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**Uganda
Amnesty International
Concerns on the
Regulation of
Interception of
Communications Bill,
2007**



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Uganda

Amnesty International concerns on the Regulation of Interception of Communications Bill, 2007

1 Introduction

Amnesty International has a number of serious concerns about the Regulation of Interception of Communications (RIC) Bill, published on 25 May 2007 and due to be submitted for debate in Parliament.¹

Amnesty International's concerns in this memorandum focus primarily on the proposed legislation's incompatibility with international human rights standards, particularly the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR), Uganda being a party to both treaties.² Many of the rights in the ICCPR and the ACHPR are reflected in the Constitution of Uganda.

In addition, Amnesty International is concerned that if passed into law and implemented in its current form, this Bill could significantly hamper the general exercise of the right to freedom of expression in Uganda – not just the rights of individuals whose communications are intercepted.

In particular, Amnesty International has serious concerns regarding:-

- The potential for violation of the rights to freedom of expression and privacy;

- The broadly and loosely defined grounds for authorizing interception of communication and the potential for abuse of broad ministerial powers;

- The lack of accountability mechanisms regarding the Minister's powers;

- The increased potential for human rights violations when the Bill is read together with the Anti-Terrorism Act;

- A flawed appeal process which violates the right to appeal or review.

¹It is not clear at the time of writing when the government would table the RIC Bill for debate in Parliament.

²Uganda ratified the ICCPR in 1995 and the ACHPR in 1986.

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2 The potential for violation of the rights to freedom of expression and privacy

2.1 The right to freedom of expression

Article 19 of the UN ICCPR provides for the right to freedom of expression which is also guaranteed under Article 9 of the ACHPR and Article 29 of the Constitution of Uganda. These provisions also allow for limitation to the right to freedom of expression.³

Under the ICCPR, any interference with the right to freedom of expression must meet a three-part test: it must be (a) provided by law, and (b) only for certain specified permissible purposes (which include the protection of national security and public order) and (c) they must be justified as being necessary in the circumstances for one of those specified purposes. The Human Rights Committee, the body of independent experts responsible for monitoring states' implementation of the ICCPR, has stated in its General Comment on Article 19 that, "...when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself".

Amnesty International is concerned that the provisions of the RIC Bill fails to meet the test proposed by the Human Rights Committee. As is discussed in more detail below⁴, the provisions of the Bill defining the grounds or purposes of interception are vaguely defined and the RIC Bill vests on the Minister in charge of security broad discretionary powers to define and interpret when to issue a warrant authorising interception and surveillance and to unilaterally determine the scope and duration of the warrant for interception. The broad powers and discretion of the Minister coupled with the lack of a proper transparency and accountability mechanisms creates an unacceptable potential for the violation of the enjoyment of the right to freedom of expression, and goes way beyond the

³Article 43 of the Constitution of Uganda provides that "in the enjoyment of rights prescribed [under the Constitution], no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest". However, under Article 43(2) (c) the Constitution "public interest...shall not permit any limitation of the enjoyment of rights and freedoms beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution".

⁴See sections 3 & 4 of this memorandum below.

defined acceptable limitation to this right.⁵ The Minister may authorise interception of any or all communication or exchange of information which in the Minister's interpretation falls under the loosely defined purposes or aims of the RIC Bill. In addition, there appears to be no requirement for the person who is applying for an interception warrant under the RIC Bill⁶ to explain why the interception is proportionate to the objective sought to be achieved by permitting the interception of communication.

As a result of provisions granting the Minister broad and unchecked powers in relation to interception of communication or information, Amnesty International is concerned that if passed into law in its current form, the RIC Bill would put in jeopardy the exercise of individual human rights, particularly the right to freedom of expression.

The potential for violation of the right to freedom of expression particularly for the press is further enhanced when the Bill is read together with provisions of the Anti-Terrorism Act.⁷

2.2 The right to privacy

The prohibition against "unlawful or arbitrary interference" with the right to privacy is guaranteed under the ICCPR (Article 17) and expressly provided for under Article 27 of the Constitution of Uganda which provides that "no person shall be subjected to interference with the privacy of that person's home, correspondence, communication, or other property". As with the right to freedom of expression this right is subject to certain defined limitations.⁸

The Human Rights Committee has stated in its General Comment on Article 17 (on the right to privacy) that the term "unlawful" means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant. According to the Committee, "arbitrary interference" is also relevant to the protection of the right provided for in article 17. In the Committee's view the expression "arbitrary interference" can also extend to interference provided for under the law. The introduction of the

⁵This is further elaborated on in sections 3 & 4 of this memorandum below.

⁶Under the RIC Bill these persons are; the Inspector General of police, Chief of Defence Forces, Directors General of Internal/External Security, the Commissioner General of Police and competent authorities of other countries acting under 'international mutual assistance agreements'.

⁷Discussed in section 5 of this memorandum below.

⁸See Constitution of Uganda, Article 43 (n 3 above).

concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. Under Paragraph 8 of this General Comment, the Committee interprets the obligation of state parties to the ICCPR as follows:

“Even with regard to interferences that conform to the ICCPR, relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis. Compliance with article 17 requires that the integrity and confidentiality of correspondence should be guaranteed *de jure* and *de facto*. Correspondence should be delivered to the addressee without interception and without being opened or otherwise read. Surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited...”

Amnesty International is concerned that the proposed RIC Bill falls short of this recommendation of the Human Rights Committee because it does not allow for proper determination of possible infringement to individuals' right to privacy on a case-by-case basis. The nature of the proposed system under the Bill which establishes a Monitoring Centre to which all communication service providers will be duty-bound to maintain an automatic switch connection will not ensure a case-by-case examination of communication or information to be intercepted as all communication would be susceptible to interception even without a warrant issued under the Bill. The Bill provides that the designated Minister shall administer the Monitoring Centre (Article 3) and that under the Bill the interception of communication must only be pursuant to the Minister's warrant (Article 15). However, there is no control of interception operations by the Monitoring Centre or the communication service provider in light of the provision in Article 8 (1) (f) of the Bill which require service providers to ensure the transmission of intercepted telecommunications to the Monitoring Centre “via fixed or switched connection as may be specified by the Minister”. Amnesty International observes in relation to the provisions establishing the Monitoring Centre that the Minister would have no control as to whether communication is intercepted strictly subject to and within the scope of warrants authorizing interception. This is especially if the interception of telecommunication and the transmission of intercepted telecommunication is done through ‘fixed connection’ as provided for in Article 8 (1) (f) of the Bill. A “fixed connection”

would not allow for a process of determining precisely which telecommunication would be the subject of a warrant authorising interception.

Amnesty International is further concerned that if passed into law in its current form, the RIC Bill would violate the Human Rights Committee's recommendation (expressed in paragraph 8 General Comment cited above) to state parties under the ICCPR to ensure that surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited.

3 Broadly and loosely defined grounds for authorizing interception of communication and potential for abuse of broad ministerial powers

Amnesty International is seriously concerned that both the RIC Bill and the Anti-Terrorism Act do not provide more precise formulations of the specific circumstances and purposes for which interception of communication is permitted.⁹ This leaves both the RIC Bill and the Anti-Terrorism Act open to broad interpretation, and possibly abuse in relation to authorising interception of communication and conduct of surveillance which may lead to significant human rights violations.

According to the Anti-Terrorism Act, the interception of communication may be conducted for the purpose of 'safeguarding the public interest', preventing violation of human rights by terrorism, preventing or detecting the commission of a terrorist offence, and 'safeguarding the national economy from terrorism'. The RIC Bill seeks to extend the scope of interception and surveillance beyond the stated reason in the Anti-Terrorism Act, that of preventing terrorism and its impact (section 19 of the Anti-Terrorism Act). Hence, the RIC Bill seeks to legalise interception and surveillance to other purposes including the prevention of crime and protection of public safety, national security or national economic interest.

According to the RIC Bill, the Minister can issue a warrant for any of a number of broadly drafted reasons. A warrant can be issued for the interception of communications if there are "reasonable grounds" for the Minister to believe

⁹It is expressly stated in the 'memorandum' of the RIC Bill that the Bill "will reinforce the provisions of Part VII of the Anti-Terrorism Act, 2002 (on Interception of Communications and Surveillance)".

that a felony has been or is being or will probably be committed”, or if it is necessary to gather information concerning actual/potential threats to ‘national economic interest’, ‘public safety’, ‘national security’ or if there is a threat to the ‘national interest involving the State’s international relations or obligations’. Of these terms, only ‘national security’ is defined in the Bill, in terms which are open to broad interpretation by the Minister who is vested with the power to issue warrants for interception and interpret the proposed law.

Under existing Ugandan law, the general rule is that interception of communication or information or the surveillance of a person and the use of intercepted communication or information by the state in the criminal procedure process would require a warrant from a court of law which the court issues after a judicial process that determines whether the state has presented a sufficient case.¹⁰ In contrast and in light of the broad powers and discretion granted to the Minister in charge of security under the RIC Bill, the proposed legal framework under the Bill makes interception of communications or information and surveillance without judicial process the general rule rather than the exception. Amnesty International observes that the proposed legal framework under the RIC Bill will mean that the Minister may authorise interception and surveillance in respect of any communication or information or the surveillance of any person as the Minister deems fit and subject to the Minister’s own interpretation or definition of what is in the interests of public safety, national security, national economic interest or the prevention of terrorism as these terms are neither precisely defined under the RIC Bill nor is there precise guidance as to the proposed ambit of the RIC Bill.

¹⁰Article 27 of the Constitution expressly prohibits unlawful interference with the right to privacy. Under section 66 of the Uganda Communications Act, any provider of communications services has to ensure that there is no unlawful divulgence, interception or disclosure. The only exceptions under this Act are where there is a court order authorising interception or in the event of a ‘public emergency’. The Uganda Posts and Telecommunications Act provides for secrecy of telephone communications and telegrams and permits interception or disclosure in the event of public emergency or in the ‘interests of public safety or tranquillity’ ‘under the direction’ of the Minister in charge of internal security. Section 38 of the Penal Code empowers police officers not below the rank of inspector or any officer recognized by the Attorney General to detain, open and examine any package or article that he suspects contains prohibited publications or information prejudicial to security and to detain such person for purposes of prosecution. The provisions of Part VII of the Anti-Terrorism Act empower the Minister responsible for internal affairs to appoint “authorised officers” to conduct interception of communications and surveillance of a person for the purposes of preventing terrorism/in respect of persons suspected of committing terrorism and related offences. Nothing in the provisions of these laws displaces the requirement for judicial authorisation of interception where the state intends to use the intercepted information in the criminal procedure process – including the prosecution of crime.

In addition and as already noted, the Monitoring Centre which is expected to carry out interception of communication is under the control of and is not independent of the same Minister who authorises interception of communication or information.¹¹

Amnesty International is also deeply concerned at the potential for abuse of the provisions of the RIC Bill which grants the Minister further powers to determine the scope and duration of the warrant and the power to unilaterally revoke or amend warrants for interception or surveillance – including extending the period for a warrant for interception or surveillance.¹² There are no provisions regarding the grounds for which the Minister may amend the warrant for interception. In particular, no provision is made for the consideration by the Minister of any human rights violation arising from the issuance or amendment-including the duration of the warrant authorising interception.

In light of the broad discretionary powers of the Minister, Amnesty International is concerned that the RIC Bill does not make provisions aimed at ensuring that the exercise of the Minister's powers in relation to the issuance of the warrant and in determining its scope is in compliance with human rights guaranteed under the Ugandan Constitution and international human rights treaties to which Uganda is bound.

4 Lack of effective accountability mechanisms regarding the Minister's powers

The provisions in Part III of the Bill in particular Article 5 of the Bill grants the Minister responsible for security the power to authorize, without any independent oversight or accountability mechanism, a warrant permitting the interception of any form of communication, including telecommunication or 'other related service or system'- which could include e-mails, faxes and pagers. Article 13 of the Bill similarly provides for the powers of the Minister to issue "detention orders" – authorizing the detention and examination of postal articles. In addition, Article 3 of the RIC Bill grants total control to the Minister over the Monitoring Centre without any independent oversight by a separate

¹¹Under Article 3 of the Bill, the Minister has the sole power to establish the Monitoring Centre (including appointing members/officers of the Centre) and the sole power to administer and ensure the operation, equipment and maintenance of the Monitoring Centre.

¹²Articles 5(3) & 6.

body. Yet the same Minister is to authorise interception to be conducted by the Monitoring Centre.

Interception of communications interferes with the right to freedom of expression and the right to individual privacy. While the RIC Bill provides that interception of communications by security officials requires authorization in the form of a warrant issued by the Minister in charge of security issues, as a member of the executive the Minister lacks the necessary independence to ensure that such interference does not put into jeopardy the individual rights and freedoms in question. Amnesty International observes that the power of authorizing interception and surveillance should be amenable to independent supervision or oversight by an independent and impartial judiciary and the legislature.

There should be independent supervision or accountability both on a case-by-case basis on the issuance of warrants authorising interception/surveillance and in the consideration of the overall collective exercise of the Minister's powers. Under the RIC Bill there is no provision for independent review or oversight of the Minister's individual decisions to issue warrants. In addition, there is no provision for independent scrutiny from time to time on the overall implementation of the Bill, the use of evidence obtained under the proposed law and violations to individual human rights occasioned by interception or surveillance.

5. The increased potential for human rights violations when the Bill is read together with the Anti-Terrorism Act

Amnesty is further concerned at the increased potential for human rights violations when the Bill is read together with the Anti-Terrorism Act.

The broad and general grounds on which a warrant authorising interception may be issued under the RIC Bill and the broad and loose definition of offences under section 7 of the Anti-Terrorism Act create increased risk of human rights violations. Under section 19 of the Anti-Terrorism Act, the interception of communications is in respect of persons suspected of having committed offences under the Anti-Terrorism Act. However, the definition of terrorism and additional offences under the Anti-Terrorism Act are cast in terms that are too wide and general, and which could reasonably fall within the jurisdiction of the RIC. Section 7 of the Act for instance, defines the offence of 'terrorism' – punishable by death - too broadly. These broad definitions extend to sections 8

and 9 of the Anti-Terrorism Act which create additional offences including the offence of supporting an institution for “publishing or disseminating news or materials that promote terrorism” an offence which may be construed to inhibit the exercise of the right to freedom of expression, in particular, by the press. Journalists may fear having their communications with their sources of information interfered with on the basis that they are dealing with people who, subject to possible broad interpretation under the Anti-Terrorism Act, are suspected of committing offences linked to terrorism.

The memorandum of the RIC Bill explicitly states that the Bill “will reinforce the provisions of Part VII of the Anti-Terrorism Act (on Interception of Communications and Surveillance)”. Amnesty International is concerned that the Minister could invoke his powers under the RIC Bill to authorise interception of communication and the surveillance of people pursuing otherwise legitimate activities on the basis of the overly broad definition of “terrorism and additional offences” under the Anti-Terrorism Act. This could lead to violations of human rights such as the exercise of right to freedom of expression, in particular by the press, as explained in the above paragraph.

6 A flawed appeal process which violates the right to appeal or review

Part V of the RIC Bill deals with appeals in respect of a warrant, directive or order issued under the Bill. Article 16(1) provides that “any person” aggrieved by a warrant, directive or order issued under the Bill may appeal to the Minister within fourteen days after being notified of the warrant, directive or order appealed against. Article 15 of the Bill prohibits the disclosure of information meant to be intercepted or communication intercepted pursuant to a warrant under the RIC Bill. By virtue of this provision, service providers and those holding protected information are prohibited from disclosing intercepted communication or information about an intended interception of communication. Presumably, it is service providers that will have the right to appeal- and not the individuals whose communications have been intercepted. Under Article 16(2) the High Court has the jurisdiction for judicial review of the Minister’s appeal decision. Amnesty International considers the exclusion of the individual’s right to appeal as being in direct contravention of Uganda’s obligations under international law and its own Constitutional guarantees. The Human Rights Committee has stated in the context of the right to privacy that:

“...In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.”¹³

Amnesty International is further concerned that under the RIC Bill (Article 16) the Minister is in effect required to review his own decisions on appeal. This runs counter to the fundamental principle of natural justice that no person may be a judge in his/her own cause. Amnesty International is concerned that there appears to be no provision or requirement for the Minister (or even the judicial review process) to assess the lawfulness of the warrant in terms of whether the warrant is necessary and whether the aim sought to be achieved by the issuance of the warrant is proportionate to the interference with the human rights of the individuals concerned.

The inadequate provisions for the right to appeal or review coupled with the lack of independent supervision or accountability with regard to the exercise of executive power to authorize the interception of communication or information under the Bill further illustrates the lack of sufficient safeguards to ensure an independent and objective balancing of the rights of the individual against the public interest or the interests of national security and other grounds stated in the Bill.

7 Use of evidence obtained other than under the Act

The RIC Bill provides in Article 7 for the admissibility of evidence obtained by means of an interception made otherwise than in accordance with the provisions of the RIC Bill having regard to the ‘potential effect of its admission or exclusion on issues of national security’. Under this provision, communication or information intercepted other than pursuant to a warrant issued under the Bill would be admissible in court, subject to the court’s determination. This provision directly contravenes Article 27 of the Constitution of Uganda and Article 17 of the ICCPR both of which prohibit unlawful interference with an individual’s right to privacy to the extent that the provision would permit a

¹³ General Comment No. 16 of the UN Human Rights Committee, Para 10.

blanket interception or surveillance and potentially allow for the interception of all communication of information.

Amnesty International is concerned that Article 7 of the RIC Bill would further contribute to the lack of effective safeguards in the Bill with regard to interception of communication or information and the conduct of surveillance.

8 Conclusion

In order to safeguard human rights protection, in particular with regard to the right to freedom of expression and the right to privacy, Amnesty International urges the Ugandan government and members of Parliament to amend the RIC Bill and the Anti-Terrorism Act to incorporate effective safeguards, in particular to ensure:-

Independent supervision of or accountability over the executive power to authorise interception of communication and the conduct of surveillance. This should include independent supervision or accountability on a case by case basis and an overall accountability on the collective exercise of the Minister's powers;

That the Bill and the Act unambiguously define grounds for and the purposes of interception of communication and surveillance, require that such measures should be proportionate to the objective which it is sought to achieve;

That the Monitoring Centre proposed to conduct interception is independent of the Minister or the executive in its establishment and operations;

That any measures taken under the Act/Bill should have due regard to Uganda's international human rights obligations;

The amendment of Article 7 of the RIC Bill to provide that only communication or information intercepted subject to a warrant issued under the amended Act is admissible, subject to ordinary rules of evidence and international human rights standards, as evidence in court proceedings;

That the provision for appeal in the RIC Bill be amended to provide that anyone aggrieved by the issuance of a warrant under the proposed law including any individual who believes that a measure taken under the act has amounted to unlawful interference with their human rights, should have the right to an appeal and review, including access to an independent and impartial judicial authority;

That the loose and wide-definition of terrorism and additional offences under sections 7, 8 and 9 of the Anti-Terrorism Act which would encompass otherwise legitimate acts be amended to clearly and precisely define the proscribed acts.

Amnesty International recommends that unless the Bill is entirely consistent with Uganda's Constitutional provisions and with Uganda's regional and international legal obligations, the Bill should be withdrawn.