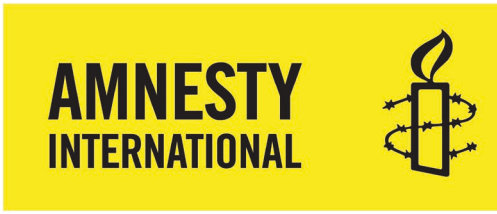

SUPPRESSION OF TERRORISM ACT

UNDERMINES HUMAN RIGHTS IN SWAZILAND

Amnesty International Publications

First published in 2009 by
Amnesty International Publications
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom
www.amnesty.org

Index: AFR 55/001/2009
Original Language: English
Printed by Amnesty International, International Secretariat, United Kingdom

Amnesty International is a global movement of 2.2 million people in more than 150 countries and territories, who campaign on 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 instruments. We research, campaign, advocate and mobilize to end abuses of human rights. Amnesty International is independent of any government, political ideology, economic interest or religion. Our work is largely financed by contributions from our membership and donations.

AMNESTY
INTERNATIONAL

About the International Bar Association
the global voice of the legal profession

The International Bar Association (IBA), established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of over 30,000 individual lawyers and more than 195 bar associations and law societies spanning all continents.

The IBA's main administrative office is in London with regional offices in São Paulo, Brazil; and in Dubai, United Arab Emirates.

Grouped into two divisions – the Legal Practice Division and the Public and Professional Interest Division – the IBA covers all practice areas and professional interests, providing members with access to leading experts and up-to-date information. Through the various committees of the divisions, the IBA enables an interchange of information and views as to laws, practices and professional responsibilities relating to the practice of law around the globe. Additionally, the IBA's high-quality publications and world-class conferences provide unrivalled professional development and network-building opportunities for international legal practitioners and professional associates.

International Bar Association
10th Floor,
1 Stephen Street,
London W1T 1AT
United Kingdom
Tel: + 44 (0) 207 691 6868
Fax: +44 (0) 207 691 6544
Website: http://www.ibanet.org

CONTENTS

INTRODUCTION

Amnesty International and the Human Rights Institute of the International Bar Association are gravely concerned that certain provisions in the Suppression of Terrorism Act No.3 of 2008 (here after referred to as the STA) threaten human rights, are inherently repressive, breach Swaziland's obligations under international and regional human rights law and the Swaziland Constitution, and are already leading to violations of the rights of freedom of expression, association and assembly. 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 was assented to by the Head of State, King Mswati III, on 7 August 2008, after a rapid passage through parliament.[1] It is being actively implemented apparently in response to the attempted bombing of the Lozitha Bridge on the night of 20 September 2008. The bomb exploded prematurely at the bridge, which is located about a kilometre from one of the residences of King Mswati. Two of the men involved in the incident, Musa Dlamini and Jack Govender, died at the scene. A third man, Amos Mbedzi, who was injured, was taken into police custody. According to reports a fourth man fled the scene after the explosion. A driver in a passing vehicle was also reported to have been injured.[2] On 26 September the King commented during an address to the United Nations General Assembly (UNGA) that "Swaziland joins the rest of the world in condemning all forms and acts of terrorism. We support efforts for the full implementation of the global counter-terrorism strategy in order to send out a clear message to all perpetrators of terrorism". The King then noted that the Parliament had "recently promulgated the Anti-Terrorism Act".[3]

---

[1] The Suppression of Terrorism Bill was tabled in parliament with a certificate of urgency. Consequently the bill was not subjected to the routine procedure of publication in the government gazette for 30 days to allow for public comment (Swazi Observer, 13 May 2008, "MPs want to consult on Terrorism Bill"; Times of Swaziland, 19 November 2008, "Ex-PM's broken promise"; Times of Swaziland, 21 November 2008, "Just Thinking: A.T.'s Law"). Civil Society Organizations have expressed concern about the lack of opportunity for public debate on the draft legislation, in view of its impact on human rights.

[2] At least two of the men involved in the incident appear to have been South African nationals. The injured man, Amos Mbedzi, a South African national, was taken into police custody and was reported to have made a statement to a magistrate. On 24 September he was charged in the Magistrate's Court with offences under the Sedition and Subversive Activities Act, the Arms and Ammunition Act and the Immigration Act and remanded in custody at Matsapha Maximum Security Prison. Subsequent remand hearings were conducted in the prison. He appears to have had family, legal and consular access. (South African Department of Foreign Affairs confirmation of consular access, letter to Amnesty International 17 December 2008; Times of Swaziland, 16 December 2008, "Drama as bomber's family turned back"; and Swazi Observer, 24 September 2008, "Lozitha Bomber Confesses; BBC News, 26 September 2008, "Tight security after Swazi Bombs"; IRIN News, 22 September 2008, "Swaziland: Bomb blast kills two"; The Weekender (South Africa), 6 December 2008, "Swazi claims of SA link to terrorism".)

[3] The Swazi Times, 27 September 2008, "King's Stern Warning to Terrorists".

In November Prime Minister B S Dlamini, who is also the Minister responsible for the police service and national security, was reported stating that "the issue of terrorism and crime was one of the mandates given to cabinet [newly appointed following the national elections on 19 September] by His Majesty". He urged the police to "deal with terrorist elements and their sympathisers firmly and effectively".[4] The new Minister of Justice and Constitutional Affairs, Mr Ndumiso Mamba, echoed the remarks of the King at the UNGA when he informed members of the police, the defence force and correctional services, during a workshop on the new law, that Swaziland's STA was backed by international instruments and conventions, which Swaziland signed and ratified, and reflected concern worldwide over acts of terrorism."[5]

Amnesty International and the Human Rights Institute of the International Bar Association recognize that states have a duty to protect all those under their jurisdiction and that in some situations this will require states adopting counter-terrorism legislative measures to protect the population from violent attacks. Attacks by armed groups, which are indiscriminate or which deliberately target civilians, constitute grave human rights abuses and can in certain circumstances also be crimes under international law.[6] States have an obligation to take measures to prevent and protect against attacks on civilians; to investigate such crimes; to bring to justice those responsible in fair proceedings that meet international human rights standards and without the imposition of the death penalty; and to ensure prompt and adequate reparation to victims.

There is at the same time however an absolute necessity for states to ensure that all anti-terrorism measures are implemented in accordance with international human rights law.[7]

---

[4] In Swazi Observer, 15 November 2008, "We'll smoke out terrorists, sympathisers"; Swazi Observer, 17 October 2008, "King Declares War on Terror"; Times of Swaziland, 17 October 2008, "His Majesty declares war on terrorists". Regarding the elections, the Commonwealth Expert Team which observed them were unable to conclude that the entire process was credible in view of the fact that "even under the new Constitution, Members of Parliament continue to have severely restricted powers, and political parties are denied formal recognition". (*Swaziland National Elections 19 September 2008: Report of the Commonwealth Expert Team*, Commonwealth Secretariat, London UK).

[5] In Swazi Observer, 25 November 2008, "Political parties not banned – Ndumiso"; Times of Swaziland, 25 November 2008, "Justice Minister Ndumiso defends Terrorism Act".

[6] See for instance in Amnesty International, *Afghanistan: All who are not friends, are enemies: Taleban abuses against civilians*, AI Index: ASA 11/001/2007, http://www.amnesty.org/en/library/info/ASA11/001/2007/en.

[7] Amnesty International, for instance, has noted this requirement for states in its comments on draft anti-terrorism laws in other countries, including South Africa (*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*, AI Index: AFR 53/04/00, http://www.amnesty.org/en/library/info/AFR53/004/2000/en); United Kingdom *(United Kingdom, Amnesty International's briefing on the draft Terrorism Bill 2005*, AI Index: EUR 45/038/2005, http://www.amnesty.org/en/library/info/EUR45/038/2005/en; *UK: Human rights: a broken promise*, AI Index: 45/0042006, http://www.amnesty.org/en/library/info/EUR45/004/2006/en.)

The UN Security Council, for instance, had, in a declaration in 2004 on the issue of combating terrorism, stated that: "States must ensure that any measure taken to combat terrorism comply with all their legal obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law".[8] These key requirements were emphasised again in the UN World Summit Outcome resolution adopted by the General Assembly in September 2005.[9] As noted by the then UN Secretary-General Kofi Annan that same year, *"Upholding human rights is not merely compatible with a successful counter-terrorism strategy. It is an essential element in it."*[10]

In September 2006 the UN General Assembly (UNGA) adopted a Global Counter-Terrorism Strategy in which all forms of terrorism were strongly condemned. This same document, which was unanimously adopted by the UNGA and in which Swaziland participated, recognized unequivocally that "measures to ensure the respect for human rights for all and the rule of law [are] the fundamental basis for the fight against terrorism".[11]

Finally in 2008, the then-UN High Commissioner for Human Rights, Louise Arbour, in her last report on the protection of human rights and fundamental freedoms while countering terrorism, stated:

> *"It has now become clear that upholding human rights is not at odds with confronting terrorism; on the contrary, the moral vision of human rights coupled with the nature of legal obligations to uphold these rights foster deep respect for the dignity of each person. National counter-terrorism strategies and international co-operation must include measures to prevent the spread of terrorism, and must also include measures to prevent ethnic, national or religious discrimination, political exclusion, and socio-economic marginalization, as well as measures to address impunity for human rights violations"* (emphasis added).[12]

This report analyses certain provisions of the STA in the context of Swaziland's international and regional human rights obligations. In summary though, Amnesty International and the Human Rights Institute of the International Bar Association have found that the STA is incompatible with Swaziland's international and regional human rights obligations on the

---

The International Bar Association has similarly noted this requirement with respect to countries such as Nepal: see *Nepal in Crisis: Justice Caught in the Cross-Fire* (September 2002), www.ibanet.org/images/downloads/hri/Report_Nepal_in_Crisis_-_Justice_Caught_in_the_Cross-fire_09.09.02.pdf.

[8] Attached to Security Council Resolution 1456 of 2004 in UN Doc. S/RES/1456 (2003), Annex, para.6.

[9] UN World Summit Declaration 2005, para.85, adopted by the Heads of State and Government gathered at the UN Headquarters from 14-16 September 2005, UN Doc. A/60/L.1, A/RES/60/1.

[10] Keynote address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security, 10 March 2005 (a.k.a. the Madrid meeting) delivered by the UN Secretary-General Kofi Annan.

[11] UN General Assembly resolution A/60/288, Annex, Plan of Action, part IV.

[12] Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (UN Doc. A/HRC/8/13, para.4).

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 limitations placed on the role of the courts in relation to review of the proscription of organizations;

- the provision allowing for up to seven days incommunicado detention without charge or trial, with the attendant risks of torture, or other cruel, inhuman or degrading treatment or punishment, 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.

The UN Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, in his 2006 report to the UN General Assembly, noted that the definition of 'terrorist act', and consequently of 'terrorist group' or 'member', is critical to assessing whether the limitations on freedoms of assembly, association and expression exceed what is permissible under international law.[13] He also expressed concern about undefined appeals by governments to "national security" as a "justification for

[13] UN Doc. A/61/267, 16 August 2006, paras.17-19, 23.

measures aimed at suppressing opposition or to justify repressive practices against" their populations.[14] Anti-terrorism laws must not be enacted nor applied "as smokescreens for hiding the true purpose of the limitations".[15]

The Government of Swaziland has already used its powers under the STA to act against groups which it claims fall within the definition in section 2 of a "terrorist group". On 14 November the Prime Minister announced that four organizations: the Peoples United Democratic Movement (PUDEMO), the Swaziland Youth Congress (SWAYOCO), the South African-based Swaziland Solidarity Network (SSN), and the Swaziland People's Liberation Army (Umbane), "have been declared specified entities", using his powers under section 28 of the STA, and "being satisfied that there is material to support a recommendation under this section".[16] While there may be a basis for police investigations into crimes allegedly committed by some members of these organizations, the indiscriminate effect of the proscription of these organizations was underscored by the reported comments of the Attorney-General Majahenkhaba Dlamini, at the time of the announcement. He warned members of the public that serious repercussions may befall them if they contravened the STA by associating themselves with the proscribed organizations. Those at risk of repercussions, he noted, included members of the organizations and any formation or group in the country which carried out activities in partnership with those organizations.[17]

Such warnings, combined with the sweeping and imprecise phrasing of some key provisions in the law along with heavy penalties for any breaches, have contributed to an atmosphere of uncertainty and of intimidation amongst a wide range of civil society organizations. This was evident in the decision taken by church and other civil society leaders on 28 November to cancel a planned meeting with members of the diplomatic community after the police insisted on being present during the meeting.[18] The Prime Minister is reported also to have advised diplomats not to be seen 'shaking hands with terrorists' or sympathisers.[19] On 3 December police arrived at a privately arranged workshop involving media workers and demanded access to sit in and monitor the proceedings. They were persuaded to withdraw, but the incident caused considerable apprehension amongst the participants.

As of December 2008 one person has been arrested and charged with contravening a provision of the STA. The president of PUDEMO, Mario Masuku, has been remanded in custody after being charged with contravening section 11 (1) (b) by "unlawfully and

---

[14] Ibid, para.20.

[15] Ibid.

[16] Legal Notice No.190 of 2008, Declaration of Certain Entities to be Specified, 14 November 2008, in Swaziland Government Gazette Extraordinary, Vol. XLVI, No. 144, November 27th, 2008; Swazi Observer, 15 November 2008, "PUDEMO, SWAYOCO, UMBANE, SSN BANNED" ; Times of Swaziland, 15 November 2008, "Political parties are terrorists – PM".

[17] Swazi Observer, Ibid.

[18] Media Release, Swaziland Coalition of Concerned Civic Organizations: Police force abandonment of meeting between diplomats and the Swazi civil society, 28.11.2008; Swazi Observer, 01 December 2008, "Cops stopped meeting with diplomats - Musa Hlope"; Times of Swaziland, 01 December 2008, "Police officers stop 'Nov 28' meeting".

[19] Swazi Observer, 5 December 2008, "PM warns diplomats against befriending terrorists".

knowingly" giving "support to the commission of a terrorist act" by making certain utterances on 27 September 2008 at the funeral for one of the men, Swazi lawyer Musa Dlamini, who died in the bombing incident.[20] During a further remand hearing on 8 December the prosecution submitted an amended charge sheet containing an alternate to the main charge, of contravening section 5 (1) of the 1938 Sedition and Subversive Activities Act.[21] It remains to be seen if this matter is brought to trial. Among others taken in for lengthy interrogations, Wandile Dludlu, the president of another one of the proscribed organizations SWAYOCO, was taken in for questioning by police on 27 November 2008. He is one of 15 other defendants charged in 2006 with treason. He and his co-accused, some of whom were subjected to torture and other ill-treatment during pre-trial detention, have still not been brought to trial on this charge.

In late November religious leaders issued an appeal to the authorities to address the issues of socio-economic marginalisation in the society and the need for dialogue, "to bring to the centre all those who have for a long time felt that they were at the margins of the political and economic life in the country".[22] The call echoed the words of the then-UN High Commissioner for Human Rights, Louise Arbour, who stated that national counter-terrorism strategies:

> *"… must <u>also</u> include measures to prevent ethnic, national or religious discrimination, political exclusion, and socio-economic marginalization, as well as measures to address impunity for human rights violations".*[23]

Her statement in turn echoes the UN General Assembly's Global Counter-Terrorism Strategy, which similarly commits governments to take measures against, among other things, "ethnic, national and religious discrimination, political exclusion" and "socio-economic marginalization".[24]

RECOMMENDATIONS TO THE GOVERNMENT OF SWAZILAND

Amnesty International and the Human Rights Institute of the International Bar Association recommend that:

---

[20] Charge sheet In the matter of: The King and Mario Masuku, in the High Court, Mbabane, Case No. 348/08.

[21] As amended by the Sedition and Subversive Activities (Amendment) Act No.8 of 1983.

[22] *Swaziland Political Situation – November 2008 Comment*, issued under the name of Louis Ncamiso Ndlovu, Bishop of the Diocese of Manzini, 19 November 2008. There had been no direct government response to this call as of December 2008.

[23] See full quote and citation above.

[24] UN General Assembly resolution A/60/288, Annex, Plan of Action, part I. Measures to address the conditions conducive to the spread of terrorism.

1. The Suppression of Terrorism Act No.3 of 2008 should 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 of the Swaziland Constitution (the detailed analysis below of key provisions of the STA indicate where changes are necessary);

2. Measures should be taken, with the technical and other assistance of the international community, properly to resource and regulate the pre-existing criminal justice system to ensure that it can effectively bring to justice suspected perpetrators of all acts of violence or incitement to violence, including those that may be characterised as 'terrorist', under the ordinary criminal law, while observing the requirements of due process, upholding fair trial standards and other human rights for all, and ensuring the independence of the judiciary;

3. If there remains a demonstrated need for counter-terrorism-specific legislation, its provisions should be redrafted to include only any measures necessary and proportionate to deal with those aspects that the effectively operating criminal justice system cannot address; these measures must also be consistent with Swaziland's human rights obligations and should be enacted only after wider public consultation and debate;

4. Swaziland should consider seeking further cooperation and engagement with the UN Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism and the possibility of requesting the advisory services and technical assistance of this mandate, to ensure that Swaziland complies with its international obligations for promotion and protection of human rights and fundamental freedoms, while implementing its other obligations under the UN Global Counter-Terrorism Strategy;

5. Appropriate assistance should be sought from relevant regional bodies, including the African Commission on Human and Peoples' Rights, the SADC Lawyers Association and the Southern Africa Litigation Centre;

6. 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 or other forms of ill-treatment, and end impunity for violations of these rights.

ANALYSIS OF CERTAIN PROVISIONS OF THE SUPPRESSION OF TERRORISM ACT IN LIGHT OF SWAZILAND'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

1. DEFINITION OF 'TERRORIST ACT': IMPERMISSIBLY BROAD/IMPRECISE

The definition of 'terrorist act' defines the scope of many of the substantive provisions of the STA. While particular provisions may have additional problems, the failure to restrict the definition of 'terrorist act' in the STA to the threatened or actual use of violence against civilians undermines the STA in its entirety. This renders many provisions incompatible with the international human rights obligations of Swaziland.[25]

These obligations were voluntarily entered into when Swaziland became a party to, among other human rights treaties, the International Covenant for Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the African Charter on Human and Peoples' Rights.

The UN Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, has repeatedly emphasised that definitions of terrorism must comply with the requirements of legality, that is, accessibility, precision, applicability to counter-terrorism alone, non-discrimination and non-retroactivity. For instance, in his 2006 Report to the UN General Assembly, he summarized as follows:

---

[25] 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).

"…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."[26] (emphasis added)

The Special Rapporteur cited in support of this definition, among others, the UN Security Council resolution 1566 (2004) and the UN Secretary-General's High-level Panel on Threats, Challenges and Change.[27]

He also stated that crimes not specifically described in the relevant international treaties may be criminalised as crimes of terror in national law only where it "is strictly necessary and provided that the definition or proscription complies with the requirements of legality…"[28] (emphasis added). On the need for precision in the definition, he notes that this includes a requirement that "the law is adequately accessible so that the individual has a proper indication of how the law limits his or her conduct; and the law is formulated with sufficient precision so that the individual can regulate his or her conduct."[29] The UN Human Rights Committee, assessing states' periodic reports under the International Covenant on Civil and Political Rights, has also highlighted that over-breadth and imprecision in the definition of 'terrorist acts' render their national laws incompatible with the ICCPR.[30]

With these standards in mind, several problems of over-breadth are immediately apparent in the definition of 'terrorist acts' in section 2 of the STA. These problems are caused by the failure in section 2 to meet the requirement of precision and the need to restrict crimes of terror to the acts identified by the Special Rapporteur. In particular:

- Section 2 subsection (1) of the definition has several problems:
    - The definition includes 'an act or omission which constitutes an offence under this Act'. This seemingly includes a range of conduct covered by overbroad definitions elsewhere in the act, without any apparent link to use of violence, and particularly use of violence for political or ideological ends

[26] 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.
[27] UN Doc. E/CN.4/2006/98, paras. 26-50.
[28] UN Doc. A/61/267, para. 44, referring to UN Doc.E/CN.4/2006/98, paras. 45-49, which in turn cite article 15 of the ICCPR in support.
[29] UN Doc. E/CN.4/2006/98, para. 46, referring to article 15 of the ICCPR. Similar provision is found in article 7 of the African Charter on Human and Peoples' Rights.
[30] E.g. Belgium, CCPR/CO/81/BEL, 12 August 2004; Iceland. CCPR/CO/83/ISL, 25 April 2005; Canada, CCPR/C/CAN/CO/5, 20 April 2006; Monaco, CCPR/C/MCO/CO/2, 28 October 2008.

(see below for further discussion on this point). This also creates potential for circular definitions, in that many of the offences under the STA in fact refer *back* to the definition of 'terrorist act' as an element of the offence.

- The definition includes the language "or within the scope of a counter-terrorism convention". This is in turn defined not only to include the actual treaties normally considered to constitute 'counter-terrorism conventions', but also "the United Nations Security Council Resolution 1373 and any other subsequent protocols that bind the Government". However Resolution 1373 was not drafted with the intention that its provisions would directly become descriptions of offences on which to base criminal prohibitions or prosecutions within national jurisdictions. Consequently Resolution 1373 did not attempt to describe elements of offences with the degree of precision required by international law. The catch-all phrase in section 2 of the STA, "any other subsequent protocols", gives scope for even less precision.

- Section 2 subsection (2) of the definition of a "terrorist act", setting out a second separate category of 'terrorist act', similarly is incompatible with international standards:

  - At least clauses (c) – "involves serious damage to property", (h) – "is designed or intended to disrupt any computer system or the provision of services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure", and (j) – "involves prejudice to national security or public safety", as well possibly as (i) – "is designed or intended to disrupt the provision of essential emergency services such as police, civil defence or medical services", do not meet the requirement that the means used to cause these outcomes, or the particular effects of the acts, must be "deadly, or otherwise involve serious violence against members of the general population…", so making subsection (2) as a whole overbroad.

  - Clause (j), in particular, by referring to seemingly any kind of "prejudice to national security" without any specification is wholly incompatible with international human rights standards.

  - The list of 'terrorist acts" in subsection (2) is not restricted to those acts where the necessary intent to intimidate and cause fear among the population is present. While it includes situations where the act "by its nature and context, may reasonably be regarded" as being intended to have those effects, this formulation creates the potential for conviction without proof of actual intent, which is not compatible with international human rights standards.

- The express inclusion of an exception for certain acts such as those "committed in pursuance of a protest, demonstration or stoppage of work" in any counter-terrorism legislation helps, in principle, to provide precision to a definition of 'terrorist act'. However, the particular provision which has been made in section 2 subsection (3) of the STA is *not* made to apply to section 2 subsection (1) of the definition of "terrorist act" and therefore its application to the many offences created by the STA is arbitrary, or at least unclear. This ambiguity is important also in the context of Swaziland's history of restrictions on the freedom of assembly and the use of excessive force and misuse of criminal charges against protestors.[31]

2. OTHER SECTIONS CONTAINING IMPERMISSIBLE BREADTH/IMPRECISION, WITH CONSEQUENT THREATS TO FUNDAMENTAL HUMAN RIGHTS

The UN Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has emphasized:

> *"That an act is criminal does not, by itself, make it a terrorist act.... Crimes not having the quality of terrorism [as earlier characterized by the Special Rapporteur], regardless of how serious, should not be the subject of counter-terrorist legislation. Nor should conduct that does not bear the quality of terrorism be the subject of counter-terrorism measures, even if undertaken by a person also suspected of terrorist crimes."*[32]

In addition to section 2, there are other individual offences defined elsewhere in the STA which criminalise conduct as "terrorist acts" regardless of whether they are linked to the use or threatened use of violence, particularly use of violence against persons for political or ideological ends. Despite this, these offences are all labelled as "terrorist acts" (as per section 2 subsection (1) of the definition of "terrorist act"), illustrating again the problem of over-breadth and legal imprecision in the STA. For instance, the law labels as a "terrorist act":

- Any time someone "intentionally and without lawful excuse, sends or communicates to another person or institution a false alarm or by any deed causes a false alarm or unwarranted panic". [section 5(3)b] This broad language would seem to cover even relatively minor misconduct such as someone pulling a fire alarm as a prank.

- Anytime someone "places a parcel, substance or thing in any place with the intention to induce…fear of …damage to property…or…submission to a demand

[31] Amnesty International, *Swaziland: Human rights at risk in a climate of political and legal uncertainty*, AI Index: AFR 55/004/2004, http://www.amnesty.org/en/library/info/AFR55/004/2004/en; International Bar Association, *Swaziland: Law, Custom and Politics,* (2003) www.ibanet.org/images/downloads/HRI/_swazilandreport.pdf.

[32] See UN Doc.E/CN.4/2006/98, paras. 39 and 47.

whether that demand is possible or impossible of being realized or being met." [section 5(3)(d)] While this provision requires intent, there is no requirement that the intent be related to the use of violence for political or ideological ends.

- Anytime someone "intentionally publishes or communicates, in whatever manner, false information about the existence of any danger…when that person does not believe in the existence of that thing or truthfulness of that publication or communication." [section 5(3)e] This could, for instance, even cover someone who simply makes false advertising claims about certain dangers or risks which could be counter-acted by a product being sold, in pursuit of fraudulent profits.

As pointed out by the UN Special Rapporteur, the issue is not whether such conduct may be outlawed - much of the conduct covered by the above may well be subject to criminalisation under ordinary criminal law (though even so, some of the definitions would seem overbroad or imprecise even for ordinary criminal law provisions) - but rather whether it may be labelled a "terrorist act" and addressed with the machinery of counter-terrorism measures.

Other problems in the STA arise when particular offences do not include the requirement of intent on the part of the person in question. Accordingly the STA labels as "terrorist acts" criminal conduct which has no intentional link to the use of violence against persons for political or ideological ends. For instance:

- Section 8(b) makes an offender of anyone who "possesses property…knowing that the property may be used, directly or indirectly, in whole or in part, for the purposes of … facilitating the commission of a terrorist act." To demonstrate the over-breadth of the framing of this offence (whether by standards of 'terrorist acts' or as a candidate for ordinary criminalisation), every major international airline possesses planes while knowing that any one of these planes may be used by others for the commission of a terrorist act. This section would make the very ownership of a fleet of planes a 'terrorist act'. Indeed, virtually anything owned by anyone could "be used, directly or indirectly, in whole or in part" for the commission of a terrorist act. In contrast to section 8(b), the more carefully-restricted section 17 addresses a similar issue in far more precise terms.

Similar problems of over-breadth and imprecision exist with, among others, section 7.

Another form of over-breadth is found in section 11, which criminalises "support" to "terrorist groups" without in any way defining the term "support" (other than to confirm that provision of false travel documents is a form of support). This over-breadth is particularly troubling when, as will be detailed later below, the problems with the process for designating 'terrorist groups' are considered.

The problem here does not just lie with the legal imprecision for purposes of criminal law. The sweeping nature of section 11 potentially excessively limits a wide range of human

rights, including: the right to legal assistance (for instance for a person charged under the STA);[33] freedom of thought, conscience and religion;[34] freedom of opinion and expression;[35] and freedom of association.[36]

Section 16 ('promotion and facilitation of terrorist acts in foreign states') also includes some conduct that is not related to violence against persons, and other conduct that is not related to political or ideological objectives. Thus, under section 16, doing anything to promote "unlawfully, destroying or damaging any property belonging to the lawful Government of" a foreign State, or giving money or doing other things that support such an act, constitutes an offence (which is then by operation of the definitions section of the STA, labelled a 'terrorist act'). This provision is so broadly drawn that it could include spray-painting the wall of a government building.

Such over-breadth and imprecision in the STA effectively gives public authorities a sweeping arbitrary discretion to label virtually anyone as a 'terrorist suspect' and to prosecute them for 'terrorist acts'. In requiring precision in the framing of such offences, international law and the fundamental principles of the rule of law are designed to protect individuals from such complete vulnerability to the arbitrary exercise of state power.

3. EXCESSIVE RESTRICTIONS ON THE RIGHT TO FREEDOM OF EXPRESSION

Several of these provisions in the STA, as already noted, threaten the enjoyment of the right to the freedom of expression, which is protected by, for example, Article 19 of the International Covenant on Civil and Political Rights (ICCPR). The right is protected too by Article 9 of the African Charter on Human and Peoples' Rights (African Charter). Swaziland accepted a specific legal obligation to respect, protect and fulfil the rights in the ICCPR when it acceded to this international human rights treaty in 2004. Article 19 states that:

> 19(1). Everyone shall have the right to hold opinions without interference.
> 19(2). Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The ICCPR allows restrictions on freedom of expression, including for the protection of national security or public health, but such restrictions are themselves expressly made subject to the requirements of demonstrable proportionality and necessity.[37]

---

[33] Under Article 14 of the ICCPR and Article 7 of the African Charter, to which Swaziland is party and obliged to uphold.
[34] Under Article 18 of the ICCPR and Article 8 of the African Charter.
[35] Under Article 19 of the ICCPR and Article 9 of the African Charter.
[36] Under Article 22 of the ICCPR and Article 10 of the African Charter.
[37] See also the UN Human Rights Committee, General Comment 10 (1983), and General Comment 29 (2001), para. 4.

> 19(3). The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Section 5(2) and at least most of section 5(3) of the STA appear to go beyond what can be justified as necessary and proportionate measures for counter-terrorism, in view of their sweeping breadth and lack of any connection to an intent to use or assist in the use of violence against persons for political or ideological ends. There are also other sections of the STA, including 11, 16(a) and 20(1)(c), which do not fulfil Swaziland's obligation to justify particular restrictive measures as being both necessary and proportionate under Article 19(3) of the ICCPR. These sections are each either themselves overbroad (Article 16(a)), or are linked to the overbroad and imprecise definition of 'terrorist act' (Article 11), or to the definition of 'terrorist group' which is not only itself linked to the definition of 'terrorist act' but also is subject to a process for designation which is incompatible with international law (Articles 11 and 20(1)(c)).

4. EXCESSIVE RESTRICTIONS ON THE RIGHTS TO FREEDOM OF ASSEMBLY AND ASSOCIATION

Sections 14, 16, 19, 20, 39, and the definition of "terrorist group" and "member of a terrorist group or organisation" in the STA all raise concerns regarding excessive restrictions on the rights to freedom of association and freedom of assembly. These rights are protected under Articles 21 and 22 of the ICCPR, as well as Articles 10 and 11 of the African Charter.

Sections 28, 29(4), and 39 not only have an impact on the rights to freedom of assembly and association, but also raise concerns about infringements to the rights of due process and fair hearing, which are protected under Article 14 of the ICCPR,[38] as well as Article 7 of the African Charter.

The UN Special Rapporteur dealt with the problem of excessive restrictions on the rights of freedom of assembly and association in his 2006 report to the UN General Assembly.[39] As he pointed out, the definition of 'terrorist acts' (and thereby 'terrorist group' and 'member' thereof) given in an anti-terrorism law is critical to assessing whether the restrictions on freedom of assembly and association exceed that which is permissible under international

[38] See also Human Rights Committee, General Comment 32 (2007), on the right to a fair hearing.
[39] UN Doc. A/61/267, 16 August 2006.

law.[40] On this very point, the failure in the STA properly to restrict the definition of 'terrorist acts' in the first place is one source of the problems with these later sections in the law. A separate important issue, also identified by the Special Rapporteur, is the invocation of such grounds, particularly undefined appeals to "national security", "as a justification for measures aimed at suppressing opposition or to justify repressive practices against its population."[41] Thus, not only must the laws themselves be properly framed, they must not have been enacted nor may they be applied "as smokescreens for hiding the true purpose of the limitations."[42]

Just as with the right to the freedom of expression, any restrictions on the rights to freedom of association and of assembly must be subject to the requirements of necessity and proportionality.[43] The Special Rapporteur has stated:

> *"The fact that an association calls for achieving through peaceful means ends that are contrary to the interest of the State is not sufficient to characterize an association as terrorist. …It is only when the association engages in or calls for the use of deadly or otherwise serious violence against persons, i.e. the tactics of terrorism, that it may be characterized as a terrorist group and its rights or existence limited and possibly subjected to the application of criminal law."*[44]

He has further stated:

> *"…the determination of whether the organization does qualify as terrorist and thus shall be proscribed must be made by an independent judicial body and there must always be a possibility to appeal a proscription decision to a judicial body. … States that decide to criminalize the individual belonging to a "terrorist organization" should only apply such provisions after the organization has been qualified as such by a judicial body."*[45]

Of particular significance to the STA's procedures for adding organisations to lists of proscribed organisations – for instance under sections 28 and 29 which allows for the declaration of "specified entities" (which under section 2 become included in the definition of 'terrorist group') - the Special Rapporteur again has emphasised the overarching importance of:

(i) legal precision and focus in the underlying definition of 'terrorist acts' and 'terrorist groups';
(ii) the principles of necessity and proportionality; and
(iii) the need for "proper procedural safeguards" for "confiscation of funds".[46]

---

[40] Ibid, paras. 17-19, 23.
[41] Ibid, para. 20.
[42] Ibid.
[43] Ibid. at para. 21-23, referring to articles 21, 22(2) of the ICCPR.
[44] Ibid., para. 24.
[45] Ibid., para. 26.
[46] Ibid., paras. 32-35.

With regard to criminalisation of membership in 'terrorist groups', he also points out that if the procedure for listing such groups does not apply criminal-system procedural safeguards (for instance as to standards of proof, openness of evidence), then the fact that an organisation has been placed on the list cannot be considered as evidence for the criminal prosecution of an individual for being a member of the group.[47] In other words, the state must prove to the criminal standard of proof (beyond reasonable doubt) not only that the person was a member of the group, but also that the group was in fact a 'terrorist group' applying the precise and focussed definition (that is, including a requirement that the group is engaged in or calls for use of violence against persons for political or ideological ends). Section 19(2) of the STA, however, reverses the onus of proof by requiring the accused person to "prove that the entity in respect of which the charge is brought was not a terrorist group."

The Special Rapporteur has stressed "the absolute necessity of ensuring that exemptions from the sanctions – in particular the freezing of funds – exist on humanitarian grounds, to ensure that non-governmental organizations and other non-profit organizations which have projects for the protection of basic economic or social rights can continue to function."[48] He elaborated particularly on the impact of counter-terrorism measures on charity work in his 2007 report to the UN Human Rights Council.[49] The STA, on the other hand, provides in section 30 that the Commissioner of Police may seize any property (widely defined in section 2 to mean any movable or immovable property, including financial assets) that he has reasonable grounds for believing has been used to commit an offence under the Act, "whether or not any proceedings have been instituted for a offence under this Act". While the Commissioner must then apply to a judge of the High Court for a detention order in respect of the property, this is done *ex parte* and only "as soon as practicable" for the Commissioner to do so (section 30(3)).

Moreover, section 39 provides that a certificate of revocation of registration as a charity may be issued where there are reasonable grounds to believe it "has made, is making, or is likely to make, available any resources, directly or indirectly, to a terrorist group." This certificate "shall not be subject to review or be restrained, prohibited, removed, set aside or otherwise dealt with" except as provided by the section (section 39(3)). That procedure involves the filing of a certificate in the High Court, where the evidence is heard in chambers and where on the request of the Minister it may be heard even in the absence of the charity (section 30(5)). The High Court's determination of the matter in this way "shall not be subject to appeal or review by any court" (section 30(6)).

In conclusion, regarding the STA's excessive restrictions on the rights to freedom of assembly and association, the key problems in the law include the following:

- The overbroad definition of 'terrorist act' renders the provisions on terrorist groups,

[47] Ibid., paras. 36-37.

[48] Ibid., para. 41.

[49] UN Doc. A/HRC/6/17, paras. 42-50.

membership in such groups, proscription of such groups, and charities, to be in turn excessively restrictive and therefore inconsistent with the international human rights obligations of Swaziland.

- Membership in a 'terrorist group' is criminalized by section 19 of the STA, without any requirement that the accused *knew* that the group was planning to use violence for political or ideological ends, or that the group was already proscribed as such by a judicial body. The allowed 'defence' for an accused set out in section 19(2) is narrower than a requirement of knowledge; furthermore it reverses the burden of proof by placing the onus on the accused to prove, among other things, that the "entity in respect of which the charge is brought was not a terrorist group" and is therefore not a substitute for properly restricting the definition of the crime in the STA.

- 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 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 remedy. The lack of an effective legal remedy is also evident in the limitation placed on the role of the courts. The Court that eventually reviews the decision to 'specify' the organisation has no actual power to overturn the decision. Rather it is entitled only to compel the Attorney-General to 'recommend to the Minister' the revocation of the decision. Of further concern is that under section 28(1), the Attorney-General would most likely have been the very official who made the original recommendation to the Minister for the proscription of the organization.[50]

[50] The further consequence of the lack of effective legal remedy could be the listing of members of proscribed organizations under the Security Council sanctions regime set up under SC resolutions 1267 (1999) and 1390 (2002). See *Kadi and Al Barakaat v Council of EU & Commission of the EC*, Joined Cases C-402/05 P and C-415/05 P, European Court of Justice, GC judgment of 3 September 2008, in which the Grand Chamber of the Court of Justice of the European Communities overturned two 2005 judgments, and annulled the effects on the applicants of two European Council Regulations which imposed sanctions on persons and organizations listed under the UNSC resolutions. The listing process has been criticised in general for denying the most basic safeguards for fair hearing and review. See Amnesty International, *Security and Human Rights: Counter-Terrorism and the United Nations*, AI Index: IOR 40/019/2008, pp.22.23, 47-49, , and the 2008 Report to the General Assembly by the UN Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/63/223, 6 August 2008, paras.16 and 45(a). See also *International Terrorism: Legal Challenges and Responses, A Report by the International Bar Association's Task Force on International Terrorism* (2003, Transnational Publishers), Chapter 4.

- Of further grave concern is 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 or 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.

- Under section 29, effect may be given to resolutions of the UN Security Council. The process for this is the Minister publishing in the Gazette "such provisions as may appear to the Minister to be necessary or expedient" after "consultation" (subsection 2). There is no requirement for Parliament to be involved, or even informed. In addition, subsection 4 provides that where the notice "makes provision to the effect that there are reasonable grounds to believe that an entity specified in the notice is engaged in terrorist activity that entity shall be deemed with effect from the date of the notice to have been declared a specified entity." Under section 2, specified entities are terrorist groups. No specific reasons need be given in the notice, which becomes law upon publication in the Gazette. Under section 28(3), the process for review of any such deemed declaration is the same process as for actual declarations under section 28, which is deficient for the reasons stated earlier.

5. LIBERTY AND SECURITY OF THE PERSON, THE RIGHT NOT TO BE SUBJECTED TO TORTURE AND THE RIGHT TO FAIR TRIAL

The STA contains other provisions which raise concerns about the protection of the right to liberty and security of the person, the right not to be subjected to torture and the right to fair trial. These include:

- Section 23, which provides for detention without charge or trial, after a police officer, with the written consent of the Attorney-General, has made an *ex parte* application to a Judge of the High Court. The possible grounds for granting the order are that the person is about to commit an offence under the STA or is interfering or likely to interfere with an investigation into an offence under the STA. In reaching his/her decision to grant the detention order, the Judge is not required to hear or solicit any evidence from any other party. While the section says that an extension order is subject to the requirement that "the maximum period of detention under that order shall not exceed seven (7) days", the section does not make clear whether further consecutive extension orders may be granted, nor does it on its face preclude a person simply being formally released and immediately re-detained. In either case section 23 appears to create provision for prolonged, indeed indefinite, detention without trial, constituting arbitrary detention prohibited

by international law.

- Section 23(5) requires the Judge to specify in the order the place and conditions of detention. However regarding conditions, this subsection only refers to access to a government doctor and to continuous video recording of the person in detention. There is no requirement that the place of detention is made known to the person's legal representative or relatives. The mandatory conditions also do not include access to independent legal assistance, independent medical assistance or for contact with relatives. There is no requirement that a police officer, who approaches the court for an extension of the initial order after 48 hours, must produce the detainee before the judge. The absence of these safeguards, along with the potential under section 23 for prolonged detention without charge or trial, creates the conditions for torture or other forms of ill-treatment.

- The possible circumstances and length of an "examination" under section 24 are not clear. This lack of clarity itself raises concerns about its compatibility with Swaziland's human rights obligations, particularly if the individual might be held in police detention in connection with an order under section 24(4)(b).

- Section 41(3) allows, on order of the Minister responsible for immigration affairs, for detention of a person whom the Minister has ordered to leave Swaziland; the manner of detention is entirely at the discretion of the Minister and appears not to be limited in any way as to length.

The STA itself does not address the need for crucial safeguards to protect the right to liberty and security of the person and to protect detainees against torture and other human rights violations. These safeguards are required, however, by the ICCPR and UN Convention against Torture and under other international human rights instruments.[51] They include:

- Prompt access to a judicial remedy to challenge the lawfulness of the detention.

- Being promptly brought physically before a judge or other independent judicial authority in any matter that is, in substance, of a criminal nature (as section 23(3) would seem to be).

- The right promptly to receive independent legal assistance, *independent* medical assistance, and to contact relatives.

---

[51] See for example, ICCPR, Articles 9 and 10; the UN Human Rights Committee, General Comments 8 (1982) and 20 (1992); the UN Committee against Torture, General Comment 2 (24 January 2008) on Article 2 of the UN Convention against Torture, para. 13; and Articles 6 and 7 of the African Charter; and African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted at 34th session (2003), DOC/OS(XXX)247, reprinted in 12 IHRR 1180 (2005), Principle M.

The UN Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has warned that "in the context of countering terrorism, national legislation is often borrowed and copied by other countries in a piecemeal way". He was making these comments in April 2007 when reporting on his visit to South Africa. He added that "if sections of the South African Counter-Terrorism Act are inserted into a national framework with less developed legal safeguards, it may indeed threaten human rights".[52] As noted below, other relevant constitutional or legislative provisions in Swaziland do not clearly cover all the rights and safeguards noted above in respect of persons detained under sections 23, 41(3) and 24(4) (b), and those provisions that do exist do not at present function in practice as reliable means of fully guaranteeing and protecting the applicable international rights and safeguards in the context of counter-terrorism measures.

The Constitution of the Kingdom of Swaziland Act (no.001 of 2005), which came into force in 2006, prohibits "torture or inhuman or degrading treatment of punishment" (Article 18(2)). This is echoed in the Directive Principles in the Constitution regarding the conduct of law enforcement (Article 57(3)). Article 38(e) requires that there be no derogation from this right, even during a period of declared public emergency. These guarantees in the Constitution are weakened, however, by the fact that this supreme law does not incorporate those safeguards intended to prevent torture and other forms of ill-treatment, and they are not adequately included in existing subsidiary law. Swaziland's obligations under the UN Convention against Torture, for instance, have not been incorporated into a law which specifically criminalises torture and other forms of ill-treatment and includes effective measures to prevent and punish these violations. At the same time there is a longstanding pattern of police torture and ill-treatment of crime suspects and political opponents and impunity for these crimes. Acts of torture currently may only be prosecuted as assault with intent to cause grievous bodily harm or attempted murder.

The Constitution allows for the deprivation of personal liberty under Article 16(1) (e) "upon reasonable suspicion of that person having committed, or being about to commit a criminal offence under the laws of Swaziland". Article 16(2) states that the arrested or detained person has to be informed of the reasons for the arrest or detention and of the right to a legal representative chosen by that person "as soon as reasonably practicable". It is unclear whether the government, and law enforcement institutions in particular, will consistently interpret these provisions to apply to all detentions under the new legislation. Further, international human rights standards require that the person is informed immediately of the reasons for the arrest or detention. Article 9(2) of the ICCPR, for instance, requires that "anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him". All persons are entitled to have the assistance of a legal counsel of their choice, to protect and establish their rights and defend them in all stages of criminal proceedings, including interrogations, and must be informed of this right immediately upon arrest.[53] The language in the Constitution, "as soon

[52] UN Press Release, UN Special Rapporteur on Human Rights and Counter Terrorism Issues Preliminary Findings on Visit to South Africa, 26 April 2007.

[53] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle M.2;

as reasonably practicable", leaves open the risk, particularly in the counter-terrorism context, that it will be applied in a manner inconsistent with Swaziland's international human rights obligations.

Article 16(6) (a) of the Constitution provides that, where requested by the arrested or detained person, the next-of-kin shall be informed "as soon as practicable" of the arrest/detention and the place where the person is held. Again the standard in the Constitution is weaker than that required under international human rights standards, where notification to family "or other appropriate persons of his choice" must take place immediately, or at least without delay. This notification includes where the detainee is transferred to another facility.[54] Again, the variation in language leaves it unclear whether the Constitutional provision will be interpreted and applied in a manner that guarantees compliance with international human rights obligations, with a particular risk of violations in the counter-terrorism context.

Subsections 6(b) and 6(c) of the Constitution allow for "reasonable access" for the detained person to next-of-kin, legal representative and personal doctor (at that person's request and cost). Such access is also required by international human rights instruments.[55] The effectiveness in practice of these provisions [as well as similar protections under common law], however, depends on full respect of the rights mentioned in the preceding paragraphs.

Further, the failure to expressly acknowledge the above constitutional rights when addressing similar issues in section 23(5) of the STA also raises concerns about consistency with Swaziland's international obligations, particularly in the absence of an immediate and binding interpretation that any Court acting under section 23(5) is required to include such provisions in its order.

Finally, under international human rights standards intended to safeguard the right to liberty and freedom from arbitrary arrest or detention, and in order to prevent violations of other fundamental human rights, all forms of detention or imprisonment must be subject to the effective control of a judicial authority or an officer authorized to exercise judicial power and

---

Principle 5 of the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990; Principles 17(1) and 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, General Assembly resolution 43/173 of 9 December 1988. See also article 55(2) of the Rome Statute of the International Criminal Court.

[54] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle M.2; Rule 92 of the UN Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; Principles 16 (1) and 16(4) of the UN Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment.

[55] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle M.2; Rule 92 of the UN Standard Minimum Rules for the Treatment of Prisoners; Principle 19 of the UN Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment.

who is fully independent.[56] Article 9(3) of the ICCPR, for instance, requires that anyone arrested or detained "shall be brought promptly before a judge or other officer authorized by law to exercise judicial power…" In a situation where a court is not officially informed of a detention or is informed only after a significant delay, the rights of a detainee are not protected.[57]

Under Article 16(3) of the Constitution, the arrested or detained person "shall, unless sooner released, be brought without undue delay before a court." Article 16(4) requires that where the person is not brought before a court within 48 hours, "the burden of proving that the provisions of subsection (3) have been complied with shall rest upon any person alleging the compliance". The effectiveness of these provisions to protect the rights of the detained person would be critically dependent on the detainee's access to a lawyer to challenge any delay in access to the courts. It remains a concern that, as already noted, the relevant guarantees under Articles 16(2) and 16(6) (a) are weakly expressed and fall below international human rights standards.

In conclusion, it would appear that the failure of the STA to address the need for crucial safeguards is a fundamental problem, to the extent that the gap is not filled by other constitutional or legislative provisions that can be relied upon in practice to guarantee these safeguards for persons detained under sections 23, 41(3) and 24(4)(b) of the STA.[58] Accordingly the application of these provisions of the STA could result in further violations of the international human rights obligations of Swaziland, over and beyond the other problems discussed earlier.

6. OBLIGATIONS AGAINST FORCIBLE RETURN WHERE THERE IS A RISK OF PERSECUTION (PRINCIPLE OF *NON-REFOULEMENT*)

Section 41 of the STA provides for the power to prevent entry to or to order removal from

---

[56] See for instance, Principle 4 of the UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment; Article 14(1) of the ICCPR, Articles 7(1) and 26 of the African Charter; UN Human Rights Committee, *Gonzalez del Rio v. Peru*, (263/1987), 28 October 1992, Report of the HRC, vol. II, (A/48/40), 1933, at 20; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principles A.4 and M.

[57] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle M.2(h). See also Inter-American Commission, Second Report on the Human Rights Situation in Suriname, OEA/Ser.I./V/II.66,doc.21 rev.1,1985, at 23.

[58] In October 2003 Amnesty International raised concerns about the weak formulation of the rights guaranteed in the Bill of Rights of the then draft constitution (see Memorandum to the Constitution Drafting Committee in Appendix A of *Swaziland: Human rights at risk in a climate of political and legal uncertainty*, AI Index: AFR 55/004/2004, pp.70-91, http://www.amnesty.org/en/library/info/AFR55/004/2004/en). Unfortunately, the weaknesses remained in the final version assented to by the King on 26 July 2005.

Swaziland. It does not mention the obligation, under Article 3 of the UN Convention against Torture not to send a person to a place where there are substantial grounds to believe he or she would face a real risk of torture, or the similar obligation under Article 7 of the ICCPR (and Article 5 of the African Charter) as regards torture or cruel, inhuman or degrading treatment. These obligations apply to all persons, including those to whom refugee status is denied. In all such situations there must be an independent, fair and effective individualized procedure in place to evaluate any claimed risk of torture or other ill-treatment before any removal is actually carried out.[59] Unless it is clear that other overriding constitutional or legislative provisions guarantee these rights and procedures in respect of persons affected by section 41, including those affected by section 42, then these aspects of the STA appear to be inconsistent with the international obligations of Swaziland.

ENDS

---

[59] See, e.g. UN Human Rights Committee, *Alzery v Sweden*, CCPR/C/88/D/1416/2005, 10 November 2006, para. 11.8; *Maksudov and others v. Kyrgyzstan*, CCPR/C/93/D/1461,1462,1476& 1477/2006, 31 July 2008, para. 12.7. Committee against Torture, *Agiza v Sweden*, CAT/C/34/D/233/2003, 20 May 2005, paras. 13.7-13.8. On the risks of human rights violations through violations of the principle of *non-refoulement* in the context of the 'war on terror', see Amnesty International, *Security and Human Rights: Counter-Terrorism and the United Nations*, AI Index: IOR 40/019/2008, pp.34-35.

Amnesty International
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW

www.amnesty.org

AMNESTY
INTERNATIONAL