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19 November 2013

Dear Dr Dlamini,

Re: A Commitment to Amend the Suppression of Terrorism Act

We, the undersigned local, regional and international civil society organisations, write to you in response to the recent commitment by your government to amend the Suppression of Terrorism Act (the STA).

Introduction

At the International Labour Organisation (ILO) Conference in Geneva, Switzerland this June, the then Minister of Labour and Social Security, Lutfo Dlamini, announced that the Swazi government had agreed to amend the definition of “terrorist” in the STA. This is a welcome development as the signatories to this letter have repeatedly expressed their concerns with the definition of “terrorist act” as contained in the STA. The inclusion of conduct that goes beyond the criteria established by the United Nations renders the definition overbroad and

imprecise, and means that the definition itself fails to meet international standards and may be used for abusive ends.

However, we maintain that the deficiencies in the Act will not be cured by amending the definitional provisions alone and therefore stress that the legislation requires a thorough overhaul. Further problems are found in the provisions granting the Minister and Attorney General discretion in designating organisations as “specified entities”. These confer too much unfettered power on the authorities and do not provide sufficient procedural safeguards for individuals and organisations who may be so designated.

We are heartened that in his speech Minister Dlamini stated that the Attorney General was working with international agencies (in addition to the relevant line ministries) in the amendment process, and we request an indication of which organisations the Minister was referring to, as well as how civil society’s participation in the process will be ensured. This amendment process is urgent as we believe that the legislation has been used and, until effective amendments are implemented, will continue to be used to suppress free political activity in Swaziland, and we therefore request a timeline for when the amendments will be enacted

International Definitions of Terrorism

In the last decade the global response to terrorism has intensified, and the United Nations has acknowledged the importance of individual countries implementing domestic counter-terrorism mechanisms. However, these measures must be in line with internationally accepted limits and cannot disproportionately infringe on fundamental human rights or be used to target and harass legitimate political opponents. Therefore, whatever the motivations for the enactment of domestic counter-terrorism legislation, the legitimacy of such legislation will always be dependent on whether or not it conforms to international human rights law.

As a member of the international community and signatory to a number of international human rights treaties, Swaziland has an obligation to ensure that its legislation, including the STA, adheres to international norms and standards. There are various aspects of the current Act – including the definition of terrorism – that are inconsistent with international law and so should be amended.

As a number of prominent organisations have expressed, the STA’s definition of terrorism is far broader than that which is internationally accepted. The UN Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, has elucidated three crucial criteria for conduct to constitute terrorism: the means used in the act must be deadly or amount to “serious violence against members of the general population or segments of it”; the intent behind the act must be to “cause fear amongst the population or the destruction of public order” or must constitute an attempt to “compel the Government or an international organization to do or refrain from doing something”; and the aim must be to further an “underlying political or ideological goal.”

Any amendment to the definitional provisions should adhere to this internationally accepted definition. This would ensure that Swaziland upholds its international obligations, and that the STA achieves the objectives of countering terrorism, and not of restraining legitimate domestic political opposition.

The concern with the present definition of “terrorist act” in the STA is that the conduct it criminalises goes far beyond what would be classified as “deadly” or “serious violence.” This is because it includes “serious damage to property”, disruption to “any computer system or the provision of services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure”, and action “designed or intended to disrupt the provision of essential emergency services such as police, civil defence or medical services.” The definition also lacks specificity, as it does not provide content to what would constitute “prejudice to national security or public safety”, which renders it susceptible to abuse. Furthermore, although it does include the international requirement that the aim of the act be to intimidate the public or compel the government to do or refrain from doing any act the inclusion of the phrase “may reasonably be regarded as being intended to” in respect of achieving these aims removes any requirement that there be actual intention – which is inconsistent with international norms.

It is the inclusion in the STA’s definition of “terrorist act” of a wide range of conduct that fails to meet the internationally stipulated criteria that has enabled officials to use the provisions of the Act to ban and disrupt non-violent political activities, search property, threaten media workers, and arrest and detain individuals for no purpose other than to suppress legitimate political activity and expression. Targets have ranged from pro-democracy campaigner, Musa Hlophe, who had his home raided and searched without a warrant and leaders of PUDEMO and SWAYOCO who have been arrested and detained under the STA. Many of these detentions have led to further human rights violations such as torture and a lack of access to legal representation.

The Designation Power

Unfortunately however, the scope for human rights violations goes beyond the definition of “terrorist act”. Another deeply concerning aspect of the legislation is the broad designation power given to the Attorney General and Minister of Justice and Constitutional Affairs in classifying organisations as “specified entities”. Section 28 gives a wide discretion to authorities and provides very little recourse to organisations designated as a specified entity. There is a strong possibility of incorrect identification as the Attorney General is only required to have “reasonable grounds to believe” that an organisation is involved in terrorist activity. Furthermore, entities can be designated as “specified entities” on the grounds that they acted on behalf of, at the direction of or in association with another specified entity. Although the provision allows for an application for revocation, and a High Court review, these applications lack the procedural safeguards normally available to litigants, and permit the total exclusion of the specified entity from the process. It is unclear whether the High

Court is given the power to reverse the decision or whether it is empowered only to refer the matter back to the original decision maker. Furthermore, the Attorney General has 60 days in which to consider an application for revocation – during which time the organisation will be treated as a “specified entity” and subject to the STA’s repressive measures, including the prosecution of individual members.

It is particularly concerning that, in section 19, the legislation criminalises individual membership of a “terrorist group”. The impact of this is that once a group has been designated a “specified entity” under section 28 all members of that group are liable to a ten-year term of imprisonment. The Act also imposes a reverse onus on these members to prove that the group was not a terrorist group, or that the individual had not taken part in any terrorist activity. This onus places an unfair procedural burden on those accused of membership.

The Swazi Constitution

The defects in the definition of “terrorist act” and with the designation power also render the STA inconsistent with the Swazi Constitution. The preamble to the Constitution affirms that Swaziland is an “open and democratic society” and article 58 declares that Swaziland “shall be a democratic country dedicated to principles which empower and encourage the active participation of all citizens, and obliges the State to “promote, among the people of Swaziland, the culture of political tolerance.” Furthermore, article 61(1)(c) provides that the country shall “promote respect for international law. It is clear then that the Swazi Constitution commits the State to act in a way that gives effect to principles of open democracy and respect for international law. It is against this backdrop that the STA must be interpreted, as all legislation must abide by the spirit and values of the Constitution.

In addition, the rights to personal liberty and to freedom of expression and association are directly impacted by the legislation’s definition of what constitutes a “terrorist act” as well as by the provisions prohibiting membership of “terrorist groups”. The Constitution does permit limitation of these rights, albeit in very specific circumstances – such as when the limitation is “reasonably required in the interests of defence, public safety, public order, public morality or public health” – and only when a limitation would be “reasonably justifiable in a democratic society”. The extent to which the rights are restricted makes the STA an unreasonable and unjustifiable limitation of the rights to freedom of expression and association, and the right to personal liberty.

In Conclusion

Without substantial amendments to the Act the deficiencies render it unconstitutional and in violation of Swaziland’s international obligations, and therefore susceptible to a judicial challenge. The assurance made by Minister Dlamini at the ILO Conference represents the first undertaking by the Swazi government to make amendment to the STA, and it is important that the ministers concerned maintain momentum in this regard.

It is reassuring that the government intends to consult with various international agencies that have specific expertise and interest in this matter. Local and international organisations expressed concern with the STA soon after it was enacted in 2008, and have continued to monitor the application of the legislation in Swaziland. Many of our organisations have in the past issued statements and reports detailing our concerns with the legislation and its use against domestic activists. Consequently, we can offer assistance in amending this piece of legislation and believe that a collaborative effort between government, individuals and organisations offers the best possible chance of ensuring that the STA is brought within the bounds of international law.

It is imperative that the amendments to this Act be adopted as soon as possible, and that the process be participative and inclusive. We request that a timeframe and schedule for the process be drawn up and communicated to us and to other interested parties in Swaziland. We await your response.

Sincerely,

Amnesty International

Coalition of Informal Economic Associations of Swaziland

Constituent Assembly of Civil Society Organizations

Concerned Christian Church Leaders

Council of Swaziland Churches

Foundation for Economic and Social Justice

Human Rights Institute – International Bar Association

Human Rights Watch

Lawyers for Human Rights (Swaziland)

Legal Assistance Centre

Luvatsi Youth Empowerment

Media Institute of Southern Africa (Swaziland Chapter)

Southern Africa Litigation Centre

Swaziland Agricultural and plantations Workers Union

Swaziland Coalition of Concerned Civic Organizations (SCCCO)

Swaziland Democracy Campaign (SDC)

Swaziland National Association of Teachers

Swaziland National Union of Students

Swaziland Positive Living

Swaziland Rural Women's Association

Swaziland United Democratic Front

Swaziland Youth in Action

Swaziland Young Women's Network

Trade Union Congress of Swaziland

Women For Women

Women in Law in Southern Africa (Swaziland Chapter)