SOUTH AFRICA

Preserving the gains for human rights in the 'war against crime':

Memorandum to the South African Government and South African Law Commission on the draft Anti-Terrorism Bill, 2000

Amnesty International (AI) welcomes the opportunity to submit the following comments on the draft Anti-Terrorism Bill which is currently being considered by the South African Law Commission on request from the Minister of Safety and Security. The Bill is quite wide ranging in its scope and intentions and AI takes no position on the matter of rendering into positive law South Africa's obligations under international conventions relating to terrorism. We will confine our comments largely to a number of proposed clauses which will likely have substantial impact on the human rights of South Africa's citizens, in particular the section in the Bill which would allow detention without charge or trial of suspects or witnesses for the purpose of interrogation.

We are aware that public debate has already occurred on the proposed legislation, including in the media and at a recent seminar hosted by the South African Human Rights Commission on 6 November in Cape Town. We understand from comments made in the national parliament, from reports in the media, as well as from AI's own discussions in Pretoria on 20 October 2000 with officials from the Ministry of Justice and the Office of the National Director of Public Prosecutions (NDPP), that the domestic impetus for this legislation has arisen primarily out of longstanding government concern over the pattern of violence in the Greater Cape Town area. In particular the government appears concerned that there continues to be difficulty in achieving convictions in the courts of those responsible for the string of bomb explosions in the past two or more years, notwithstanding the number of joint police and military security operations in the area and the increased involvement of the NDPP's office in directing the investigations. Clearly members of the public must also be extremely concerned as well, in view of the deaths and injuries which have resulted from these bomb blasts.

The Minister of Safety and Security, Steve Tswete, is reported to have stated in the national parliament recently his belief that those responsible for this "urban terror" are members of PAGAD (People against Gangsterism and Drugs), or militant elements among this anti-crime vigilante organization. Alleged statements by some PAGAD members and the organization's affiliations with the local Muslim community appear to have led to the view amongst some national and provincial authorities that the "acts of urban terror" are ideologically motivated and anti-state.The authorities have also publicly linked the organization to the targeted killings of officials involved in investigating or hearing cases against their members, as well as to the intimidation of potential prosecution witnesses.

Civil society organizations, statutory bodies with oversight functions, journalists and others have, however, expressed concern that there may be a multiplicity of actors involved in this violence, including organized crime or even renegade members of the security and intelligence services, and that primarily what underlies the investigation failures is corruption, inefficiencies, limitations in resources or other shortcomings in law enforcement agencies. As the South African Human Rights Commissioner, Jody Kollapen, noted at the

Cape Town seminar, if the problem is a lack of capacity, this needs to be dealt with head-on, to ensure that the actual perpetrators are more likely to be arrested and brought to justice, rather than by passing new laws, particularly where they involve serious inroads into fundamental human rights.[1]

While Amnesty International does not condone under any circumstances deliberate and arbitrary killings or threats of violence by armed opposition groups, or killings or threats of violence acquiesced in by elements of the state, the organization is concerned that certain provisions in the proposed Bill violate international and regional human rights treaties to which South Africa is a party and may lead to human rights violations.

COMMENTS ON PROVISIONS IN THE BILL

DEFINITION OF A "TERRORIST ACT"

The proposed Bill will allow the authorities to use extraordinary measures against individuals suspected of crimes involving extreme acts of violence against people and directed to particular ends. In this regard it is vital that the definition of a "terrorist act" is formulated very narrowly. The current definition[2] is too widely drawn and could encompass legitimate activities, as for instance trade union strikes which can at times result in damage to property or the disruption of the delivery of essential services or can be intended to induce the government, employers or members of the public to agree to something.

The implications of the wide definition of a "terrorist act" can be seen in section 12 of the Bill, which refers to the protection of property of internationally protected persons. Under the provision, "any person who wilfully, with intent to

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[1] South African Human Rights Commission seminar, "Human Rights, Crime and Urban Terror", 6 November 2000; F Allie, "Pagad: Where there is smoke, there is fire", Mail & Guardian, November 10-16 2000; Chris McGreal, "Zealots, criminals or amateurs - who are Cape Town's bombers", The Guardian (UK), 21 October 2000; Howard Barrell, "Clean up the cops first", Mail & Guardian, September 29 to October 5, 2000; Marianne Merten, "Back to detention without trial ?", Ted Leggett, "Tshwete is barking up the wrong tree", idem, 15-21 September 2000.

[2] **"terrorist act"**, means -

(a) any act ~~which is a violation of the criminal laws of the Republic and~~ which does or may endanger the life, physical integrity or freedom of ~~or cause serious injury or death to~~ any person or persons, ~~any number or group of persons~~ or causes or may cause damage to ~~public or private~~ property~~, natural resources, environmental or cultural heritage~~ and is calculated or intended to -

(i) intimidate, ~~instill fear put fear in, force,~~ coerce or induce any government or persons, ~~body, institution, office bearer,~~ the general public or any ~~segment~~ section thereof, ~~to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles~~; or

(ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or

(iii) create unrest or general insurrection in any State; ~~and~~

~~(b) any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organising, or procurement of any person, with the intent to effect any of the acts in paragraph (a)(i), (ii) or (iii);~~

The words struck out in the text are those amendments which the Law Commission's project and working committees considered should be made.

intimidate, coerce, threaten or harass, enters or introduces any part of himself or herself or any object within that portion of any building or premises...; or refuses to depart...” commits an offence and is liable on conviction to a fine and/or term of imprisonment of up to five years. Arguably such activities could encompass non-violent demonstrators attempting to deliver a petition to an embassy.

If the definition remains vaguely or too widely worded, then the danger exists that the provisions of the law will be open to abuse or used for repressive purposes. The need to narrow the definition is also underscored by the stringent sanctions, such as lengthy terms of imprisonment, laid down in sections 2 to 14 for contraventions of the proposed Act.

MEMBERSHIP OF A TERRORIST ORGANISATION

A related concern arises from section 4 which makes it an offence to become a member of a “terrorist organisation” and provides for a term of imprisonment of up to five years upon conviction for this offence. Paradoxically the Bill does not provide for a mechanism for proscribing organizations, which would of course have raised concerns about infringements of the right to freedom of association. The creation of this “membership” offence contains the possibility that a member of a particular organization could be prosecuted even if he or she, when joining the organization, was unaware that it was regarded as a terrorist organization. The same liability to prosecution may also arise even if he or she did not commit or intend to commit acts of violence, or conspire, aid, abet or in any other way facilitate the commission of terrorist acts. Besides the further freedom of association concerns that would arise from criminalizing membership in this way, how would a court of law adjudicate such a case, given that there are no guidelines provided in the legislation for determining when an organization can be considered to be a terrorist organization ?

SELF-INCRIMINATION

Section 21(1) makes it an offence for any person “who knowingly possesses any information which may be essential in order to investigate any terrorist act” which is being or has been committed, or is being planned, to “intentionally” withhold such information from a law enforcement officer or public prosecutor. The implementation of this section, in view of the breadth of the definition of a “terrorist act” in the Bill, could result in abusive prosecutions. In addition the provision may be in breach of the right not to incriminate oneself, which is enshrined in international standards as well as in South Africa’s Constitution.[3]

3Section 35 (1)(c) of the Constitution of the Republic of South Africa; Article 14(3)(g) of the International Covenant on Civil and Political Rights (ICCPR); Principle 21 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles); Article 21(4)(g) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (Yugoslavia Statute); Article 20(4)(g) of the Statue of the International Criminal Tribunal for Rwanda (Rwanda Statute);

STOP AND SEARCH POWERS

Section 22 provides wide powers to the police authorities to authorise the stopping and searching of vehicles where it "appears" that there are "reasonable grounds to do so in order to prevent a terrorist act". Under this authorisation any police officer in uniform "may stop and search any vehicle or person" for "articles which could be used for or in connection with the commission, preparation or instigation of any terrorist act". Subsection 3 states that a police official may exercise powers under this section "whether or not he or she has any grounds for suspecting the presence of such articles". These are very low thresholds for such extraordinary, quasi-emergency powers, especially when such a power can be granted for a period of up to 48 hours, by police officials only. Even with the requirement for ministerial confirmation within 48 hours, it would be preferable to allow judicial review of the authorisation.[4]

It may be that everyone passing through a roadblock will be searched in an orderly way. However, there is a risk that searches could be carried out in an arbitrary or discriminatory manner. At the same time the section provides for a term of imprisonment of up to six months for anyone convicted of the offence of failing to stop for or "wilfully" obstructing a police officer using the powers under this section.

DETENTION WITHOUT CHARGE OR TRIAL

General Comments

Regarding the draft provision in section 16 of the Bill to allow for detention without charge for the purposes of interrogation for a period beyond the constitutionally-permitted 48 hours, the Law Commission's Discussion Paper accompanying the draft Bill contains the following apposite comment:

> "The project committee wishes to express its profound concern from the outset that South Africa has a terrible history of abuse in detention, and wants to note that the country now has a Constitution which is a product of that history. The committee therefore considers that the most compelling justification need to be advanced for the measures set out in regard to detention for the purposes of interrogation ...."

Elsewhere it expressed concern that the "project and working committees have not been told why measures of the sort set out under clause 16 for the detention of persons for interrogation are required and why conventional policing methods are inadequate." They emphasised that "before these detention measures can be considered by the Commission and subsequently in all probability by Parliament, compelling evidence of justification need to be presented." [5]

Article 67(1)(g) of the Statute of the International Criminal Court (ICC Statute)

4See also footnote 33 below.

5South African Law Commission (SALC), Discussion Paper 92, Project 105 Review of Security

The Law Commission rightly emphasises the need to keep in view constantly "the South African history of security legislation and the abuses committed under it" when considering "the measures to be implemented in combatting terrorism". In support of this concern it cites extensively from the Truth and Reconciliation Commission's findings that the state condoned directly and indirectly the systematic torture and ill-treatment of uncharged detainees by the security forces prior to 1994.[6]

Amnesty International shares the Law Commission's concerns based on its own reported observations during that period reviewed by the TRC,[7] as well as on the current evidence of human rights violations committed by law enforcement agencies. The depth and persistence of abuses in the past strongly suggest that the reintroduction of the power to detain without charge carries the grave risk of a repetition of the past pattern of human rights violations. The likelihood of repetition is increased by the reality that torture still occurs in South Africa, primarily in the context of criminal investigation. Investigations by Amnesty International and by statutory and civil society organisations in South Africa clearly indicate that the police and the military (in its domestic law enforcement role) have not yet overcome the legacies of the past. Despite efforts by post-1994 governments, with the assistance of certain foreign governments, to retrain law enforcement agencies and subject them to greater scrutiny, incidents of torture or ill-treatment during interrogations or at the point of arrest or during house searches are still occurring. There is corroborated evidence of the infliction of torture on individuals in the custody of law enforcement agents, particularly from specialised units, such as electric shock and suffocation tortures, forced painful postures, suspension from moving vehicles and helicopters, and severe and prolonged beatings.[8]

While it must be said that law enforcement agencies, particularly the police, are under extreme pressure to deal effectively with rampant crime, often of the most vicious sort, some of the victims of these current incidents of torture were completely innocent of the crimes of which they were apparently suspected, and were subsequently never brought to trial or convicted of any offence. However, even if the

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Legislation (Terrorism: Section 54 of the Internal Security Act, No. 74 of 1982), July 2000, pp.12 and xii

6SALC, pages 12-23

7See for instance, Amnesty International, *Political Imprisonment and Torture in South Africa* (PUB 81/00/78) January 1978; *South Africa: Human rights violations under the national state of emergency* (AFR 53/92/86) June 1986; *South Africa State of Fear: Security force complicity in torture and political killings, 1990-1992* (AFR 53/09/92) June 1992.

8See for instance, Amnesty International *Report 2000*; "Amnesty International welcomes Government action against racially-motivated violence by police" (AFR 53/003/2000) 8 November 2000; "South Africa: Torture and misuse of lethal force by security forces must end" (AFR 53/05/99) 20 April 1999; *Forensic Medicine and Ethics* (ACT 75/12/99) December 1999; *South Africa The criminal justice system and the protection of human rights: the role of the prosecution service* (AFR 53/01/98), February 1998.

arrested person were in fact guilty of the crime of which he or she were suspected, state officials are absolutely forbidden to use torture. There can be no justification for torture, even under the most extreme circumstances or conditions of war, civil unrest or high levels of criminal activity. The bombings and other violence in the greater Cape Town area, much of which has gone unresolved for two or more years, represents in acute form those pressures on the government which appear to have led it to consider a return to drastic measures. In AI's view the response to these pressures should not be the re-introduction of old "solutions" and the adoption of measures which cannot deliver security and crime prevention. Such measures will, at the same time, put South Africa in breach of its own Constitution and its obligations under international human rights law.

Grounds for Detention

Notwithstanding the heading of section 16 of the Bill ("Custody of persons suspected of committing terrorist acts"), subsection 1 allows for very broad grounds for detention under a warrant, namely "that there is reason to believe that any person possesses or is withholding from a law enforcement officer any information regarding any offence under this Act" (emphasis added). Although a warrant can only be issued by a judge of the high court after receipt of information under oath from a Director of Public Prosecutions (DPP), the provision is so widely phrased that it could encompass journalists, lawyers or others with privileged information or family members or witnesses who have been intimidated about specific incidents or particular suspects.

Place of detention

Subsection 2(a) is of concern, as it does not oblige the authorities to take the detainee immediately to the place referred to in the warrant, nor does it specify that the place of detention must be an officially recognised place of detention. Past incidents of torture and ill-treatment often reveal that the abuses have been inflicted in non-formal locations (for example, security force vehicles, headquarters of specialised units, the veld) after arrest and prior to the person being brought, if at all, to a police station or other recognised places of detention. The type of recognized place of detention, whether police station, prison or other institution, will also have implications for the detainee's access, for instance, to proper or emergency medical care, and on the degree of supervision or monitoring of conditions and treatment in detention.[9]

The subsection has no provision prohibiting the transfer of the detainee to another holding place without immediately informing the detainee's lawyer and

9See Principles 11(2) and 20 of the UN Body of Principles , Article 10 of the UN Declaration on the Protection of All Persons from Enforced Disappearance, and Rule 7(2) of the UN Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules).

family, nor any provision obliging the authorities to maintain accurate records of the detention. These requirements are vital protections against enforced “disappearances”, torture or other forms of ill-treatment.[10]

Right of the detained person to information on the reasons for the detention
There is a similar concern with subsection 2(b) by which the authorities must furnish the detainee with the reasons for the detention “as soon as possible”. International standards require that anyone who is arrested or detained must be informed immediately, at the time of arrest, of the reasons why he or she is being deprived of his or her liberty. The reasons given must be specific and must include a clear explanation of the legal and factual basis for the arrest or detention.[11] A key purpose of this requirement is to allow detainees the opportunity to challenge the legality of their detention.

Concerns about the grounds for extending detention and the right to silence
Subsection 2 provides that the detainee shall be held at the place of custody for “interrogation” until the judge orders his or her release or the detention period (see below) has expired. The judge may order the release if “no lawful purpose will be served by further detention”. However the judge may extend the detention solely on the grounds that the detainee has not “satisfactorily replied to all questions under interrogation” (section 16 (2)(i)(aa)). The provision clearly establishes a link between the possibility of release and the exercise of the right to silence. It is not clear how the judge can determine if the detainee has responded satisfactorily to questions, although subsection 3(b) does place the onus on the DPP to show reasons for further detention (see further below). However if the detainee chooses to exercise his or her constitutional right to silence,[12] then the possibility of a judicially-ordered release would be prejudiced. It is important to note that, in terms of section 37 (5)(c) of the Constitution, the right to silence is a non-derogable right during any declared state of emergency.

Recognizing the vulnerability of people in detention, Principle 21 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles) states:

> “1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned

10Article 10(2) of the UN Declaration on Disappearance, Principle 12 of the UN Body of Principles.

11Article 9(2) of the ICCPR , Paragraph 2(B) of the African Commission Resolution on the right to Recourse Procedure and Fair Trial, Principles 10 and 11(2) of the UN Body of Principles; Comments of the UN Human Rights Committee in *Drescher Caldas v. Uruguay* (43/1979), 21 July 1983, 2 Sel.Dec.80, and in *Portorreal v. Dominican Republic* (188/1984), 2 Sel.Dec.214; Concluding Observations of the HRC: Sudan, UN Doc. CCPR/C/79/Add.85,19 November 1997, para.13. Section 35 (2)(a) of the Constitution provides that “Everyone who is detained...has the right to be informed promptly of the reason for being detained”.

12Under section 35 (1)(a) of the Constitution

> person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other persons".

The European Court of Human Rights has stated that "[a]lthough not specifically mentioned in article 6 of the [European] Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under article 6".[13]

The right to silence is also set out as a right in the rules of evidence and procedure of the international tribunals for the former Yugoslavia (Rule 42 (A)) and Rwanda (Rule 42(A)) and in Article 55 (2)(b) of the Rome Statute of the International Criminal Court (ICC).

Period of detention without charge and judicial oversight

The Bill proposes that any person detained in terms of a warrant issued under section 16 (1) should be brought before a judge within 48 hours and thereafter once every seven days or, as suggested by the Law Commission, again after a further five days (subsection 3 (a)). The draft law proposes that a person should not be detained without being charged for a period in excess of 30 days (subsection 4). The Law Commission project committee noted that it considered 30 days too long and proposed a 14-day limit, adding, however, that this was "a random figure but in principle [the period] ought to be confined to as short a period as can be justified".[14]

The above subsections require the authorities to produce the detainee before a High Court judge within 48 hours, which appears compliant with national and international legal standards. However the positive effect of this is undermined by the absence in section 16 of any explicit link between the reason for arrest and the ongoing detention. There is a risk that the judge's role becomes primarily one of determining if the detainee has answered questions "satisfactorily", and not of hearing whether or not there exists a prima facie basis for charging the detainee with any offence. In addition the extension of the period allowing for the interrogation of the detained person to up to 30 days, or even 14 days, is contrary to international human rights standards, as well as South Africa's own Constitution, except under conditions of a declared state of emergency.[15]

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13 *Murray v United Kingdom* (41/1994/488/570), 8 February 1996, at 20

14 SALC, Discussion Paper, p.324 note 36. International standards require that a person must be informed "promptly" of the charges against them (Article 14 (3) of the ICCPR, Article 20(2) of the Yugoslavia Statue; Article 19(2) of the Rwanda Statute, Article 67(1)(a) of the ICC Statute) and that too long a delay will be a breach of the right to trial within a reasonable time (Article 9(3) of the ICCPR).Under section 35 (1)(e) of the Constitution an arrested person must be brought before a court within 48 hours and charged or released.

15 Under Sections 35 (1)(d). The right is derogable where a state of emergency has been declared (section 37 (5)(c) and State of Emergency Act, No. 64 of 1997).

The judge will be obliged, under section 3(b), to enquire about the "conditions of the detainee's detention and welfare", but it is not indicated how this should be done. There is also no indication as to what the judge should do were he or she to find evidence of ill-treatment, nor if such evidence and related concern would be a basis for ordering the release of the detainee. South Africa is obliged under Article 12 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to ensure that "its competent authorities proceed to a prompt and impartial investigation, whenever there is reasonable ground to believe that an act of torture has been committed". Hence explicit procedures should be in place to clarify the judge's responsibility.

The right to challenge the lawfulness of detention

The first section of subsection 3(c) of the Bill provides only the right to make written representations to a judge. The Law Commission's amendment would have the effect of leaving open the possibility of making oral representations to a judge. The scope of this right under subsection 3 (c) is not clear. It is certainly weaker than the provision envisaged under a declared state of emergency by which "the detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings and to make representations against continued detention".[16] Principle 32(2) of the UN Body of Principles requires that "the detaining authority shall produce without unreasonable delay the detained person before the reviewing authority". It is clearly an important protection to the safety of the detainee that they appear in person in any proceedings challenging the lawfulness of the detention.

It would seem vital that the representations can and should be made to a High Court judge who is not involved in the ongoing review of the detention. Under Principle 32 of the UN Body of Principles, governments are required to create procedures for challenging the lawfulness of detention and obtaining release without delay if the detention is unlawful. The review of the lawfulness of the detention must ensure that it was carried out according to the procedures established by national law and that the grounds for detention were authorised by national law. The detention must comply with both the substantive and the procedural rules of national legislation. In addition, courts must also ensure that the detention is not arbitrary according to international standards. An arrest or detention which may be lawful under national law may nonetheless be arbitrary under international standards, for example, if the law under which the person is detained is vague, excessively broad, or is in violation of other fundamental standards such as the right to freedom of expression, or where elements of inappropriateness, injustice and lack of

16Constitution of the Republic of South Africa, Section 37 (6)(g)

predictability are involved.[17]

Access and incommunicado detention

Subsection 5 lays down restrictions on access to the detainee, confining automatic access only to a judge of the High Court, officials, or persons authorised by the National Director of Public Prosecutions (NDPP) or a regional DPP. The drafters have not included provision for "international humanitarian organisations" as is envisaged under a declared state of emergency.[18] Similarly, only the listed judicial and other officials are entitled to any "official information" relating to or obtained from the detainee.

These provisions are very drastic and would amount to legitimising incommunicado detention, which can increase the risk of torture, ill-treatment and "disappearances". International standards and treaty bodies provide that restrictions and delays in granting detainees access to the outside world are permitted only in very exceptional circumstances and then only for very short periods of time. In the view of the United Nations Commission on Human Rights, "prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment".[19] The United Nations Special Rapporteur on torture has called for a total ban on incommunicado detention, stating that:

> "Torture is most frequently practised during incommunicado detention. Incommunicado detention should be made illegal and persons held incommunicado should be released without delay. Legal provisions should ensure that detainees be given access to legal counsel within 24 hours of detention."[20]

The United Nations Human Rights Committee, the treaty body monitoring compliance with the International Covenant on Civil and Political Rights (ICCPR), has found that the practice of incommunicado detention may violate Article 7 of the ICCPR (prohibiting torture and ill-treatment) or Article 10 of the ICCPR (safeguards for people deprived of their liberty).[21] In its examination of Peruvian laws allowing

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17Article 9 of the Universal Declaration of Human Rights, Article 9(1) of the ICCPR, Article 6 of the African Charter on Human and Peoples' Rights, Article 55 (1)(d) of the ICC Statute, and the conclusions of the UN Human Rights Committee, *Albert Womah Mukong v. Cameroon* (459/1991), 21 July 1994, UN Doc. CCPR/C/51/D/458/1991, p.12. Under the Constitution, courts in South Africa, when interpreting the Bill of Rights, "must consider international law" (section 39(1)(b)).

18Section 4 of Act 64 of 1997 - "Regulations governing the detention of persons shall provide for such international humanitarian organisations as may be recognised by the Republic to have access to persons detained under such regulations in order to monitor the circumstances under which such persons are detained".

19Resolution 1997/38, para.20

20Report of the Special Rapporteur on torture, UN Doc. E/CN.4/1995/434, para.926(d)

21*Albert Womah Mukong v. Cameroon* (458/1991) 21 July 1994, UN Doc. CCPR/C/51/D/458/1991; *El-Megreisi v.Libyan Arab Jamahiriya* (440/1990) 23 March 1994, UN Doc. CCPR/C/50/D/440/1990.

up to 15 days' incommunicado detention at the discretion of the police to interrogate detainees suspected of terrorism-related offences, the same body stated that "incommunicado detention is conducive to torture and ... consequently this practice should be avoided", and that "urgent measures should be taken to strictly limit incommunicado detention".[22]

Subsection 6 of the Bill proposes some form of access which appears to mitigate the effects of the preceding clause 5. The subsection states that the detainee "shall be entitled":

> (a) to consult with a legal practitioner of his or her choice and such legal practitioner shall be entitled to be present when the detainee is interrogated;
> (b) to be visited in detention by his or her medical practitioner.

It has been widely recognised that prompt and regular access to a lawyer for a detainee is an important safeguard against torture, ill-treatment, coerced confessions and other abuses.[23] International standards accordingly favour giving detainees access to counsel without delay after arrest. The UN Human Rights Committee has stressed that "all persons arrested must have immediate access to counsel".[24] Principle 7 of the United Nations Basic Principles on the Role of Lawyers states that access to a lawyer must be granted "promptly".[25] The UN Special Rapporteur on torture has recommended that anyone who has been arrested "should be given access to legal counsel no later than 24 hours after the arrest".[26]

In light of the above standards, it is of concern that the proposed subsection 6(a) of the Bill does not explicitly state when the detainee can have access to his or her lawyer for consultations.

International standards are also clear on the right of any arrested or detained person, whether or not charged with a criminal offence, to confidential written and oral communications with a lawyer, although the latter may take place within sight of law enforcement officials for reasons of security.[27] Again, subsection 6(a) is silent on this particular right.

22Preliminary observations of the HRC: Peru, UN Doc. CCPR/C/79/Add.67, paras 18 and 24, 25 July 1996.

23UN Human Rights Committee General Comment 20, para.11; Report of the UN Special Rapporteur on torture (E/CN.4/1992/17), 17 December 1991, para. 284.

24Concluding Observations of the HRC: Georgia, UN Doc. CCPR/C/79/Add.74, 9 April 1997, para. 28.

25Less than 48 hours from the time of arrest or detention

26Report of the UN Special Rapporteur on torture, UN Doc. E/CN.4/1990/17, 18 December 1989, para.272.

27UN Human Rights Committee, General Comment 13, para.9; Principles 22 and 8 of the Basic Principles on the Role of Lawyers, Principle 18 of the UN Body of Principles; Para. 2(E) (1) of the African Commission Resolution on the Right to Recourse Procedures and Fair Trial.

The subsection does, however, include an important provision recognised in international standards as a safeguard, namely entitling the detainee's chosen legal adviser to be present when the detainee is interrogated. As noted by the UN Special Rapporteur on the independence of judges and lawyers:

> "it is desirable to have the presence of an attorney during police interrogations as an important safeguard to protect the rights of the accused. The absence of legal counsel gives rise to the potential for abuse...".[28]

The Rules for the Yugoslavia and Rwanda tribunals and the Rome Statute of the International Criminal Court require that suspects have the right to counsel when questioned by the Prosecutor.[29] However, in view of past and some current patterns of police interrogation practices in South Africa, it is difficult to be confident that this requirement would always be complied with, unless it were made absolutely clear that the occurrence of irregular interrogation sessions, i.e. where the chosen legal adviser was not present to guarantee the integrity of the process, would constitute grounds for a judge to order the release of the detainee.

Subsection 6(c) of the Bill would permit the detainee the right to communicate with and be visited by his or her spouse or partner, next of kin, and chosen religious counsellor, unless the National Director of Public Prosecutions (NDPP) or a DPP "shows on good cause to a judge why such communication or visit should be refused". This proviso should never amount to a generalised or arbitrary prohibition against such visits which would be contrary to international standards. Rule 92 of the UN Standard Minimum Rules, for instance, states that

> "An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution."

Principle 15 of the UN Body of Principles states that "...communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days."

Further concerns regarding the grounds for detention or extension of the period of detention

Section 16(7) of the Bill elaborates on the possible reasons for detaining a person or continuing their detention. The list contains some unusual items and indicates an underlying purpose behind section 16 of the Bill which distinguishes it from reasons

28Report on the Mission of the Special Rapporteur to the United Kingdom, UN Doc. E/CN.4/1998/39/add.4, para 47, 5 March 1998.

29Rule 42 of the Yugoslavia Rules, Rule 42 of the Rwanda Rules, Article 55 (2) (c) of the ICC Statute.

typically invoked by states as the basis for the suspension of certain fundamental rights in, say, a declared state of emergency. Subsection 7 would require that the detention or extension of the period of detention must be motivated by one or other of the following purposes:

> "(a) to compare fingerprints, do forensic tests and verify answers provided by the detainee;
> (b) to explore new avenues of interrogation;
> (c) through interrogation to determine accomplices;
> (d) to correlate information provided by the person in custody with relevant information provided by other persons in custody [detainees?];
> (e) to find and consult other witnesses identified through interrogation;
> (f) to hold an identification parade;
> (g) to obtain an interpreter and to continue interrogation by means of an interpreter;
> (h) to communicate with any other police services and agencies;
> (i) to evaluate documents which have to be translated; or
> (j) any other purpose relating to the investigation of the case approved by the judge."

These purposes relate to standard tasks undertaken by police or other investigation agencies in the course of investigating specific crimes. Taken together or separately as justification for detention or for extending the period of detention without being charged, they are neither necessary nor reasonable and may allow opportunity for the police to proceed inefficiently or in bad faith, while still having legal grounds to continue with the detention. Unless there are compelling reasons which would normally be reviewed by a bail court for keeping an arrested person in pre-trial custody,[30] police investigators would be expected to undertake these tasks without resorting to drastic procedures in relation to witnesses or others with information bearing on the case under investigation.

The underlying purpose for allowing prolonged detention without charge or trial under these circumstances must be, it seems, to place the detained person under psychological pressure to ensure "co-operation" with the investigation process. The likely result is to place in jeopardy the human rights of suspects or other individuals who may be assumed to have relevant information for the investigation.

During the South African Human Rights Commission seminar in Cape Town on 6 November 2000, the Deputy Minister of Safety and Security, Joe Matthews,

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30In the view of the UN Human Rights Committee, pre-trial detention must not only be lawful, but must also be necessary and reasonable in the circumstances. It has held that suspicion that a person has committed a crime is not sufficient to justify detention pending investigation and indictment, but may be necessary to prevent flight, avert interference with witnesses and other evidence, prevent the commission of other offences, or where the suspect poses a clear and serious risk to others which cannot be contained by less restrictive means. Where a person is held in detention pending trial, the authorities must keep the necessity of continuing such detention under regular review (*Van Alphen v. the Netherlands*, 305/1988, 23 July 1990, Report of the HRC Vol II(A/45/40), 1990, at 115, Article 9(3) of the ICCPR and, similarly, Principle 39 of the UN Body of Principles and Rule 6 of the UN Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules).

when responding to concerns about the proposed length of detention without charge, reportedly stated that "we are not in a state of emergency", rather it is that the police want the time for detention and interrogation to be extended beyond 48 hours.[31] Amnesty International is concerned, however, that the proposed legislation will grant the authorities what are in effect emergency powers, particularly in relation to detention without charge or trial, without any of the safeguards provided for under national and international law with a formal declaration of a state of emergency.[32] Under South Africa's international human rights obligations, derogations from certain guaranteed rights are only permitted in a state of emergency that has been declared in accordance with international standards.[33]

In conclusion, Amnesty International urges the sponsors of the Bill to take into account the above comments and ensure that the resulting legislation is consistent with South Africa's regional and international human rights obligations.

31See footnote 1 above.

32See section 37 of the Constitution and the State of Emergency Act of 1997 for the requirements under South African law, and "Fair trial rights during states of emergency" in Amnesty International, *Fair Trials Manual* (Pol 30/02/98, December 1998), chapter 31.

33See Article 4 of the ICCPR, which South Africa ratified in 1998, which includes the requirement for States to report in detail on measures taken when derogating from their obligations under the Covenant to other States parties through the intermediary of the UN Secretary General.