UGANDA

AMNESTY INTERNATIONAL MEMORANDUM ON THE REGULATION OF INTERCEPTION OF COMMUNICATIONS ACT, 2010

AMNESTY INTERNATIONAL

Index: AFR 59/016/2010 Amnesty International 14 December 2010

Amnesty International Publications

First published in 2010 by
Amnesty International Publications
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom
www.amnesty.org

Index AFR 59/016/2010
Original Language: English
Printed by Amnesty International, International Secretariat, United Kingdom

Amnesty International is a global movement of 2.8 million supporters, members and activists in more than 150 countries and territories who campaign to end grave abuses of human rights.

Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

We are independent of any government, political ideology, economic interest or religion and are funded mainly by our membership and public donations.

AMNESTY
INTERNATIONAL

INTRODUCTION

Amnesty International is concerned that the Regulation of Interception of Communications (RIC) Act, 2010 passed into law in July and in force since 3 September 2010 lacks adequate safeguards to ensure respect and protection of human rights, in particular the right to freedom of expression and the right to privacy, that may be threatened in the course of its implementation.

The RIC Act introduces far reaching government discretionary powers in surveillance and interception of electronic, telecommunications and postal communications between individuals, groups and organisations.

In 2008 Amnesty International raised a number of concerns about the then Regulation of Interception of Communications (RIC) Bill, published in May 2007[1]. This Bill was quickly passed into law in July, as the RIC Act, with a few changes. Despite the changes made to the RIC Bill when it was enacted into law, many of the concerns identified by Amnesty International regarding the potential negative human rights impact of the Bill remain in the RIC Act. Amnesty International is particularly concerned at the potential for violations to the right to freedom of expression and the right to privacy mainly because of:

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

The lack of independent oversight over the exercise of executive powers in relation to the Monitoring Centre -- an institution through which private communication companies are to enable interception of communication by the authorities;

The lack of clarity regarding whether judicial authorization of interception of communication extends to disclosure of protected information.

1 Uganda: Amnesty International concerns on the Regulation of Interception of Communications Bill, 2007 (AFR 59/005/2008).

1 THE RIGHT TO FREEDOM OF EXPRESSION AND THE RIGHT TO PRIVACY

Generally, interception of communications interferes with the right to freedom of expression and the right to privacy. However such interference should comply with the relevant legal standards under international and domestic human rights law.

The right to freedom of expression and the right to privacy are provided for under international human rights law and the Ugandan Constitution.[2] These rights are not absolute, but any restrictions placed on them must be in line with provisions in international legal instruments to which Uganda is party and the provisions of the Ugandan Constitution.[3] International human rights law and standards set out criteria which states must satisfy in order to ensure that any restrictions on the exercise of these rights are not arbitrary. In particular, restrictions can be imposed only for certain legitimate reasons, and must be demonstrably necessary for and proportionate to the achievement of their legitimate objective.[4] The RIC Act fails to meet these criteria mainly because it does not precisely define the grounds for interception and monitoring of communication, the criteria to be applied by the relevant designated judge authorizing interceptions under the RIC Act and the broad unchecked powers of the Minister in charge of security in relation to the Monitoring Centre – the facility through which the interception regime under the Act is to be implemented. These concerns are further discussed in the subsequent sections of this memorandum.

---

[2]Article 29 of the Ugandan Constitution provides for the right to freedom of expression. This right is also provided for under Article 19 of the UN International Covenant on Civil and Political Rights (ICCPR) and Article 9 of the African Charter on Human and Peoples Rights (ACHPR). Uganda is party to both treaties. Article 27 of the Ugandan Constitution guarantees the right to privacy which is also provided for under Article 17 of the ICCPR.

[3]See Uganda: Amnesty International concerns on the Regulation of Interception of Communications Bill, 2007 (AFR 59/005/2008) pp 5-8, available at < http://www.amnesty.org/en/library/asset/AFR59/005/2008/en/10bf8327-7507-11dd-8e5e-43ea85d15a69/afr590052008en.pdf >

[4]*Ibid.*

2 PROVISIONS ON, AND GROUNDS FOR THE AUTHORIZATION OF INTERCEPTION OF COMMUNICATION

One positive change between the RIC Bill and the RIC Act is with regard to accountability and independence of decisions to authorise interception of communication. The Bill proposed to place the decision to authorise interception of communication in the hands of an executive official, but the Act now places this authority in the hands of a judicial officer.[5] Section 5 (1) of the Act requires the specified state security officials to make an application before "a designated judge" to decide whether to issue a warrant authorising any interception of communication under the Act.

Amnesty International considers that judicial supervision is necessary to ensure an independent assessment of possible conflict between the exercise of individual human rights and state interests – in this instance in relation to interception and monitoring of communications.

Amnesty International is however concerned that the Act fails to provide more precise formulations of the specific circumstances and purposes for which interception of communication may be authorized by the judge. Section 5(1) (a) – (e) provides for the issuance of a warrant authorizing interception where there are, among other reasons, "reasonable grounds to believe that the gathering of information [is necessary] concerning an actual threat to national security or to any national economic interest…and that "the gathering of information [is necessary] concerning a potential threat to public safety, national security or national economic interest…"

Of these terms, only 'national security' is defined in section 1 of the Act, and even then, the definition is overly broad: The section provides that: "national security of Uganda includes matters relating to the existence, independence or safety of the State".

There are no explicit provisions or criteria in the RIC Act, for the judge to consider and apply before issuing a warrant for interception of communication. This failure means that the designated judge is not specifically required to consider the potential for human rights violations before issuing such a warrant and as a result increases the risk that warrants for interception could result in human rights violations. There is also the risk that warrants issued will not conform to international standards particularly with regards to the need to ensure that government action taken in relation to interception and monitoring of

[5]Under the RIC Bill, 2007, the decision to authorise interceptions was placed in the hands of the government Minister in charge of security.

communications is necessary and proportionate. The lack of precise formulations of the grounds and criteria for the designated judge to apply in authorizing interception leaves the RIC Act open to broad interpretation, and possibly abuse. This may lead to human rights violations, particularly in relation to the right to freedom of expression and the right to privacy.

It is also not clear how the provision regarding "the designated judge" referred to under section 5(1) of the Act would be brought into effect. The Act does not make further provisions about the terms of reference for the appointment of the designated judge – including whether the "designated judge" for authorization of warrants under the Act would be a single judge who is solely responsible for authorizing all applications, or whether this role would be carried out by a number of judges as part of their range of judicial duties. It is also not clear what the rules of procedure or the process before the designated judge(s) would be. The lack of clarity on the envisaged role of the designated judge (s) and the procedures under which the judge (s) will operate could negatively affect the efficacy of the envisaged judicial role as a safeguard against human rights violations in implementing the new law.

Amnesty International notes that under section 16 of the RIC Act, the Minister (in charge of security) may, by statutory instrument, make regulations for carrying into effect the provisions of the Act which may be read to extend to provisions regarding clarity on the regime for the designated judge (s). However, in light of the need to ensure the judicial independence of the designated judge (s), mandated with the decision to consider applications for warrants of interception by state security officials working under the control and direction of the government (including the Minister), Amnesty International is of the view that this provision (section 16) must not apply to the process for judicial authorization of interception.

3 NO OVERSIGHT OF MINISTERIAL POWERS WITH REGARDS TO THE MONITORING CENTRE

Section 3 of the Act provides for the establishment of "a Monitoring Centre" (the Centre) by the Minister responsible for security (the Minister) in consultation with other relevant Ministers. According to this section the Centre's purpose is to enable the interception of communications under the Act - it "shall be the sole facility through which authorised interceptions shall be effected" (section 3 (1) (a) & (4). It shall be equipped, operated, maintained and administered under the Minister's direction. Section 3(1) (c) grants the Minister power to acquire, install and maintain connections between telecommunication systems and the Centre.

Amnesty International is concerned that there is no oversight mechanism to ensure transparency and accountability of the exercise of the Minister's powers in relation to the Monitoring Centre.

Under section 8 of the Act communication service providers – including those dealing with postal and telecommunication systems – have a duty (failure for which they may incur an imprisonment term, fine or both) to enable interception of communication under the RIC Act. Section 8(1) (f) states that service providers have a duty to ensure that "intercepted communications are transmitted to the monitoring centre via fixed or switched connection as may be specified by the Minister". This section appears to contradict section 2 of the Act which obliges persons – including communication service providers not to allow interception of communication unless those affected have consented to the interception, or unless there is a judicial warrant issued under section 5. Amnesty International believes that the provision in section 8 (1) (f) envisaging interception through fixed or switched connection significantly increases the likelihood that communications will be intercepted without judicial warrants or consent of affected individuals. Once a fixed or switched connection is established, there seems to be no technical means to ensure a case-by-case examination of some communication or information to be intercepted.

Amnesty International considers it essential that there should be some kind of independent monitoring system in place to ensure that interceptions carried out through the Monitoring centre are strictly limited to those authorized by the terms of specific judicial warrants and/or the consent of affected individuals. Such a system should also ensure that the Monitoring Centre is used by the authorities in a way which complies with the law at all times.

4 NO CLARITY REGARDING JUDICIAL AUTHORIZATION FOR THE DISCLOSURE OF PROTECTED INFORMATION

Section 10 (1) of the Act provides that the specified state security officials may, by notice to a person they believe to have possession of protected information, impose a requirement to disclose this information. 'Protected information' is defined as "information encrypted by means of a key" (section 1). Under section 10, such notice to disclose protected information is applicable "subject to the provisions of the Act". This may be read to include the need for judicial authorization to intercept protected information. However section 10 does not make explicit reference to the need for judicial authorisation and therefore could be interpreted by the specified state security officials to infer that such judicial authorization is not necessary for the interception of protected information. The latter interpretation is particularly plausible

if section 10 (providing for the issuance of notice to disclose protected information) is contrasted with sections 4 and 6 of the Act (on interception of general/non-protected communications), and section 13 (on retention of postal articles), all of which make it clear that those forms of interception must be done on the basis of a judicial warrant issued under section 5 of the Act.

The lack of clarity in the wording of section 10 leaves open the possibility that state security officials may seek to intercept protected information separately from, and outside the scope of a judicial warrant with the potential violation of individual's human rights, particularly the right to freedom of expression and the right to privacy.

CONCLUSION

The RIC Act as it currently stands does not have adequate safeguards, which significantly increases the risk that that the rights to freedom of expression and privacy as well as other human rights will be violated. The broad and undefined basis for interception of communication also allows for possible intrusion into communications of individuals and professionals – such as journalists, human rights defenders and political dissidents engaged in legitimate activities and exercising their human rights, including freedom of expression and association.

In order to respect and protect human rights, Amnesty International urges the Ugandan government and members of Parliament to amend the RIC Act in order to incorporate effective safeguards and in particular to ensure:-

- That there are provisions which precisely define the grounds for, and the purposes of interception of communication and surveillance. These provisions should also specifically require that such measures should only be used where it is demonstrably necessary to achieve the intended purpose and the measure is proportionate to the sought objective ;

- That there is clarity on the regime for judicial authorization of interception, including putting in place clear procedures that deal with the appointment of the designated judge (s) and how the designated judge (s) would operate; and the criteria for the consideration of state applications for interception;

- That there is effective independent oversight regarding the exercise of the Ministerial powers over the working and operations of the Monitoring Centre in conducting interception of communications;

- That an independent oversight mechanism must ensure that the operations of the

Monitoring Centre are not carried out in a way that results in human rights violations;

- That there is explicit provision on the need for judicial authorization for the disclosure of protected information under section 10 of the Act;

- That any measures taken under the RIC Act should be in full compliance with Uganda's international human rights obligations and the Constitution and other relevant domestic law.

www.amnesty.org