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Kenya

Memorandum to the Kenyan Government on the Suppression of Terrorism Bill 2003

Introduction

The Kenyan Government is presently gathering suggestions and comments on the Suppression of Terrorism Bill 2003 following widely expressed concerns and strong criticism that it contained measures that would impact negatively on human rights. The Bill, which was initially published last year, has now been shelved, pending presentation of a revised version to Parliament.

Amnesty International expressed concerns regarding the Suppression of Terrorism Bill 2003[1]. The organisation welcomes the opportunity to add its voice to civil society in Kenya to further highlight some of the provisions in the Bill which need to be reviewed as they contravene human rights treaties to which Kenya is a party, as well as Kenyan law, and may consequently result in violations of human rights. Amnesty International welcomes the opportunity given to civil society to express their views on the Bill and is aware that public debate is on-going[2].

As an international human rights organization, Amnesty International's concerns in this memorandum focus primarily on the proposed legislation's incompatibility with international human rights standards, particularly the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR), Kenya being a party to both treaties[3], and also to a range of human rights non-treaty standards which together constitute an international framework for the protection of human rights.

Many of the rights in the ICCPR and the ACHPR are reflected in the Constitution of Kenya. The Constitution guarantees the respect of the fundamental rights of every citizen in accordance with the law. Amnesty International is of the view that the proposed legislation, in its present form, would suspend certain safeguards that protect the rights of those prosecuted or detained under it, and therefore violate fundamental rights protected under the Kenyan Constitution, as well as international human rights standards. The proposed legislation should also take into consideration the on-going debates around enhancing the Bill of Rights in the constitutional review process.

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[1] Amnesty International, Annual Report 2004, Kenya Entry.
[2] Amnesty International met with several human rights NGOs, activists, faith-based organisations during a visit from 12 to 27 May, 2004 in Nairobi, Mombasa and Lamu.
[3] Kenya became a party to the ICCPR on 23 March 1976 and to the ACHPR on 23 January 1992.

Amnesty International takes this opportunity to welcome the decision by the Government of Kenya not to impose the death penalty for offences listed in the Bill. By so doing the government demonstrates its commitment to abolish the death penalty and to respect the fundamental right to life of Kenyan citizens. Amnesty International urges the Government to translate this commitment into reality by taking positive steps to effectively abolish the death penalty in law.

Amnesty International acknowledges that governments have a right and duty to protect the rights and safety of people within their territory. The organisation shares concerns about abuses of human rights by non-state actors and has repeatedly called on armed groups to abide by the principle of protection of civilians. However, any legislation or actions taken towards these ends must be in full conformity with international human rights standards.

Amnesty International is concerned that the Suppression of Terrorism Bill could encourage the creation of a two-tier justice system, providing the legal framework of arbitrary arrests, illegal detention, searches and a flawed judicial process. The creation of a distinct system of arrests, detention and prosecution relating to "terrorism" may violate the right of all people to be equal before the courts.[4] Amnesty International takes no position on the matter of rendering into positive law Kenya's obligations under international conventions relating to "terrorism".

Amnesty International is particularly concerned about the following:

- the vague and broad definition of "terrorism" and "terrorist" act or action;
- extensive powers given to the police and customs officers to stop search and seize, detain and arrest;
- incommunicado detention and the denial of the right to legal representation during interrogation;
- making detention the rule and bail the exception, thus impacting on the right to personal liberty;
- immunity of state officials from prosecution or civil suits under the Bill;
- curtailing of the freedoms of association and expression;
- the crime of incitement to commit a "terrorist" act wholly or partly outside Kenya;
- lack of safeguards and due process in decisions to extradite.

[4] Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

1. Definition

The proposed Bill would allow the authorities to use extraordinary measures against individuals perceived or suspected of having committed crimes, being involved in extreme acts of violence against people and directed to particular ends. In this regard it would be crucial that what constitutes "terrorism" be unambiguous and the elements of the offence involved in a "terrorist" act or action be precisely and clearly formulated.[5]

The current definitions of both terms are too widely drawn and could encompass legitimate activities, as for instance, peaceful protests marches or rallies in the context of the reforms presently being discussed in Kenya (constitutional or judicial reforms or the fight against corruption). "Act" and "action" include omission, according to the Bill.

The definition of the crime of "terrorism" and "terrorist" acts and actions in vague and imprecise terms violate the principle of legality for crimes, *nulllum crimen sine lege*. This universally recognised principle, particularly in human rights treaties[6], prescribes that the legal definitions of criminal offences must be strictly construed and exempt from all ambiguity.

If the definition remains vaguely or too widely worded, the provisions of the law will inevitably be open to abuse or used for repressive purposes. The need to provide for greater clarity in the definition is also underscored by the stringent

[5] Clause 3(1) In this Act, "terrorism" means the use or threat of action where-
(a) the action used or threatened –
(i) involves serious violence against a person;
(ii) involves serious damage to property;
(iii) endangers the life of any person other than the person committing the action;
(iv) creates a serious risk to the health or safety of the public or a section of the public; or
(v) is designed seriously to interfere with or seriously to disrupt an electronic system;
(b) the use or threat is designed to influence the government or to intimidate the public or a section of the public; and
(c) the use or threat is made for the purpose of advancing a political, religious or ideological cause;
Provided that the use or threat of action which involves the use of-
(i) firearms or explosives;
(ii) chemical, biological, radiological or nuclear weapons; or
(iii) weapons of mass destruction in any form,
shall be deemed to constitute terrorism whether or not paragraph (b) is satisfied.
(2) In this section –
(a) "action" includes action outside Kenya;
(b) a reference to any person or to property is a reference to any person, or to property, wherever situated;
(c) a reference to the public includes a reference to the public of a country other than Kenya; and
(d) "the government" means the government of Kenya or of a country other than Kenya.

[6] Article 15 of the ICCPR and Article 17 of the ACHPR.

sanctions, such as life or lengthy terms of imprisonments and heavy fines for contraventions, as well as the extra-territorial jurisdiction in the proposed Bill. The lack of a clear definition gives further cause for concern because the decision to institute prosecution for such offences could be seen as politically motivated.

2. Stop, Search and Seizure

In circumstances where investigations are being carried out in "cases of urgency", a "police officer of or above the rank of inspector", if he has reason to suspect, "with the assistance of such other members of the police force" can enter and search any premises or place, search any person or vehicle found on any premises or place, stop, board and search any vessel, aircraft or vehicle, seize remove and detain anything which appears to be or contain evidence of the commission of a "terrorist action", without a warrant obtained from a judge of the High Court.[7]

Amnesty International is concerned about possible abuses in the exercise of such extensive powers while investigators may term every situation as an "emergency", thus doing away with judicial oversight. There is also a risk that searches could be carried out in an arbitrary or discriminatory manner.

Further stop and search powers are conferred to a member of the police force, customs officer or "other officer".[8] The uncertainty of who the "other officer" could be in reality creates the possibility of abuse. The term should either be clarified or deleted, as penalties are severe. For example, anybody who fails to stop a vehicle shall be liable on conviction to imprisonment for a term not exceeding two year or to a fine, or both.[9]

Clause 21 provides for the seizure and detention of "terrorist" cash and here again, wide latitude is given to "an authorized officer", who may seize the cash before and only afterwards, "as soon as is reasonably practicable", make an ex parte application to the High Court for a detention order. This provision, as well as all others relating to "terrorist" property, needs to be viewed in light of Article 14 of the ACHPR, which stipulates that the right to property shall be guaranteed and provides for specific limitations of such a right.

[7] Clause 26 of the Suppression of Terrorism Bill.
[8] Clause 41 of the Bill.
[9] Clause 41(3) of the Bill.

3. Arrest, Access and Incommunicado Detention

The Bill provides that a police officer of or above the rank of inspector, may … direct that the person arrested be detained in police custody for a period not exceeding thirty-six hours from his arrest, without having access to any person other than a police officer of or above the rank of inspector or a government medical officer …[10]

Basing itself on its reports of abuses committed by law enforcement officials in Kenya, Amnesty International is seriously concerned that the introduction of the 36-hour incommunicado detention carries grave risk of repetition of patterns of human rights violations. One of the first actions taken by the present government when it came into power in December 2002 was to open up the Nyayo House "torture chambers" as a gesture of recognition of the human rights violations, including torture and unlawful detention, meted out to numerous Kenyan citizens in the past.

Torture still occurs in Kenya, despite its prohibition by the Constitution of Kenya and despite the enactment of the Criminal Law Amendment Act in July last year, amending the Penal Code, the Criminal Procedure Code and the Evidence Act to prohibit the use of confession statements or admissions of guilt as evidence in criminal proceedings, if made under duress.

Provisions in the proposed Suppression of Terrorism Bill are drastic and would amount to legitimising incommunicado detention, which can increase the risk of torture, ill-treatment and "disappearances". International standards provide that restrictions and delays in granting detainees access to the outside world are permitted only in very exceptional circumstances and even 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 in itself constitute a form of cruel, inhuman or degrading treatment."*[11] It is incompatible and inconsistent with the right to personal liberty.

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."*[12]

The United Nations Human Rights Committee, the treaty body monitoring compliance with the ICCPR, has found that the practice of incommunicado detention may

[10] Clause 30 of the Bill. Emphasis ours.
[11] Resolution 1997/38, para. 20
[12] Report of the Special Rapporteur on torture, UN Doc. E/CN.4/1995/434, para. 926(d)

violate Article 7 of the ICCPR (prohibiting torture and ill-treatment) or Article 10 of the ICCPR (safeguards for people deprived of their liberty).[13] In its examination of certain laws allowing 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 "urgent measures should be taken to strictly limit incommunicado detention."[14]

The Suppression of Terrorism Bill only allows access by a police officer of or above the rank of inspector or a government medical officer during the period of incommunicado detention, in an attempt to mitigate the effect of such a mode of detention. However, this provision falls short of internationally recognised human rights standards and principles.

The Bill does not make provision for access to counsel during the 36-hour incommunicado detention period and such a measure is arrived at "if the police officer has reasonable grounds to believe that exercise of the right to consult a legal adviser … will lead to interference with or harm to evidence connected with an offence under Parts II, III and IV[15], or to interference with, or physical injury to, other persons; … will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or will hinder the tracking of, search for or seizure of terrorist property."[16]

While the Bill gives reasons as to the "why" of this provision, as above-stated, it gives no indication as to what will happen to the detainee and provides no safeguards from any potential abuse during this period of incommunicado detention. This draconian provision is in breach of fair trial guarantees enshrined in the ICCPR and the ACHPR,[17] as well as provisions relating to liberty and security of the person.

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.[18] 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".[19] Principle 7 of the United Nations Basic Principles on the Role of Lawyers states that access to a lawyer must be granted "promptly".

[13] *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
[14] Preliminary observations of the HRC: Peru, UN Doc.CCPR/C/79/Add.67, paras 18 and 24, 25 July 1996.
[15] Part II – Terrorist Offences; Part III – Declared Terrorist Organisations; Part IV – Terrorist Property.
[16] Clause 30(2)(a), (b) and (c) of the Bill
[17] More specifically in Article 14(3)(b) ICCPR and Article 7(1)(c) of the ACHPR.
[18] UN 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
[19] Concluding Observations of the HRC: Georgia, UN Doc. CCPR/C/79/Add.74, 9 April 1997, para. 28.

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".[20]

International standards are 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 the sight of law enforcement officials for reasons of security.[21] The provisions in the Bill are in breach of an important prerequisite in international standards as a safeguard, namely the detainee's chosen legal counsel 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 of abuse…"[22]

During its recent visit to Kenya to investigate the human rights impact on the "war on terror" Amnesty International interviewed a suspect who indicated that he was kept incommunicado for 48 days. Amnesty International strongly urges the Kenyan Government not to adopt such a measure. The potential of abuse is real. Besides, incommunicado detention is not compatible with Kenya's obligations under international treaties to which it is a party.

As indicated above, the provision also appears to be incompatible and inconsistent with the right to personal liberty. The essential corollary to the right to liberty is protection against arbitrary or unlawful detention. Both Article 9 of the ICCPR and Article 6 of the ACHPR guarantee to everyone the right to liberty and security of person. According to Article 9 of the ICCPR, "*No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law*." The Human Rights Committee has stated that "[p]re-trial detention should be an exception and as short as possible"[23].

[20] Report of the UN Special Rapporteur on torture, UN Doc.E/CN.4/1990//17, 18 December 1989, para. 272.
[21] UN Human Rights Committee, General Comment 13, para.9; Principles 22 and 8 of the Basic Principles on the Role of Lawyers; Para. 2(E) of the African Commission Resolution on the Right to Recourse Procedures and Fair Trial.
[22] Report 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
[23] Human Rights Committee General Comment 8, para.3

4. Review of detention and bail

Within the "powers of investigation in cases of urgency", the police officer can arrest and detain any person whom he "reasonably suspects of having committed or of being about to commit an offence". [24]

It is not clear from the Bill, what happens in such circumstances. Would the extraordinary provisions of incommunicado detention then apply? If this were to be the case, serious violations of the right to liberty and security of the person could ensue.

International human rights standards and mechanisms require supervision of detention by an independent, preferably judicial body. The African Commission on Human and People's Rights, charged with monitoring implementation and compliance with the ACHPR, held that the failure to allow a prominent political figure detained for several years without charge or trial to challenge the violation of his right to liberty before a court violated Article 7(1) (a) of the African Charter.[25]

Article 9(4) of the ICCPR provides that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Principle 4 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment requires that detention must be "ordered by, or be subject to the effective control of, a judicial or other authority." "Other authority" is defined as a body "whose status and tenure shall afford the strongest possible guarantees of competence, impartiality and independence."

Amnesty International is concerned at the absence of an effective procedure for review of the lawfulness of detention. There is a need to ensure sufficient independent supervision of detention as envisaged by international standards.

The Bill is also totally silent on the issue of bail for offences under it. Amnesty International is aware that under Kenyan law, certain offences are subject to bail while others are not. There is no indication regarding offences such as incitement to commit offences outside Kenya or wearing of uniforms.[26] The ICCPR provides that "it shall not be the general

[24] Clause 26(e) of the Bill.
[25] *Krischna Achutan (on behalf of Aleke Banda), Amnesty International on behalf of Orton and Vera Chirwa, Amnesty International on behalf of Orton and Vera Chirwa v. Malawi,* (64/92, 68/92, 78/92 respectively), 8th Annual Activity Report of the African Commission on Human and Peoples' Rights, 1994-1995, ACHPR/RPT/8th/Rev.I
[26] Refer to relevant passages later in the present document.

rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceeding."[27]

5. Immunity from criminal or civil proceedings and the right to redress

Clause 40(3) of the Bill provides for immunity from criminal or civil proceedings to "a member of the police force, customs officer or other officer … [who] by the use of force, caused injury or death to any person or damage to or loss of any property".

Amnesty International has repeatedly voiced its concerns about impunity for human rights violations in Kenya. This provision in the proposed legislation may in effect provide blanket impunity for killing, torturing or maiming or destruction of property, not only by police officers and customs officers but also by undefined "other officers" who may be involved in the arrest and detention process. The possibility of mistake and arbitrary acts remains real.

Article 1 of the ACHPR provides that states parties *"shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them*." According to Article 2, "*every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.*"

The proposed clause is in contradiction with those obligations that Kenya undertook to express into law on its adherence to the ACHPR. In fact, the clause, if enacted, will breach clear principles laid down in the Charter by enacting a law that will, in effect, remove the right to redress under the Bill.

Furthermore, this provision is a clear violation of Article 2(3) of the ICCPR, which provides that each State Party undertakes
(a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."

Amnesty International calls for removal from the Bill of all provisions, which would perpetuate a culture of impunity in Kenya and would curtail the right of redress for the injury, loss of life, damage to property, as well as compensation for victims of unlawful arrest or detention[28].

[27] Article 9(3) of the ICCPR.
[28] As provided for by Article 9(5) of the ICCPR.

6. "Terrorist" Organizations and Membership Thereof – Freedom of Association

An organization is "declared a terrorist organization" if the Minister responsible for matters of security "believes that it is concerned in terrorism".[29] The criteria for reaching a decision regarding an organization's involvement in "terrorism" include whether the organization promotes or encourages "terrorism"; or "is otherwise concerned in terrorism". Again, these criteria are vague and imprecise that the serious possibility of arbitrary and political decisions and conclusions cannot be discarded.

The executive arm of government is being given wide powers of decision on a fundamental right issue without any checks and balances, contrary to the concept of the rule of law. No right of review of the Minister's decision is provided for in the Bill. Aggrieved members of any organization proscribed by the Minister should be able to challenge the decision in a court of law.

Clause 10 of the Bill makes it an offence to become a member of a "declared terrorist organisation". This offence, as drafted, 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. This provision is tenuous, even if the Bill provides as a defence that "the organisation was not a declared a "terrorist" organisation on the last (or only) occasion on which he became a member or began to profess to be a member".[30]

Another far-reaching provision criminalizes the setting up of a meeting or managing a meeting addressed by a person who belongs or professes to belong to a declared "terrorist" organization, and this regardless of whether it is a meeting of three or more persons and whether or not the public are admitted.[31]

The proposed legislation provides for a term of imprisonment not exceeding ten years or to a fine, or both upon conviction for these offences. All these provisions infringe Article 22 of the ICCPR and Article 10 of the ACHPR, dealing with freedom of association and need reviewing.

[29] Clause 9 of the Bill.
[30] Clause 10(2)(a) of the Bill.
[31] Clause 11 of the Bill.

7. Freedom of Information and Expression

Clause 29 of the Bill deals with the disclosure of information in connection with "terrorist" investigations and one of the circumstances refers to a situation where a person discloses to another "anything which is likely to prejudice the investigation", criminalizing such disclosure and providing, on conviction, for a term of imprisonment not exceeding ten years or to a fine, or both.

Amnesty International is concerned that police may use such provisions to force lawyers and journalists to hand over to the police information in their possession, which the police may claim to be useful to their investigation. Such provisions may be used to intimidate journalists from pursuing certain lines of inquiry, or others investigating and reporting on activities of individuals under suspicion of the state. This provision, which is in contradiction with Article 19 of the ICCPR[32] and Article 9 of the ACHPR[33], can prove to be a serious set-back to freedom of expression in Kenya.

The African Commission adopted a Declaration of Principles on Freedom of Expression in Africa. [34] The Declaration expands the obligations of states parties to the ACHPR regarding the right to freedom of expression. It asserts that the right to freedom of expression "is a fundamental and inalienable human right and an indispensable component of democracy,"[35] and provides further that "no one shall be subject to arbitrary interference with his or her freedom of expression."[36]

Another provision, which has been severely criticised, relates to what the heading of Clause 12 of the Bill terms as "Uniforms". A person who in a public place wears an item of clothing or wears or carries or displays an article in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a declared terrorist organisation is guilty of an offence. On conviction he/she is liable to a term of imprisonment not exceeding six months or to a fine or both. This offence is considered of such importance that a member of the police force may arrest a person without a warrant on grounds of reasonable suspicion.

A dress code represents, for many, a way of expressing themselves or a way of showing that they belong to a certain faith or cultural group, many of whom would also carry and display symbolic articles. Several representatives of civil society expressed concerns that

[32] ICCPR, Article 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*.
[33] ACHPR, Article 9 guarantees to every individual the right to receive information and the right to express and disseminate his opinion.
[34] At its 32nd Session in October 2002 in Banjul, The Gambia.
[35] Article 1 of the Declaration.
[36] Article 2 of the Declaration.

specific groups, because of their dress code, could be targeted and their rights breached arbitrarily should such a provision be enacted. They felt that even without the enactment, some were already subjected to "profiling" in the fight against "terrorism".

8. Incitement of offences outside Kenya

The crime of "incitement of offences outside Kenya" is provided for in Clause 8 of the Suppression of Terrorism Bill. The risk of politically motivated prosecutions under this clause is apparent in this offence as decisions may be affected by government foreign policy.

Amnesty International is concerned about the vagueness of the offence of "incitement" to commit an act of "terrorism". Starting from the argument that "terrorism" itself is vaguely defined, how would a court of law adjudicate a case of incitement to commit an act of "terrorism"? The offence may be committed by words only and the proscribed act can take place wholly or partly outside Kenya. In addition, whether the person incited is present or not in Kenya at the time of the incitement, is immaterial. Thus, the extra-territorial jurisdiction given to Kenyan courts in the prosecution of an imprecise offence leaves open the possibility of abuse of process.

Clause 3(1)(c) of the Bill, linked with this specific provision on incitement, opens up the danger that prosecuting such "inciters" may be prompted by overseas governments targeting opponents who may have found refuge in Kenya. There is also concern that the right to fair trial may be infringed if individuals were to be charged on the basis of intelligence information provided by other governments or by informants, should the defence be denied access to such information through classification or the use of public interest immunity certificates.

9. Extradition

The heading of the Bill indicates that apart from providing measures for the detection and prevention of "terrorist activities", the legislation seeks to amend the Extradition (Commonwealth Countries) Act and the Extradition (Contiguous and Foreign Countries) Act. Clause 37 of the Bill provides for the use of counter-"terrorism" conventions as a basis for extradition.

Amnesty International acknowledges that extradition is a key element of the international law enforcement co-operation that provides a safeguard against impunity. The organization is concerned that, in its efforts to facilitate and expedite extradition procedures, Kenya is proposing through the enactment of Clause 37 of the Suppression of Terrorism Bill, to weaken or is failing to put in place human rights guarantees for suspects or accused persons.

Amnesty International considers that an individual should not be surrendered to a country where he or she would be at risk of being brought to justice in a trial that does not

respect internationally recognised rights of fair trial for whatever reason, such as the imposition of the death penalty, and not simply because of the prejudice towards the individual, such as religion or country of origin.

Amnesty International recognizes that states have a right to take measures to protect their own security: nonetheless, the protection against forcible return or surrender to a country where one might face torture is absolute and binding under international human rights law.

Kenya is a party to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Under Article 3, no person may be returned to another state where "there are substantial grounds for believing he would be in danger of being subjected to torture".

The Kenyan government is also bound by the internationally recognized principle of non-refoulement, which prohibits states from returning people against their will to countries where they risk serious human rights violations.

10. Conclusion

Amnesty International is concerned that numerous provisions in the proposed Suppression of Terrorism Bill are in direct contravention of Kenya's obligations under international human rights treaties and other norms. Several provisions are open to abuse by law enforcement officials and the Bill in its current form fails to provide for adequate safeguards against such abuse. A number of the provisions in the Bill contravene internationally recognized human rights standards – including the rights to liberty, fair trial, freedom of association and freedom of expression – and may lead to the violation of individual human rights recognized under international human rights treaties, including the ICCPR and the ACHPR.

Although states may suspend certain rights during emergency situations, the Human Rights Committee has stated that measures derogating from the provisions of the ICCPR must be of an exceptional and temporary nature.[37] Even during an armed conflict, "*measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.*"[38] In addition, such measures must be limited to the extent strictly required by the exigencies of the situation.[39] Moreover, any derogation must not involve discrimination "*solely on the ground of race, colour, sex, language, religion or social origin*"; and should not be *"inconsistent with the State party's other obligations under international law, particularly the rules of international humanitarian law*".[40] Kenya

[37] General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) para.1
[38] *Ibid.* para. 3
[39] *Ibid*. para. 4
[40] *Ibid*. paras. 8 and 9

has not declared an emergency situation nor is it facing armed conflict. It should therefore adhere strictly to principles under international law.

According to the African Commission, Article 1 of the ACHPR confirms that governments have bound themselves legally to respect the rights and freedoms enshrined in the Charter and to adopt legislation to give effect to them. While the Commission has acknowledged that states may face difficult situations, it has also reaffirmed that the Charter does not contain a general provision permitting states to derogate from their responsibilities in times of emergency[41]. The Commission further stated that the restriction of human rights is not a solution to national difficulties and that the legitimate exercise of human rights does not pose dangers to a democratic state governed by the rule of law.

11. Recommendations

Amnesty International urges Kenya to ensure that any new draft legislation to address "terrorism" or "acts of terrorism" is consistent with Kenya's international human rights obligations.

Amnesty International makes the following recommendations to the Government of Kenya:

- Kenya should comply with all international human rights treaties to which it is a party, including specifically, the International Covenant on Civil and Political Rights, the Convention Against Torture, and the African Charter on Human and Peoples' Rights.[i]

- Kenya should ratify all international human rights treaties, which it has not yet done, including the First and Second Optional Protocols to the ICCPR, and the Optional Protocol to the Convention Against Torture.

- Kenya should review all its laws and legislation to bring them in line with international human rights standards. In particular the whole Suppression of Terrorism Bill needs to be viewed in the context of Kenya's international human rights obligations and several provisions need to be redrafted or discarded altogether in accordance with human rights principles.

- All comments from legal experts and bodies, civil society (including national and international human rights NGOs, faith-based organizations) should be fed into the debate surrounding the framing of any future anti-"terrorism" legislation.

[41]Commission Nationale des Droits de l'Homme et des Libertes vs. Chad, African Comm. Hum. & Peoples' Rights, Comm. No. 74/92.

- The Suppression of Terrorism Bill should provide for judicial review to prevent the misuse of special powers conferred by the Bill to law enforcement officials, including police and customs officers, as well as to the executive arm of government.

- Kenya should not adopt any provisions that would allow for incommunicado detention of suspects as this could lead to widespread use of torture and ill-treatment, and breaches of impartial and fair trial standards.

- Afford all facilities and opportunities to a suspect to defend himself effectively, including the right to be assisted by counsel immediately, right from the beginning of proceedings, including during the interrogation phase.

[i] Kenya is a party to:

- International Covenant on Civil and Political Rights (ICCPR), but it has not ratified its First Optional Protocol giving a individual victim the right to petition and its Second Optional Protocol aiming at the abolition of the death penalty;
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- The Convention on the Elimination of Discrimination of All Forms of Discrimination Against Women (CEDAW), but not its Optional Protocol giving an individual victim the right to petition;
- The Convention Against Torture (CAT), but not to its Optional Protocol providing for the regular and periodic monitoring of places of detention through visits to these facilities conducted by expert bodies.
- The Convention on the Rights of the Child (CRC); it has ratified its first Optional Protocol on the involvement of children in armed conflict, but has only signed the second Optional Protocol on the sale of children, child prostitution and child pornography;
- The Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- The Convention relating to the Status of Refugees;
- Rome Statute of the International Criminal Court; signed in August 1999 but not yet ratified;
- African Charter on Human and Peoples' Rights;
- African Charter on the Rights and Welfare of the Child.