the tensions

between counterterrorism measures and humanitarian action. Second, by sponsoring research projects that look into the effects of counterterrorism laws on humanitarian action in the region. Third, by creating a digest of terrorist cases within the region that compares the national legal frameworks for counterterrorism and identifies the challenges faced by courts in investigating and prosecuting terrorist offences, including, where applicable, situations where humanitarian actors were charged or prosecuted.

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Model Anti-Terrorism Law, endorsed by the 17<sup>th</sup> Ordinary Session of the Assembly of the African Union, Malabo (30 June–1 July 2011).

### 5.3 Legislation

#### *Angola*

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#### ***Mauritius***

Prevention of Terrorism Act, Act 2/2002.

Convention for the Suppression of the Financing of Terrorism Act, Act 37/2003.

#### ***Mozambique***

2022 Law on Terrorism.

#### ***Namibia***

Prevention and Combating of Terrorist and Proliferation Activities Act, 2014. Act 4 of 2014.

#### ***Seychelles***

Prevention of Terrorism Act, Act No. 7 of 2004.

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#### ***South Africa***

Protection of Constitutional Democracy against Terrorist and Related Activities Amendment, Act, 2022.

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#### ***Tanzania***

Prevention of Terrorism Act, Act No. 21 of 2002.

#### ***Zambia***

Anti-Terrorism Act, Act No. 21 of 2007.

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## 5.4 Caselaw

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## **ANNEXES**

### **6.1 Table summarizing IHL Saving Clauses and Humanitarian Exemptions**



SADC Member	IHL Saving Clause	Humanitarian Exemption	Relevant Provision and Scope of Exemption
Angola	None	None	
Botswana	None	None	
Comoros	None	None	
Democratic Republic of Congo	None	None	
Eswatini	None	Exemption on the offence of soliciting and giving support to terrorist groups for terrorist acts.	Section 11(1) and (2) of the Suppression of Terrorist Act provides that: (1) 'A person who knowingly, and in any manner— (a)solicits support for, or gives support to, any terrorist group, or (b)solicits support for, or gives support to, the commission of a terrorist act,

SADC Member	IHL Saving Clause	Humanitarian Exemption	Relevant Provision and Scope of Exemption
<b>Eswatini</b>			<p>commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding fifteen (15) years.’</p> <p>(3) For the purposes of this section, registered organizations engaged in essential humanitarian aid projects, are exempted from the provisions of this section.’</p>
<b>Lesotho</b>	Exemption on any act or omission which occurs in a situation of armed conflict which is in accordance with IHL		<p>Section 2 of the Prevention and Suppression of Terrorism Act, 2018 which defines terrorism does not extend to ‘an act or omission which [...] occurs in a situation of armed conflict and is, at the time and in the place it occurred, in accordance with rules of international law applicable to the conflict.’</p>
<b>Madagascar</b>	None	None	
<b>Malawi</b>	None	None	
<b>Mauritius</b>	None	None	
<b>Mozambique</b>	None	None	

SADC Member	IHL Saving Clause	Humanitarian Exemption	Relevant Provision and Scope of Exemption
Namibia	None	Exemptions on: (1) the provision of humanitarian or civil assistance; (2) entry into or transit through Namibia of designated person for humanitarian purposes;(3) expulsion for purposes of repatriation; (4) bunkering services for humanitarian purposes.	<p><b>Section 21 of the Prevention and Combating of Terrorist and Proliferation Activities Act, 2014</b> provides that:</p> <p>A person within Namibia or elsewhere who offers to render any foreign military assistance, other than humanitarian or civilian assistance aimed at relieving the plight of civilians in an area of armed conflict, or any mercenary activities or related services to a foreign state, organ of a state, group of persons or other organisation or person, unless:</p> <p>(a) in the execution of State powers; or</p> <p>(b) he or she has been granted authorisation to offer such assistance in terms of section 49,</p> <p>commits an offence and is liable to a fine not exceeding N\$100 million or to imprisonment for a period not exceeding 30 years, or to both such fine and such imprisonment.</p> <p><b>Section 26 of the Prevention and Combating of Terrorist and Proliferation Activities Act</b> provides that</p> <p>(1) The Minister responsible for foreign affairs</p>

SADC Member	IHL Saving Clause	Humanitarian Exemption	Relevant Provision and Scope of Exemption
Namibia			<p>must, without delay upon receipt of a designation or sanctions list under section 22, submit such designation or sanctions list to the Minister responsible for immigration and border control, who must, without delay, cause -</p> <p>(a) the prevention of entry into or transit through Namibia of designated persons and their biological or adoptive parents and children with the exception that –[...]</p> <p>(ii) this subsection does not apply where entry or transit is necessary for the fulfilment of a judicial process, for humanitarian reasons, or to honour a request received from the relevant Security Council Sanctions Committee to allow entry or transit or to attend meetings at the United Nations Headquarters</p> <p><b>Section 26 of the Prevention and Combating of Terrorist and Proliferation Activities Act</b> provides that</p> <p>where appropriate, the expulsion from the Republic of Namibia of a national of a designated country</p> <p>- (i) working on behalf of or at the direction of a designated person or organisation for purposes of terrorist or proliferation activities or the funding</p>

SADC Member	IHL Saving Clause	Humanitarian Exemption	Relevant Provision and Scope of Exemption
			<p>of such activities; or (ii) assisting in the evasion of sanctions or violation of applicable Security Council Resolutions, for purposes of repatriation to his or her country of origin, unless the presence of the person is required for fulfilment of judicial proceedings, medical, safety, or other humanitarian purposes.</p> <p><b>Section 34 (6) of the Prevention and Combating of Terrorist and Proliferation Activities Act</b> provides that</p> <p>A person, organisation and any Customs and Excise official or officer of a competent authority in Namibia, must cause the refusal of any bunkering service to be provided to a vessel or aircraft, where</p> <ul style="list-style-type: none"> <li>- (a) reasonable grounds exists to suspect a Security Council resolutions and sanctions violation; or</li> <li>(b) a search or inspection is refused under this section, except where such services are necessary for humanitarian purposes or until such time as the cargo has been inspected, or seized and disposed of, if necessary</li> </ul>
Seychelles	None	None	

<b>South Africa</b>	<b>None</b>	<b>None</b>	
<b>Tanzania</b>	<b>None</b>	<b>None</b>	
<b>Zambia</b>	<b>None</b>	Humanitarian exemption for bunkering services	<p>Section 48(10) of the Anti-Terrorism and Non-Proliferation Act provides that</p> <p>A person, entity and any officer of customs or an authorised officer, must cause the refusal of any bunkering service to be provided to a vessel or aircraft, where— (a) reasonable grounds exist to suspect a Security Council resolution or sanctions violation; or (b) a search or inspection is refused under this section, except where those services are necessary for humanitarian purposes or until such time as the cargo has been inspected, or seized and disposed of, if necessary.</p>
<b>Zimbabwe</b>	IHL saving clause in the Preamble		<p>The Preamble to the Suppression of Foreign and International Terrorism Act provides that</p> <p>[..] 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 Co-operation among States in accordance with the said Charter, shall not, for any reason, including for the purposes of extradition or prosecution, be considered a terrorist activity.</p>

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