

# MEMORANDUM TO THE GOVERNMENT OF SWAZILAND ON THE SUPPRESSION OF TERRORISM (AMENDMENT) BILL, 2016

From Amnesty International  
Southern Africa Regional Office  
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## INTRODUCTION

Amnesty International welcomes the Swaziland Government's preparedness to amend the Suppression of Terrorism Act of 2008 (STA) as it had committed to do in March 2012 at the Universal Periodic Review of the United Nations Human Rights Council.

Amnesty International has consistently called for the STA to be repealed or immediately amended, because it is an inherently flawed piece of legislation which is inconsistent with Swaziland's obligations under international and regional human rights law as well as the Swaziland Constitution.

In 2009, Amnesty International in association with the International Bar Association found several provisions of the STA to be incompatible with Swaziland's human rights obligations.<sup>1</sup>

While states have a duty to protect all those under its jurisdiction, including by taking measures to prevent and protect against attacks on civilians, there is also an absolute necessity to ensure that all anti-terrorism measures are implemented in accordance with international human rights law.

The STA continues to be used to limit freedoms of expression, association and peaceful assembly by arresting or threatening to arrest human rights defenders and political activists exercising their rights. In 2015, pre-trial proceedings continued in five separate cases of 13 people charged under the STA and the Seditious and Subversive Activities Act of 1938 after arrests dating back to 2009. All the accused were out on bail but appeared in court on remand. Offences include shouting slogans, possessing People's United Democratic Movement (PUDEMO) leaflets, wearing PUDEMO t-shirts, and calling for a boycott of the elections held in 2013. The trials have all been postponed, pending the outcome of a constitutional challenge to the laws under which the charges were brought. This challenge began to be heard in the High Court in

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<sup>1</sup> Amnesty International and the International Bar Association, *Suppression of Terrorism Act undermines Human Rights in Swaziland*, Index: AFR 55/001/2009  
<https://www.amnesty.org/en/documents/afr55/001/2009/en>

September 2015 with further hearings taking place in February 2016. Judgement has been reserved in the matter.

The following comments and suggestions on the Suppression of Terrorism (Amendment) Bill, 2016 (referred to as the STA Amendment Bill for convenience) are intended to be a contribution to making the law broadly consistent with Swaziland's human rights obligations and commitments.

With regard to the STA Amendment Bill, Amnesty International welcomes in the comments below particular aspects of the proposed amendments, but wishes to note here several immediate concerns, namely:

- The amendments to the Bill are mostly cosmetic and do not address the concerns with the STA raised previously by Amnesty International and the Human Rights Institute of the International Bar Association;
- The STA Amendment Bill has been tabled in parliament with a certificate of urgency which limits the opportunity for public comment on the proposed amendments. A Bill of this significance requires broad-based public consultation to ensure adequate public input.

#### RECOMMENDATIONS TO THE GOVERNMENT OF SWAZILAND

Amnesty International recommends that:

1. The Suppression of Terrorism Act, 2008 should be immediately repealed as it is an inherently flawed piece of legislation which is inconsistent with Swaziland's obligations under international and regional human rights law as well as the Swaziland Constitution.
2. The Suppression of Terrorism (Amendment) Bill, 2016 should be immediately amended to bring it in line with Swaziland's obligations under international and regional human rights law as well as the Swaziland Constitution.
3. The Suppression of Terrorism (Amendment) Bill, 2016 should be subjected to the routine procedure of publication in the government gazette for 30 days to allow for adequate public consultation and comment.
4. The state should fully protect and uphold the internationally recognized rights of freedom of opinion and expression, freedom of association, freedom of assembly, to the liberty and security of the person, to fair trial and to not be subjected to torture and other ill-treatment, and end impunity for violations of these rights.
5. All criminal charges currently made under the Suppression of Terrorism Act 2008 be withdrawn.

## ANALYSIS OF CERTAIN PROVISIONS OF THE SUPPRESSION OF TERRORISM (AMENDMENT) BILL

### 1. AMENDMENTS TO SECTION 2 – DEFINITIONS OF 'TERRORIST ACTS'

Section 2 deals with the definitions of what constitutes a 'terrorist act'. The inclusion of the requirement of 'intent' in the definition of what constitutes a terrorist act in the amendment of section 2(a) is a positive development.

In his 2006 Report to the UN General Assembly, the UN Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism outlined the inclusion of intent as a vital condition for an act to be criminalised as terrorist. He summarized as follows:

"...at the national level, the specificity of terrorist crimes is defined by the presence of three cumulative conditions: (i) the means used, which can be described as deadly, or otherwise serious violence against members of the general population or segments of it, or the taking of hostages; (ii) the intent, which is to cause fear among the population or the destruction of public order or to compel the Government or an international organization to do or refrain from doing something; and (iii) the aim, which is to further an underlying political or ideological goal. It is only when these three conditions are fulfilled that an act should be criminalized as terrorist; otherwise it loses its distinctive force in relation to ordinary crime." <sup>2</sup> (emphasis added)

The requirement of intent is diluted however with the use of "or" before "is intended to cause". This creates the option of 'intent' not being considered when bringing charges under the STA. This imprecision is problematic also in the context of Swaziland's history of impermissible restrictions on the freedom of peaceful assembly and the use of excessive force and misuse of criminal charges against protesters.<sup>3</sup>

The ambiguity created by Section 2(3) in the original act, which provided for an exception for certain acts such as those "committed in pursuance of a protest, demonstration or stoppage of work", has been partially addressed in the STA Amendment Bill. The amendment applies the exception to "the lawful activities of registered employee and employer organizations, federations and other lawful organizations". As there is still no definition of what amounts to "lawful activities" or "lawful organisations", the amendment does not provide enough clarity however and this should be addressed.

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<sup>2</sup> UN Doc. A/61/267, 16 August 2006, para. 44. For more detailed analysis see UN Doc. E/CN.4/2006/98, 28 December 2005, paras. 26-50.

<sup>3</sup> Amnesty International, *Swaziland: Amnesty International Submission To The UN Universal Periodic Review, May 2015*, AI Index: AFR 55/3466/2016, <https://www.amnesty.org/en/documents/afr55/3466/2016/en/>; Amnesty International, *Swaziland: Amnesty International Condemns Repression of Fundamental Freedoms*, 30 March 2015, Index number: AFR 55/1345/2015

The amendments included in this section do not adequately address the concerns raised previously by Amnesty International. Furthermore the continued failure to restrict the definition of ‘terrorist act’ to the threatened or actual use of violence against civilians continues to undermine the STA in its entirety. This continues to render many provisions incompatible with the international human rights obligations of Swaziland.<sup>4</sup>

Amnesty International calls on the Swazi authorities to incorporate the detailed analysis provided in its 2009 report together with the Human Rights Institute of the International Bar Association, *Suppression of Terrorism Act undermines Human Rights in Swaziland*, into its amendment of the definitions of ‘terrorist acts’.

## 2. AMENDMENTS TO SECTION 11 - *SOLICITING AND GIVING SUPPORT TO TERRORIST GROUPS FOR TERRORIST ACTS*

The expanded detail on what constitutes “support” for “terrorist groups” in Section 11 (2) addresses the overly broad wording of the STA. This is a welcome step. The inclusion of the requirement of ‘intent’ in this subsection is a further positive development.

## 3. AMENDMENTS TO SECTION 28 - *ORDERS DECLARING CERTAIN ENTITIES TO BE SPECIFIED*

The deletion of the provision in subsection 6(e) for the court to order the attorney general to “make recommendations” to the minister to revoke “an order” made pursuant to the STA is a positive development. With the amendments, if the judge finds the order “unreasonable” he/she can make an order directing the minister to revoke it. This judicial oversight is an improvement on the original act as it provides some degree of legal remedy.

As this is the only amendment to the original section 28, many concerns remain. These include the following:

- Section 28 allows organisations to be ‘specified’ as ‘terrorist groups’ if they are considered to be acting ‘in association with’ an entity that is directly involved in the commission of a terrorist act. However, there is no requirement in this provision that the organisation’s action, which

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<sup>4</sup> Amnesty International has criticised excessively broad definitions of terrorism in laws in other countries, such as Ghana, the Russian Federation, the USA, China, Jordan, UK and Turkey (in *Security and Human Rights: Counter-Terrorism and the United Nations*, AI Index: IOR 40/019/2008, pp.26-31, <http://www.amnesty.org/en/library/info/IOR40/019/2008/en>). The International Bar Association has similarly examined the anti-terrorism legislation in the USA, UK, India, Pakistan, Indonesia and Germany (in *International Terrorism: Legal Challenges and Responses, A Report of the International Bar Association’s Task Force on International Terrorism* (Transnational Publishers, 2003), Chapter 3).

has been allegedly done 'in association' with such an entity, has any substantive connection to the commission of a terrorist act.

- The procedure established by section 28 appears designed to delay the named organization from having access to judicial review until after the government has taken up to 60 days first to consider any request to revoke the notice of designation. During this period the organisation, even if wholly wrongly named, appears to remain subject to all of the repressive measures of the STA without possibility of legal remedy.
- Section 28(7) which allows the review judge to receive and act on a wide range of information that is normally not admissible in law, but does not specify the need to absolutely exclude any information demonstrated to have been obtained by torture and other ill-treatment. The legal obligation to exclude any information obtained in this manner arises from Article 7 of the ICCPR and Article 15 of the UN Convention against Torture, to which Swaziland became a party in 2004.

## **CONCERNS RAISED PREVIOUSLY THAT REMAIN UNADDRESSED**

In their 2009 report, *Suppression of Terrorism Act undermines Human Rights in Swaziland*, Amnesty International and the Human Rights Institute of the International Bar Association found that the STA to be incompatible with Swaziland's international and regional human rights obligations on the following grounds:

- the failure to restrict the definition of 'terrorist act' to the threatened or actual use of violence against civilians, as well as to restrict it to acts taken in pursuit of an underlying political or ideological goal, a failure which affects most of the other provisions of the law as they depend on the definition;
- the related failure of the definition of a terrorist act to meet the requirements of legality, that is, accessibility, precision, applicability to counter-terrorism alone, non-discrimination and non-retroactivity;
- the offences are defined with such over-breadth and imprecision that they place excessive restrictions on a wide range of human rights - such as freedom of thought, conscience and religion, freedom of opinion and expression, freedom of association and freedom of assembly - without adhering to the requirements of demonstrable proportionality and necessity;
- the reversal of the onus of proof with respect to allegations of membership of a terrorist group;
- the lack of access to effective legal remedies and procedural safeguards in response to actions of the Executive, consequently infringing the rights of due process in a fair hearing;

- the provision allowing for up to seven days incommunicado detention without charge or trial, with the attendant risks of torture and other ill-treatment, or enforced disappearances;
- the absence of effective safeguards in the law to prevent these human rights violations;
- the provision of the power to order the removal from Swaziland of “a person in Swaziland” suspected of an offence under the law, without procedural safeguards.

As none of these concerns raised have been addressed by the STA Amendment Bill 2016, the proposed legislation remains fundamentally flawed. As such, Amnesty International calls on the government of Swaziland to immediately repeal the Suppression of Terrorism Act, 2008 or incorporate the matters raised as problematic into their redrafting of the STA Amendment Bill in order to bring it in line with Swaziland’s obligations under international and regional human rights law as well as the Swaziland Constitution.