

SWAZILAND

Memorandum to the Government of Swaziland on the Sexual Offences and Domestic Violence Bill

From Amnesty International
International Secretariat London
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Introductory remarks

Amnesty International welcomes the Swaziland Government's commitment to develop an effective legislative framework for the prosecution of cases involving rape and other forms of sexual violence, and, for the first time, to introduce legislation to provide for civil legal remedies for women and others experiencing domestic violence. Prime Minister Themba Dlamini had informed Amnesty International, during a meeting in London in February 2005, of his strong condemnation of violence against women in Swaziland and that he had instructed the Minister of Justice and Constitutional Affairs to prepare a Bill for parliament to protect women and children against sexual abuse. The public circulation of this draft law is an indication of his government's determination to bring national law into line with the country's obligations under human rights treaties and to promote and protect the rights of women.¹

States and government agencies are obliged to respect human rights by refraining from violating people's human rights. They are obliged also to protect human rights from being abused by private citizens and organizations.² The persistence of and increase in sexual violence against women and girls is of great concern in Swaziland. Similarly, the lack of any protection remedies for women, whose lives are at risk from gender-based violence in the family, has been a long-standing concern of organizations in the country dedicated to improving the status of women and their quality of life. The extraordinarily high prevalence of HIV infection has also created a great sense of urgency, in light of the widely accepted view internationally that

¹ Swaziland has ratified the Convention on the Elimination of All Forms of Discrimination against Women (Women's Convention), as well as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and signed the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, all of which are relevant to the promotion and protection of women's rights. Swaziland has also ratified the Convention on the Rights of the Child, which is also relevant for this draft law

² Amnesty International, *Making Rights a Reality: The Duty of States to Address Violence Against Women*, June 2004 (AI Index: ACT 77/049/2004), p. 5

gender-based violence and women's lack of legal equality and low socio-economic status put them at increased risk of being infected and affected by HIV/AIDS. As the UN Secretary-General's Special Envoy for HIV/AIDS in Africa, Stephen Lewis, expressed it in a speech in March 2004: "*I've been in the Envoy job for nearly three years. If there is one constant throughout that time, a large part of which has been spent traversing the African continent, it is the thus-far irreversible vulnerability of women...gender inequality is what sustains and nurtures the virus, ultimately causing women to be infected in even greater disproportionate numbers.*"³ His perspective reinforces the urgent need for the Government of Swaziland to implement reforms arising from the provisions of the new Constitution and having the effect of promoting gender equality consistent with international human rights standards.

The following comments and suggestions on the draft Sexual Offences and Domestic Violence Bill (referred to as the SO Bill for convenience) are not intended to be comprehensive, but as a contribution to making the law effective and broadly consistent with Swaziland's human rights obligations.

Amnesty International has been reporting and continues to report on the abuses of the human rights of women in countries across the world, in particular in relation to violence against women in the family and community and in the context of armed conflict.⁴ The organization works to contribute to the efforts to eradicate violence against women, by, among other things, urging governments to take the necessary steps, both in law and practice, to ensure the protection, promotion and respect for the human rights of women.

With regard to Swaziland's draft law, Amnesty International welcomes in the comments below particular aspects of the proposed new legislation, but wishes to note here several immediate concerns, namely: the SO Bill includes 14 proposed offences

³ Speech delivered by Stephen Lewis to the Microbicides 2004 conference, London, 30 March 2004 (<http://www.microbicides2004.org.uk>)

⁴ See note 2 above; other reports include *Stop Violence Against Women: how to use international criminal law to campaign for gender-sensitive law reform* (AI Index: IOR 40/007/2005); *Protecting the human rights of women and girls: A medico-legal workshop on the care, treatment and forensic medical examination of rape survivors in Southern and East Africa* (AI Index: AFR 53/001/2002); *Sudan, Darfur – Rape as a weapon of war* (AI Index: AFR 54/076/2004); *Sierra Leone – Rape and other forms of sexual violence against girls and women* (AFR 53/035/2000); *Nigeria: Unheard Voices – violence against women in the family* (AI Index: AFR 44/004/2005); *Guatemala – No protection, no justice: killings of women in Guatemala* (AI Index: AMR 34/017/2005); *Kosovo (Serbia and Montenegro): 'Does that mean I have rights?': Protecting the human rights of women and girls trafficked for forced prostitution in Kosovo* (AI Index: EUR 70/010/2004); *Turkey: Women confronting family violence* (AI Index: EUR 44/013/2004)

which will be punishable by the death penalty; it substantially removes judicial discretion in sentencing; it criminalises sexual acts between consenting adults of the same sex; and, finally, some provisions in the SO Bill could unintentionally further stigmatise people living with HIV/AIDS and increase the risk that some people, particularly men, may not want to know or be open about their HIV status. Such a result would harm rather than protect the rights of women and others at risk of sexual violence.

In light of these concerns, Amnesty International would like to suggest that the drafting committee reviews the focus of relevant parts of the SO Bill. The emphasis, in the organization's view, should be on supporting the human rights and needs of survivors of sexual violence to have access to justice and to urgent health care and treatment, rather than on setting up a punitive regime to punish HIV positive suspects. Please see further comments on this aspect below.

1. Preamble

Amnesty International welcomes the reference to the country's obligations under international human rights treaties to which it is party and its commitments to standards promoted within the Southern African Development Community relevant to the rights of women. The organization notes the specific reference to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and wishes to encourage the Government of Swaziland to ratify this protocol, without reservations. Amnesty International also urges the Government of Swaziland to ratify the African Charter on the Rights and Welfare of the Child.

2. Definitions

The definition in the SO Bill of what constitutes "rape" needs some reconsideration to ensure both that the law is clear, and thereby enforceable, and that the law reflects developments in international criminal law which are intended to protect more effectively the rights of women and of survivors of sexual violence in general. Amnesty International welcomes the indications in this section of the SO Bill that the drafters wish to move beyond the common law definition of the crime of rape, which in various jurisdictions is limited to non-consensual or forced vaginal penetration ("sexual intercourse"). The UN Special Rapporteur on violence against women, among others, has criticised this approach in the law as it "only relates to situations between men and women and there must be vaginal penetration by the penis.... [The]

focus is on a male perspective of acceptable boundaries of heterosexual sex rather than on the victims' experience of sexualized violence".⁵

The SO Bill defines rape to "include" "the intentional unlawful sexual act with a person or without consent of that person, accomplished through force, threat of violence or intimidation". "Sexual act" is defined as: "(a) the insertion, even to the slightest degree, of the genital organs of a person into the genital organs or anus of another person; (b) the insertion of any other part of the body of a person or any object into the genital organs of another person, except where such insertion of any part of the body other than the genital organs of a person or any object into the genital organs or anus of another person is consistent with sound medical practices carried out for sound medical practices [reasons?]; or (c) any other form of genital stimulation".

There are two immediate queries arising from the language of this definition. What is the meaning of the word "include" here? Does it imply that the common law definition of rape is retained and that the SO Bill is in some way expanding the definition of rape to encompass other kinds of sexual acts? Amnesty International recommends that the word "include" is removed and is replaced either by "is" or "constitutes", so that it is unambiguously clear what the SO Bill intends is the crime of rape. The second query relates to the intention in the use of the word "or" in the definition (unless mistakenly left in the draft). The inclusion of the word appears to suggest that the absence of consent is an additional element of the crime, or an alternative to the "unlawful" element as defined further below.

Section 2 (2) to (5) defines what is the "unlawful" element of the crime of rape. This element is framed in terms of a sexual act having been committed "in any coercive circumstance"; or "under false pretences or by fraudulent means"; or "in respect of a person who is incapable in law of appreciating the nature of the sexual act". Sub-sections 2 (3) - (5) list the circumstances which would be considered "coercive", the circumstances which involve "false pretences" or "fraudulent means", and the circumstances under which a person would be considered incapable in law of appreciating the nature of a sexual act.

In terms of this definition of rape and read in conjunction with Section 2 (2) to (5), the prosecutor will have to prove both the absence of consent (presumably as indicated by

⁵ Report of the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, Addendum, Report on the mission of the Special Rapporteur to South Africa on the issue of rape in the community (11-18 October 1996), E/CN.4/1997/47/Add.3, 24 February 1997, paragraph 22; E/CN.4/1997/47, paragraph 35

the existence of one or more of the circumstances listed in sub-sections (2) to (5)) and that the sexual act was done through force, threat of violence or intimidation. However, some of the coercive or other circumstances listed in the sub-sections do not, at least overtly, involve force, threats of violence or intimidation. This lack of clarity or even contradictory language in the defining of the crime of rape could undermine the ability of the prosecution service to bring cases to trial.

Amnesty International recommends that the reference to “force, threat of violence or intimidation” should not be included in the *definition* of the offence of “rape”. Developments in international criminal law emphasise that the key element of the crime is the violation of sexual autonomy. Force or violence can be one way of showing this, but these should not be the sole indicator of the perpetrator’s actions within the definition of the offence. Rape can be committed without physical force being used by the perpetrator, as is evident in the list of “unlawful” circumstances set out in Sections 2 (3) to (5).

The drafters of the bill may find it useful to consider the approach on the definition of rape found in international criminal law. The *Elements of Crimes of the Rome Statute of the International Criminal Court* defines under Article 7(1) (g)⁶ the elements of the crime of rape as follows:

1. (1) *The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;*
2. (2) *The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. (It is understood that a person may be incapable of giving genuine consent if affected by natural, induced, or age-related incapacity)*
3. (6) *The perpetrators committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give consent.⁷*

⁶ Rome Statute of the International Criminal Court, adopted on 17 July 1998 (A/CONF.183/9)

⁷ ICC-ASP/1/3(part II-B), 9 September 2002, found at http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_b_e.pdf

Such an approach, incorporating positive developments in international criminal law, has been approved by the European Court of Human Rights (ECHR) in the case of *M.C. v Bulgaria*.⁸ In this case, the investigation and prosecution in Bulgaria of two adult men who allegedly raped a 14-year-old girl was terminated by the authorities on the grounds that there had been insufficient proof that she had been compelled to have sex. In the appeal against this decision, the respondent state, Bulgaria, was found by the ECHR to have failed to respect its positive obligations under Article 3 of the European Convention on Human Rights (the right not to suffer torture or ill-treatment) and Article 8 (the right to privacy and to a family life) because the Bulgarian court had required evidence of physical resistance on the part of the victim.

The European Court of Human Rights stated:

“In international criminal law, it has recently been recognized that force is not an element of rape and that taking advantage of coercive circumstances to proceed with sexual acts is also punishable. The ICTY [International Criminal Tribunal for the former Yugoslavia] has found that in international criminal law any sexual penetration without the victim’s consent constitutes rape, and that consent must be given voluntarily, as a result of the person’s free will, assessed in the context of the surrounding circumstances. While the above definition was formulated in the particular context of rapes committed against the population in the condition of armed conflict, it also reflects a universal trend towards regarding a lack of consent as the essential element of rape and sexual abuse...the evolving understanding of the manner in which rape is experienced by the victim has shown that victims of sexual abuse – in particular girls below the age of majority – often provide no physical resistance because of a variety of psychological factors or because they fear violence on the part of the perpetrator...Moreover, the development of law and practice in that area reflects the evolution of societies towards effective equality and respect for each individual’s sexual autonomy.”⁹

3. Failure to disclose HIV status

Section 2 (4) (c) of the SO Bill defines what is meant by “false pretences” or “fraudulent means” to include circumstances where a person “*intentionally fails to disclose to the person in respect of whom a sexual act is being committed, that he or she is infected by a life-threatening sexually transmissible infection in circumstances in which there is a significant risk of transmission of such infection to that person.*” As a practical matter, this provision is likely to increase women’s vulnerability to a charge under this section, largely due to circumstances beyond their control. In so far as “life-threatening sexually transmissible infection” refers to HIV, women are more likely than men to know their HIV status due to routine testing which is conducted through antenatal clinics. Many HIV-positive women who were themselves infected by their husbands or partners who acquired HIV outside of the relationship risk

⁸ Application no. 39272/98, judgment on 4 December 2003.

⁹ Paragraphs 163-166

violence or other serious consequences if they reveal their status, or if they insist on condom use or refuse sex. As a result, this provision will likely only further victimize women, who are already suffering disproportionately from the epidemic.¹⁰

In addition this provision unnecessarily makes the failure to disclose HIV status part of the criminal law relating to rape. The state already has available legal remedies in particularly egregious cases. The state could consider, for instance, charging an accused with common law crimes such as murder, where there is *prima facie* evidence that the accused knew his status and intentionally or recklessly infected his victim(s) with HIV, as a result of which his victim(s) died; or in cases where the victim is still alive, that accused could be charged with assault. The state could also consider charging an accused with culpable homicide where the person negligently infected another with HIV, as a result of which the person died.¹¹ There have been successful prosecutions in a number of jurisdictions, including in the United Kingdom, in such cases.

4. Precluded defences

Amnesty International welcomes the preclusion, under Section 2 (6), of the defence against a rape charge of previous or existing marital or other relationship with the complainant. The exclusion of this defence is in keeping with developing international standards, as reflected in UN General Assembly Resolution 52/86 of 2 February 1988, which urges member states to “review, evaluate and revise their criminal procedure, as appropriate, in order to ensure that . . . rules and principles of defence do not discriminate against women, and such defences as honour or provocation do not allow perpetrators of violence against women [to] escape all criminal responsibility...”¹²

5. Proposed penalties and judicial discretion

In general, punishments provided for by law may be imposed only on those convicted of crimes after trials which meet international standards for fairness. The punishments

¹⁰ These comments were made on the same provision contained in South Africa’s Sexual Offences Bill (see “South Africa: Submission to the Parliamentary Portfolio Committee on Justice and Constitutional Development, Parliament of South Africa, on the draft Criminal Law (Sexual Offences) Amendment Bill, 2003” by Amnesty International and Human Rights Watch (AI Index: AFR 53/006/2003))

¹¹ “Legal and ethical aspects of HIV/AIDS”, in David McQuoid-Mason, Bess Pillemer, Carol Friedman and Mahomed Dada, *Crimes Against Women and Children, A Medico-Legal Guide*, published by the Independent Medico-Legal Unit, University of KwaZulu Natal, Durban, South Africa and the Department of Forensic Medicine, University of Dundee, UK, March 2002, p.99

¹² Clause 7 (d) of Resolution 52/86: “Crime prevention and criminal justice measures to eliminate violence against women: Model strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice”

imposed must be proportionate to the gravity of the crime and the circumstances of the offender.¹³

The penalties proposed for rape under Section 2 (8) are all mandatory minimum sentences, ranging from 15 years to death sentences, depending on the age of the victim and the presence of other “aggravating factors”. The proposed penalties are likely to be a reflection both of the shock within Swazi society at the nature and frequency of the incidents which are occurring and the need to respond to the profound distress caused to victims. The drafting committee, however, may wish to review the sentencing provisions in light of the discussions in neighbouring South Africa and reflections there on the impact of the mandatory minimum sentence regime introduced in 1997 in relation to certain offences, including rape in certain circumstances.¹⁴ High minimum sentences, of which there are many in this Bill, may constrain the ability of the judiciary and magistracy to apply their minds to each case and to exercise their discretion in relation to what might be the appropriate sentence. There may arise as a result a reluctance to convict.

In terms of any intention through these provisions to deter potential perpetrators, there may in fact be unintended and very different consequences, as for instance with the proposed death penalty in the case of a rape of a child where the perpetrator has “parental power” over that child (Section 2 (8)(d)). The irreversibility as well as the severity of the punishment may add to pressures on the child and other supportive adults not to pursue a criminal complaint.

6. Death Penalty

With respect to the death penalty, the new Constitution for Swaziland, which was assented to by the Head of State, King Mswati III, on 26 July 2005, retains the death penalty, but makes it non-mandatory.¹⁵ The SO Bill, which contains 14 separate offences carrying the *mandatory* death penalty, appears to be directly in conflict with this requirement under constitutional law. In addition, the last executions conducted in Swaziland were in July 1983. The King marked his coronation by commuting all death sentences. With the exception of 2000, in the last five years the High Court has

¹³ Report of the 8th United Nations Congress on the Prevention of Crime and Treatment of Offenders, UN Doc.A/Conf.144/28,rev.1 (91.IV.2), Res.1(a), 5(c), 1990; see in general on this issue, Amnesty International, “*Fair Trials Manual*”, 1998 (AI Index: POL 30/02/98)

¹⁴ See, for instance, Julia Sloth-Nielsen & Louise Ehlers, *A Pyrrhic victory? Mandatory and minimum sentences in South Africa*, Institute for Security Studies, ISS Paper 111, July 2005 (<http://www.iss.org.za>) and the work of the South African Law Reform Commission referred to therein

¹⁵ A person shall not be deprived of life intentionally save in the execution of the sentence of a court in respect of a criminal offence under the law of Swaziland of which that person has been convicted (Section 16.1). The death penalty shall not be mandatory (Section 16.2)

imposed no more than one death sentence per year and in some years none at all. The King has continued to exercise his “prerogative of mercy” to grant clemency to prisoners under sentence of death. This direction of events is consistent with obligations which Swaziland acquired when it ratified a number of international human rights treaties in 2004, including the UN Convention against Torture and Other cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights (ICCPR).¹⁶ The UN Commission on Human Rights has called on states not to increase the number of crimes for which the death penalty is allowed.¹⁷

The introduction of a mandatory death penalty is not consistent with international human rights norms.¹⁸ In this regard, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions has concluded that “the mandatory death penalty, which precluded the possibility of a lesser sentence being imposed regardless of the circumstances, is inconsistent with the prohibition of cruel, inhuman or degrading treatment or punishment”.¹⁹

Finally, there is no conclusive evidence to suggest that the death penalty is a more effective deterrent against serious crime than other less severe forms of punishment. In practice the death penalty is an arbitrary punishment. It is irrevocable and always

¹⁶ Article 6(6) of the ICCPR states that: “Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant”. A compilation of relevant human rights standards can be found in Amnesty International, *International Standards on the Death Penalty* (AI Index: ACT 50/001/2006)

¹⁷ See Resolution 2005/59 adopted by the Commission on Human Rights, 20 April 2005, which calls upon states that maintain the death penalty “Progressively to restrict the number of offences for which the death penalty may be imposed and, at the least, not to extend its application to crimes to which it does not at present apply” (clause 5(b)). The Resolution also “Calls upon States that no longer apply the death penalty but maintain it in their legislation to abolish it.” (clause 8)

¹⁸ As stated by the UN Human Rights Committee in Communication No.845/1998 on a specific complaint, “The Committee considers that this system of mandatory capital punishment would deprive the author of his right to life, without considering whether, in the particular circumstances of the case, this exceptional form of punishment is compatible with the provisions of the Covenant [on Civil and Political Rights]. The Committee accordingly is of the opinion that there has been a violation of article 6, paragraph 1 of the Covenant”

(<http://www.unhchr.ch/tbs/doc.nsf/0/2b1bdbc58254f93bc1256e91004ad574?OpenDocument>).

Similarly the Privy Council in a response to a ruling by the Court of Appeals of Barbados ruled that the maintenance of the mandatory death penalty “will...not be consistent with the current interpretation of various human rights treaties to which Barbados is a party” (Boyce and Joseph v. The Queen, Privy Council Appeal No.99 of 2002, Judgment of 7 July 2004, para. 6, at <http://www.privycouncil.org.uk/output/page472.asp>)

¹⁹ see Report of the Special Rapporteur to the UN Commission on Human Rights, UN Doc:E/CN.4/2005/7, paragraph 80

carries the risk that the innocent may be put to death. Nearly half of the countries in the world, including a number of countries in southern Africa, have now abolished the death penalty in law or practice.

7. Aspects of the SO Bill relating to the HIV status of the suspect/perpetrator

Section 2 (8) (c) proposes the death penalty for rape “where HIV/AIDS is an aggravating factor”. This provision may have the unintended result of further discouraging men from knowing their status. As already noted above, more women than men know their status, mainly due to antenatal clinic testing. In Swaziland and in many other countries, men are in general more reluctant to participate in voluntary counselling and testing (VCT) programs. Consequently most women acquire the virus from men who do not know their status and they are at risk of abandonment and violence on disclosing their HIV status to the male partners who infected them in the first place.²⁰ While the drafters of this Bill are attempting to address a very grave situation in which women, and young girls particularly, are at risk of contracting HIV through rape and systematic sexual abuse, the new law should not be framed in such a way as to undermine HIV prevention programs or to further stigmatise people living with HIV/AIDS.

Section 2 (9) proposes that a suspect who has been convicted of rape will be “subjected to a blood test” and if the “results are positive” (presumably in relation to the presence of HIV), they will be submitted to the presiding officer by the prosecutor prior to sentencing. There are a number of concerns with this provision. The trial court is invited to take into account the HIV status of the convicted accused as an “aggravating factor” for the purpose of sentencing. Yet there is no reference to a need for the prosecution to prove during the trial that the accused had any requisite *mens rea*, that is, he intended to infect the victim or even that he knew his status and behaved with reckless disregard for the life of the other person. The fact that such an aggravating factor is only considered at the time of sentencing is against the right to be informed “promptly and in detail” of the nature and cause of the charge against him.²¹ The African Commission on Human and Peoples’ Rights Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa states under section N (3) (e) (6) (i): “Before judgment or sentence is rendered, the accused and his or her defence counsel shall have the right to know and challenge all the evidence which may be used to support the decision. All evidence submitted must be considered by the judicial body”.

²⁰ Comments made by South African Supreme Court of Appeal Justice Edwin Cameron, when chairing a Task Team for the South African Law Reform Commission on aspects of the draft Sexual Offences Bill relating to HIV/AIDS (reported on Independent Online, Cape Town, 3 February 2004)

²¹ The International Covenant on Civil and Political Rights (Article 14.3a)

The SO Bill is also silent on the question of the HIV status of the survivor in relation to the consideration of “aggravating factors”. In addition to the issue of proving the intention of the accused, the court may need to establish with confidence that the harm suffered by the rape survivor, if HIV positive, was directly linked to the wrongful or negligent conduct of the accused. The necessary inquiry could potentially impose an additional burden on the victim of the crime and could expose her to public controversy and attack.

On a related note, if part of the impetus for this law reform is to improve access for the survivor of sexual violence to redress, including to urgent medical care and treatment (see comments on Section 29 (1) below), then the proposed timing of this testing of the suspect is far too late to benefit the survivor. With the usual delays in the criminal justice system, the convicted suspect may not be tested until several years after the commission of the crime. The critical time-frame for the survivor of a sexual assault is 72 hours, within which she/he should be offered voluntary counselling and testing for HIV, and if indicated, prophylactic anti-retroviral medication (PEP), as well as treatment to prevent or respond to the presence of sexually transmitted infections and emergency contraceptives in the case of females. If knowing the suspected perpetrator’s status, as well as her/his own, is vital to protecting the survivor’s health and life, then the proposed Section 2 (9) is irrelevant.

The further difficulty with this provision is that it is unlikely suspects, convicted or otherwise, would voluntarily submit to testing, particularly where the result could contribute to a very severe sentence. UNAIDS, in its guidelines on policy on HIV testing and counselling, states that “HIV testing without informed consent and confidentiality is a violation of human rights”.²²

In considering these issues, the drafters of the SO Bill may find it useful to review the discussions which took place in South Africa under the auspices of the South African Law Reform Commission and the parliamentary Portfolio Committee on Justice in connection with the Compulsory HIV Testing of Alleged Sexual Offenders Bill.²³ One of the main objects of this bill was to respond to the needs of victims of alleged sexual offences in the context of widespread sexual violence amidst the increasing prevalence of a national epidemic of HIV. In a submission made to the Portfolio Committee, the non-governmental organization, the AIDS Law Project (ALP),

²² UNAIDS Policy on HIV testing and counselling, August 1997 (accessed on 21 November 2005 at http://www.unaids.org/html/pub/publications/irc-pub03/counsepol_en_pdf)

²³ See <http://www.info.gov.za/gazette/bills/2003/b10-03.pdf> ; and <http://www.law.wits.ac.za/salc/report/report.html>

emphasised the need to consider this issue within the framework of both protecting the rights of the survivor of sexual violence and the rights of the accused, as well as the impact on public health measures to limit the spread of HIV. They stated that “legislation that allows survivors of sexual assault the right to ascertain the HIV status of alleged perpetrators may, in certain circumstances, be an important aspect of empowerment and choice...for (survivors)”, at least those who have been able to report their cases to the police. They recommended that the practical realisation of this choice for survivors needs to be fully integrated into public health services on HIV and state services for survivors of sexual assault (including the provision of post-exposure prophylaxis (PEP) within 72 hours of the assault, in conjunction with the testing and counselling and follow-up testing over a 3-6 month period for survivors). “If there is a possibility of infection, the knowledge of the offender’s status allows further choices to be made about treatment and sexual and reproductive activities”. In this view, testing only can be done at the request of the survivor or someone acting on her/his behalf.²⁴

While affirming the choice of survivors of sexual assault to find out an alleged offender’s HIV status, the ALP stated that any legislative proposals would at the same time have to attempt to limit the infringement of the rights of the alleged offender. The South African draft law contained procedural safeguards which the ALP thought adequate to protect the rights of an accused person, including that a magistrate has to consider an application for compulsory HIV testing by means of “in camera” proceedings; that sufficient prima facie evidence must exist to establish that a sexual offence has been committed against the victim by the arrested person and that in the course of the offence the victim may have been exposed to the bodily fluids of the arrested person; that the decision on the granting of the order is communicated only to the survivor/person acting for them, the alleged offender, the Investigating Officer and those who have to conduct the testing; that the results of the test are communicated to the survivor and offender only; and that there are penalties for malicious disclosure of the results. An additional safeguard was that the results were not to be admissible in evidence in criminal or civil proceedings. The testing of the alleged offender should include a requirement to provide pre-test counselling to increase the possibility of “informed consent”. Post-test counselling should also be provided.

The above approach would not preclude the state from pursuing common law charges of murder, culpable homicide or assault against suspects where evidence emerges of

²⁴ Submission on the Compulsory HIV Testing of Alleged Sexual Offenders Bill, Portfolio Committee on Justice, National Assembly, Parliament, 6 February 2003, AIDS Law Project, Centre for Applied Legal Studies, University of the Witwatersrand (www.alp.org.za)

intentional, reckless or negligent exposure of another person to HIV, as discussed previously.

8. Homosexuality

The inclusion of the provision in Section 4 of the SO Bill to criminalise “sexual acts” (as defined in the Preamble) between two consenting adults of the same sex and impose a minimum two-year jail sentence is contrary to Swaziland’s obligations under the International Covenant on Civil and Political Rights. In 1994 the UN Human Rights Committee, which monitors states’ compliance with the Covenant, found that an Australian law which criminalised same-sex relations between adult men violated the right to privacy and the right to freedom from discrimination. The Committee noted that the reference to “sex” in the non-discrimination clauses of the Covenant – Articles 2(1) and 26 – should be taken as including “sexual orientation”.²⁵ Other UN human rights monitoring bodies have also emphasised that discrimination on the basis of sexual orientation is prohibited under international legal standards and have urged states parties to take measures to prevent or eliminate such discrimination.²⁶

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that “the continuing prejudice against members of sexual minorities and especially the criminalization of matters of sexual orientation increase the social stigmatization of these persons. This in turn makes them more vulnerable to violence and human rights abuses, including death threats and violations of the right to life...”²⁷

In the southern African region, the South African Constitutional Court ruled in 1998 that laws criminalizing “sodomy” (referring to consensual sex between men) violated

²⁵ Human Rights Committee, *Toonen v. Australia* (Views on Communication, No. 488/1992, adopted 31 March 1994. The Human Rights Committee expanded the principle of non-discrimination and equal protection to the area of partnership rights for same-sex couples in its conclusions on the complaint, *Young v. Australia* (Communication no. 941/2000, 6 August 2003, CCPR/C/78/D/941/2000)

²⁶ For instance in the Concluding Observations of the Committee on the Elimination of Discrimination against Women: Kyrgyzstan, 27 January 1999, UN Doc. A/54/38, paragraphs 127-8; Concluding Observations by the Committee on Economic, Social and Cultural Rights: China (Hong Kong Special Administrative Region) (E/C.12/1/Add.58), 2001, paragraphs 15 and 31; Ireland (E/C.12/1/Add.35), 1999, paragraph 5. See also Amnesty International, *The Human Rights of Lesbian, Gay, Bisexual and Transgender People: A primer to working with the United Nations Treaty Monitoring Bodies and the Special Procedures of the United Nations Commission on Human Rights*, 2005 (AI Index: IOR 40/004/2005)

²⁷ Report of the Special Rapporteur. Ms Asma Jahangir, submitted pursuant to Commission on Human Rights resolution 1998/68, UN Doc.E/CN.4/2001/9, 11 January 2001, paragraph 50

the rights to equality, dignity and privacy enshrined in the 1996 Constitution.²⁸ Sexual orientation, like gender or race, relates to fundamental aspects of human identity. As the opening words of the Universal Declaration of Human Rights affirm, human rights are founded on the concept of respect for the inherent dignity and worth of the human person. Laws and practices aimed at coercing individuals to alter or deny their sexual orientation, or punishing them for not doing so, attack a deeply rooted aspect of human personality.²⁹

9. Human trafficking for sexual exploitation and other related matters

Amnesty International welcomes the intention to put into domestic law provisions to prevent and to bring to justice those responsible for trafficking in persons, especially of women and children. This intention is consistent with the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children,³⁰ and also Swaziland's obligations under international human rights law. The draft provisions in Section 7 (5) and (6) should be reviewed, though, in light of the UN's Recommended Principles and Guidelines on Human Rights and Human Trafficking.³¹ These principles and guidelines place human rights protection and assistance to the trafficked persons at the centre of efforts to prevent and combat trafficking.

Amnesty International reiterates its concern about the proposed mandatory death sentences contained in Section 7 (2) (a) and (3); Section 8 (6); Section 10 (3); Section 11 (3); Section 11 (4); Section 12 (2), (3) and (4).

10. Cultural practices

Section 19 appears to be intended to give effect to a provision in the new Constitution which holds that a "woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed" (Section 29 (3)). The constitutional provision does not specify what these customs might be, whereas the SO Bill lists eight "cultural practices", in relation to which "no person must, without consent, be subjected...." It also specifies that children under 16 years cannot consent under law to these practices, but makes an exception of "virginity testing". Section 19 (3)

²⁸ Judgment in *National Coalition for Gay and Lesbian Equality & Another v. Minister of Justice & Others*, CCT11/98 (www.constitutionalcourt.org.za)

²⁹ Amnesty International, *Crimes of hate, conspiracy of silence: Torture and ill-treatment based on sexual identity*, 2001 (AI Index: ACT 40/016/2001), p. 7; Amnesty International, *Human Rights and Sexual Orientation and Gender Identity*, 2004 (AI Index: ACT 79/001/2004)

³⁰ The Protocol supplements the UN Convention against Transnational Organized Crime and was adopted and opened for signatures, ratification and accession by General Assembly resolution 55/25 of 15 November 2000

³¹ See Report of the UN High Commissioner for Human Rights to the Economic and Social Council, UN Doc. E/2002/68/Add.1, 20 May 2002

provides for a minimum ten-year sentence for any person convicted of having subjected a person to the listed practices without consent.

In its comments in 2003 to the Constitution Drafting Committee on Swaziland's draft constitution, Amnesty International expressed concern that the formulation in Section 29 (3) of the then draft Constitution places the burden on the individual woman to assert her right to 'opt out' of any customary practices to which she may have objections. The organization noted that this may be a difficult right for her to exercise due to the pressures she may be subject to within the family or local community or the precariousness of her economic circumstances.³²

It may be appropriate for a bill which is primarily focussed on *sexual offences* to include reference to practices only where they involve elements of forced sexual relations or forced or child marriage or other violations of sexual autonomy or physical integrity. In so far as these elements are inherent to the practice in question, the SO Bill could prohibit them as constituting violations of the rights protected under the Constitution and under human rights treaties to which Swaziland is party.

Under UN General Assembly resolution 56/128 of 30 January 2002, "*Traditional or customary practices affecting the health of women and girls*", States which have ratified the Women's Convention and the Convention on the Rights of the Child are called upon "to develop, adopt and implement national legislation, policies, plans and programmes that prohibit traditional or customary practices affecting the health of women and girls... and to prosecute the perpetrators of such practices".³³ In relation to the eight cultural practices listed in the Bill, female genital mutilation (FGM) should be explicitly prohibited. Article 5 (b) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa obliges States Parties to prohibit, through legislative measures backed by sanctions, "all forms of female genital mutilation". Although Swaziland has not yet ratified the Protocol, it is now in force regionally and Swaziland, as a signatory to the Protocol, should not act in any way contrary to its spirit. UNICEF, in its recent report on this issue, describes FGM as a "fundamental violation of human rights [including] the right to the highest attainable standard of health and to bodily integrity" and is "an extreme example of

³² AI's memorandum to the CDC, sent in October 2003, is included as an appendix to its report, *Swaziland: Human rights at risk in a climate of political and legal uncertainty*, July 2004 (AI Index: AFR 55/004/2004). Women and Law in Southern Africa Research and Educational Trust (WLSA) (Swaziland) drew attention to these difficulties at length in their publication, *The Draft Constitution: What's in store for Swazi Women* (Mbabane, 2003)

³³ Clause 3(d), General, A/RES/56/128, 30 January 2002

discrimination based on sex”.³⁴ Swaziland is a party to both the Women’s Convention and other human rights treaties violated by this practice, including the Convention on the Rights of the Child (violated under Articles 3, 19 and 24). The UN Committee on the Elimination of Discrimination against Women has recommended, in its General Recommendation No. 24, the “enactment and effective enforcement of laws that prohibit female genital mutilation”. Similarly the UN Committee on the Rights of the Child has repeatedly recommended states to enact legislation to prohibit female genital mutilation.³⁵

Amnesty International is concerned that the practice of “virginity testing” (VT) should also be scrutinised in terms of Swaziland’s obligations to protect the human rights of women and girls. Section 19 (3) of the SO Bill criminalises the act of subjecting another person to cultural practices which, in the case of women 16 years and older includes VT. In so far as this provision protects young women and adults from forcible VT, it appears to be consistent with international human rights standards. The UN Special Rapporteur on violence against women, Radhika Coomaraswamy, has explicitly condemned forcible testing. She commented, in relation to Turkey, that “forcibly subjecting detainees to so-called virginity tests is an egregious form of gender-based violence constituting torture or cruel, inhuman or degrading treatment”; she urged the government to take all measures to abolish the practice.³⁶ The UN Special Rapporteur, however, has also expressed concern that the practice where it occurs outside a custody situation may also violate a woman’s human rights, namely

³⁴ UNICEF, “Female Genital Mutilation/Cutting: A statistical exploration”, 2005. Further evidence of emerging international consensus on FGM occurred in November 2005, when Ministers in charge of child affairs in the Member States of the Organization of the Islamic Conference (OIC) and the Heads of Arab, Islamic and International Governmental and Non-Governmental Organizations issued the Rabat Declaration on Child’s Issues in the Member States of the Islamic Conference. In this Declaration they called upon “all Member States to take the necessary measures to eliminate all forms of discrimination against girls and all harmful traditional or customary practices, such as child marriage and female genital mutilation, in light of the Cairo Declaration on Legal Tools for the Prevention of Female Genital Mutilation and the Maputo Protocol, to enact and implement proper legislations and formulate, where appropriate, national plans, programmes and strategies [for] protecting girls.” (paragraph 10)

³⁵ See for example, Concluding observations on the second periodic report of Uganda, CRC/C/15/Add.270, 30 September 2005, where the Committee recommends that the State party adopt legislative measures to prohibit the practice and conduct awareness-raising campaigns to combat and eradicate the persistent practice of FGM and other traditional practices harmful to the health, survival and development of children, especially girls.” to be found at:

<http://www.ohchr.org/english/bodies/crc/docs/co/CRC.C.15.Add.270.pdf>

³⁶ E/CN.4/1999/68 Violence against women in the family, paragraph 178; E/CN.4/2003/75/Add.1, paragraph 1833

her rights to dignity and equality, and called on state agencies not to collaborate in the practice.³⁷

It is not clear why the SO Bill makes a special case for VT in regards to children who are under 16 years of age. Either the drafters are assuming that a child under 16 is deemed capable in law of giving free and informed consent to undergoing VT or that the issue of consent is not relevant because in some way the practice is viewed as inherently good or widely supported. In parts of southern Africa its revival has been associated with efforts to combat the spread of HIV/AIDS. However official, statutory and non-governmental organizations in southern Africa have expressed concern that even if viewed as a prevention tool, the practice does not address male responsibility for the spread of HIV/AIDS and is inherently discriminatory. It places the burden of responsibility and blame entirely on girls and young women.³⁸ If they “consent” to the test and “fail”, they will likely be subjected to various forms of social discrimination and stigma. If they do not consent to undergoing testing, they may well suffer the same consequences. The practice may also expose girls and young women to greater risk of sexual violence, particularly where the “results” are announced, due to the existence of the belief that sexual intercourse with a girl virgin can “cure” an HIV positive male.³⁹ The social environment girls and women find themselves in means that undergoing VT will likely be more of a social requirement, invalidating the preconditions for informed consent.⁴⁰ In this context, VT is contrary to

³⁷ Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45, E/CN.4/1995/42, 22 November 1994; Report of the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, in accordance with the Commission on Human Rights resolution 2001/49. Cultural practices in the family that are violent towards women. E/CN.4/2002/83, 31 January 2002; E /CN.4/2003/75/Add.1. International, regional and national developments in the area of violence against women 1994-2003, E /CN.4/2003/75/Add.1

³⁸ Leclerc-Madlala Suzanne. Virginité testing: managing sexuality in a maturing HIV/AIDS epidemic. *Medical Anthropology Quarterly* 2001;15(4):533-52; Virginité Testing Diverts Attention from the Lack of Male Sexual Responsibility. *WHP Review*, No. 40, Summer 2001, pp.3-6; (South African) Commission on Gender Equality Consultative Conference on Virginité Testing, Report, 12 - 14 June 2000 and Joint Press Statement of the Commission on Gender Equality, South African Human Rights Commission and the National Youth Commission

³⁹ South African Commission on Gender Equality, Submission to the Department of Social Development on the Children’s Bill, 1 November 2005, p.9

⁴⁰ See Rebecca J Cook, Bernard M Dickens and Mahmoud F Fathalla, *Reproductive Health and Human Rights Integrating Medicine, Ethics and Law*, OUP Clarendon Press, 2003, p.302, where they note that “Women’s role as virgins is particularly oppressive where women have no control over their sexual availability to men, not only in conditions of military conflict but in times of routine civil order when women cannot resist authoritative men, in their families and outside. The requirement of virginité as a symbol of virtue is an oppressive denial of human rights where women are powerless to protect their physical integrity.”

Swaziland's obligations under the Women's Convention and the Convention on the Rights of the Child (CRC) to eliminate gender-based discrimination and stereotyping.⁴¹

In addition to discriminatory aspects inherent in VT, the practice itself is physically invasive in a manner relating very directly, graphically and symbolically, to women's sexuality. The procedure has no validity medically speaking.⁴² It violates the privacy, dignity and well-being of the girl child and woman and can cause psychological trauma.⁴³ As such, the practice amounts to the denial of the rights of women and girls to physical, mental and sexual integrity.⁴⁴ In 2000 the UN Committee on the Rights of the Child, in response to South Africa's compliance report, noted its concern that "the traditional practice of virginity testing...threatens the health, affects the self-esteem and violates the privacy of girls" and recommended that the State party introduce sensitization and awareness-raising programmes for practitioners and the general public to change traditional attitudes and discourage the practice of virginity testing in light of articles 16 and 24(3) of the Convention".⁴⁵ In a submission in 2005 on South Africa's draft Children's Bill, the statutory Commission on Gender Equality stated that this practice [in South Africa] "subjects and exposes vulnerable girl children to an invasion of their privacy, degrading treatment, [impairment] of their dignity, stigmatisation [and] sexual abuse", as well as being a discriminatory practice.⁴⁶

⁴¹ Women's Convention Articles 2(e) and (f), 5 (a); CRC Article 2 (1)

⁴² See David McQuoid-Mason, Bess Pillemer, Carol Friedman and Mahomed Dada, *Crimes Against Women and Children, A Medico-Legal Guide*, published by the Independent Medico-Legal Unit, University of KwaZulu Natal, Durban, South Africa and the Department of Forensic Medicine, University of Dundee, UK, March 2002, at pp.229, 230, and 283-285 where they discuss special considerations in the examination procedure for sexual assault victims, noting that "the hymen cannot be used to determine whether the patient is still a virgin, or whether other penetration or sexual abuse has taken place"

⁴³ A study undertaken in 1999 of 118 forensic doctors in Turkey found that over 90 per cent of the doctors agreed that "virginity examinations" caused psychological trauma for the patients. In the preceding 12 months they had conducted 6,000 examinations. See Frank, M et al. Virginity examinations in Turkey: role of forensic physicians in controlling female sexuality. *Journal of the American Medical Association* 1999 August 4;285(5):485-90; Gürsoy E, Vural G. Nurses' and midwives' views on approaches to hymen examination. *Nursing Ethics* 2003; 10:485-96; Amnesty International, *Women, violence and health*. (AI Index: ACT 77/001/2005), p.10

⁴⁴ see UN CEDAW General Recommendation 19 (Violence against Women); CRC Articles 2 (1), 3 (1) and (2), 5, 12 (1), 16, 19, 24, 34, 37 (a) and (b)

⁴⁵ Concluding Observations of the Committee on the Rights of the Child: South Africa, CRC/C/15/Add.122, 23 February 2000, paragraph 33 ([http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/6e861f881eca1ble8025687f005a805b?O](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/6e861f881eca1ble8025687f005a805b?O))

⁴⁶ South African Commission on Gender Equality, Submission to the Department of Social Development on the Children's Bill, 1 November 2005, p.7

The drafters of the SO Bill may find it useful to review the discussions on this issue in the South African parliament. After intense public debate, the parliament passed the Children's Bill in December 2005, prohibiting, under Clause 12, "virginity testing of children under the age of 16", but allowing it in the case of children older than 16, only if the child had "given consent to the testing in the prescribed manner", after proper counselling and in the manner prescribed. The results could not be disclosed without the consent of the child and the body of the child tested could not be marked in any way.⁴⁷

With respect to other practices listed in Section 19, the drafting committee could seek advice from expert bodies, including UN agencies, on the extent to which they may involve violations of human rights. The Swaziland Chapter of Women and Law in Southern Africa, for instance, has described one of the listed practices, *Kungenwa* (sometimes referred to as 'widow inheritance'), as "not only an abuse of women's human rights of choice, [but also] a health hazard to all parties in this day and age of HIV/AIDS."⁴⁸ In so far as this or other practices involve forced or child marriage, they are contrary to Swaziland's obligations under the Women's Convention (Article 16), the International Covenant on Economic, Social and Cultural Rights (Article 10) and the International Covenant on Civil and Political Rights (Article 23), as well as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Article 6), and the African Charter on the Rights and Welfare of the Child (Article 21), both of which treaties Swaziland has signed.⁴⁹

11. Medical Dimensions

Amnesty International welcomes the inclusion of the requirement in Section 29 (1) for the Minister of Justice and Constitutional Affairs to consult the Minister of Health and Social Welfare and issue regulations which will "prescribe" a protocol for the care, treatment and (forensic) medical examination of "sexual offences victims". Those responsible for drafting the regulations may find it useful to consult the WHO

⁴⁷ Republic of South Africa Children's Bill [version B 70D-2003] (incorporating all amendments) as finalised by the Social Development Portfolio Committee, 13 December 2005

⁴⁸ in *The Draft Constitution: What's in store for Swazi Women*

⁴⁹ The right not to be subjected to forced marriage or child marriage has been commented on and elaborated by the UN treaty bodies and incorporated into non-binding declarations such as the Platform for Action of the Fourth World Conference on Women, Beijing, China, 1995, UN Doc.

A/CONF.177/20 (paragraphs 93, 268, 274 and 275)

(<http://www.un.org/womenwatch/daw/beijing/platform>), and the Program of Action of the International Conference on Population and Development, Cairo, Egypt, 1994, UN Doc.

A/CONF.171/13 (Principle 9 and paragraphs 4.21, 5.5, 6.11)

(<http://www.unfpa.org/icpd/docs/index.htm>)

*Guidelines for medico-legal care for victims of sexual violence.*⁵⁰ As discussed above, if part of the impetus for this law reform is to improve access for the survivor of sexual violence to redress, including to urgent medical care and treatment, then it will be vital for the government authorities to act on their obligations under Section 29 (1). The implementation of such a protocol, accompanied by appropriate training for health care providers, the police and criminal justice officials, should help improve the access for survivors to legal remedies and to health care.

In this connection, Amnesty International also welcomes the reported decision of the government and stake-holders consultative meeting at the beginning of February “to increase to 100 per cent by 2008 the number of persons reported to have been raped or exposed to incest who received PEP services”.⁵¹

Section 29 (2) provides for the death penalty for an HIV positive person who engages in unprotected sex and intentionally transmits the virus. As already noted in relation to Section 2 (4) (c) and Section 2 (8) (c), this type of provision will most likely discourage men from undergoing testing to know their status.

12. Vulnerable Witnesses

Sections 30 and 31 impose duties on prosecutors and court officials to take specified steps to minimise the possibilities for secondary trauma and intimidation of complainants, child witnesses and other possible “vulnerable witnesses”. These measures include a court procedure for declaring a witness a “vulnerable witness” or giving evidence by means of CCTV or giving evidence through an intermediary (especially in the case of a child witness) or in closed court proceedings and prohibiting the publication of the identity of the complainant or complainant’s family.

These provisions do not appear to conflict with the right of the accused to examine witnesses, as provided for article 14(3)(e) of the International Covenant on Civil and Political Rights, but should help ensure access to justice for complainants by assisting them with presenting evidence with confidence and without fear.⁵² The High Court is equipped to implement such measures, under the Criminal Procedure and Evidence

⁵⁰ WHO, *Guidelines for medico-legal care for victims of sexual violence*, Geneva: WHO, 2003 (available at <http://wholibdoc.who.int/publications/2004/924154628X.pdf>); see also Shereen Akoojee, Pravi Moodley and David McQuoid-Mason, *DEALING WITH HIV INFECTION: Antiretroviral Post-Exposure Prophylaxis (ARV-PEP)*, Independent Medico-Legal Unit (IMLU), with The Global Fund and KwaZulu-Natal Department of Health, Durban, 2005

⁵¹ reported in the Swazi Observer, 07.02.2006

⁵² Comments made on similar provisions in the South African Criminal Law (Sexual Offences) Bill by Amnesty International and Human Rights Watch (see note 10 above)

(Amendment) Act of 2004, but to help ensure that there are not long delays in the holding of trials to this standard, the government would need to commit to making available additional financial, technical and human resources to the courts, including the lower courts. It may also be important to include provision for the training of several prosecutors to work as specialised sexual offences prosecutors. This approach in South Africa, together with other measures for vulnerable witnesses, has helped increase the conviction rate in rape trials.

13. Abolition of Cautionary Rule

Amnesty International welcomes the proposed abolition of the cautionary rule, which requires the trial judge to take into account him/herself that the evidence of a woman complaining of rape may be inherently unreliable and must be corroborated. The abolition of this rule is consistent with gender-sensitive trends in international criminal law and human rights law.⁵³

The Rules of Procedure and Evidence of the International Criminal Court, for instance, provide that in cases involving sexual violence the Court:

“Shall be guided by and, where appropriate, apply the following principles:

...

(d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.”⁵⁴

Evidence of “the prior or subsequent sexual conduct of a victim or witness” in such cases is explicitly deemed inadmissible under Rule 71. Courts must not call for corroboration of evidence solely on account of the fact that the witness is the complainant of a sexual offence.

14. Special procedures for young offenders

Section 38 contains important requirements which take into account the country’s obligations under the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights to uphold the rights and safety and promote the physical and mental well-being of juveniles and take into account the desirability of rehabilitating the young person. There will be need for a commitment of State resources to ensure that there are a sufficient number of trained social workers and a

⁵³ See comments by the UN Special Rapporteur on Violence Against Women, Ms Radhika Coomaraswamy, in Report on the mission of the Special Rapporteur to South Africa on the issue of rape in the community (11-18 October 1996), paragraph 22, on common law jurisdictions and the “cautionary rule”, E/CN.4/1997/47/Add.3, 24 February 1997

⁵⁴ Rule 70 of the ICC Rules of Procedure and Evidence

properly established “diversion programme” to implement effectively the provisions in Section 38.

We recommend that Section 38 also includes some further safeguards to ensure that an accused person under the age of 18 years has the same rights as an adult accused to a fair and speedy trial and to have his or her privacy fully respected at all stages of the proceedings. The drafters of the SO Bill may find it useful to consult the UN Rules for the Protection of Juveniles Deprived of their Liberty and the Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules).⁵⁵ The death penalty for juveniles is prohibited under international law.

15. Civil legal remedies in cases involving domestic violence

Amnesty International welcomes the intention of the Government to establish enforceable civil legal remedies for women and others, who are experiencing domestic violence. This will be an important step towards “creating a climate of intolerance for violence against women”.⁵⁶ In so far as this section of the SO Bill appears to have drawn substantially on South Africa’s Domestic Violence Act (Act 116 of 1998), which is widely recognized as “good law”, the drafting committee and others involved in finalising the SO Bill for presentation to the Parliament of Swaziland may find it useful to review the findings of a substantial three-year monitoring project on the implementation of that law. The monitoring was conducted by a consortium of civil society organizations in co-operation with the South African Law Reform Commission, criminal justice officials, magistrates and health care professionals. Their findings highlighted problems in the implementation of the law due to, among other things, insufficient training for police and court officials (including training to address deeply entrenched attitudes), a lack of infrastructure and resources to ensure the effective and efficient enforcement of rights of complainants, and the impact of women’s socio-economic circumstances on their ability to sustain a complaint against an abusive partner.⁵⁷

⁵⁵ See http://www.unhchr.ch/html/menu3/b/h_comp37.htm ; http://www.unhchr.ch/html/menu3/b/h_comp48.htm ; see also Amnesty International, *FAIR TRIALS MANUAL*, December 1998 (AI Index: POL 30/02/98), chapter 27

⁵⁶ Penny Parenzee, Lillian Artz and Kelley Moulton, *Monitoring the Implementation of the Domestic Violence Act, First Research Report 2000-2001*, The Consortium on Violence Against Women, Institute of Criminology, University of Cape Town (UCT), 2001, p. 108

⁵⁷ Penny Parenzee, Lillian Artz and Kelley Moulton, *op cit*, pp. 102-112, and throughout; Lillian Artz, *Magistrates and the Domestic Violence Act: Issues of Interpretation*, The Consortium on Violence Against Women, Institute of Criminology, UCT, 2003, pp. 48-51, and throughout (see Gender, Health & Justice Research Unit, Faculty of Health Sciences, UCT - www.uct.ac.za/depts/sjrp for these reports); Dee Smythe and Lillian Artz, “Money matters: structural problems with implementing the DVA”, in *AGENDA*, Gender-based Violence Trilogy, vol. 1.1, No. 66, 2005, pp. 24-33

In conclusion, Amnesty International would like to commend the Government of Swaziland for its commitment to develop a stronger legal framework to combat sexual violence, gender-based violence in the family and trafficking in persons. Amnesty International hopes that the concerns raised and recommendations made in this Memorandum can be considered by those responsible for further work on the Sexual Offences and Domestic Violence Bill prior to its consideration by Parliament this year. The promulgation of a new law which is both effective and broadly consistent with Swaziland's human rights obligations will be a vital step towards improving the status of women and their quality of life.