

UHRC opinion on the contentious clauses in the Bill

Clause 2

It defines an 'authorised officer' as a security officer or other person designated by the Minister under Clause 24 of the Bill. By including "other person" the use of authorised officer within the meaning of Clause 2 is too wide and open to abuse. *The Commission suggests that the definition of the "authorised officer" should be restricted for purposes of this Bill, to a "security officer".*

Clause 5

Clause 5 allows extradition of a person suspected of terrorism irrespective of the possibility of political persecution or unfair trial. Should a person suspected of terrorism still be extradited when there are political motives behind the application for extradition? Should such a person be extradited even when evidence is overwhelming that the person may not receive fair trial?

The Extradition Treaty prohibits extradition of persons to a country where they could face political persecution. It does not also apply to political refugees. This is to avoid deprivation of such person a right to a fair trial, political persecution and subjection to torture, cruel, inhuman and degrading treatment or punishment in the country of extradition. This clause therefore has the potential of contradicting this intent.

Such person may also be seeking refugee status in another country. The clause would deny such a person his right to seek refugee status in another country on political grounds. *The clause should therefore be deleted as it may abuse the right of refugees, the right to a fair trial, and the right to protection from political persecution.*

Clause 7 and 8

Clause 7 makes terrorism an offence and thereafter defines what the offence is contrary to the conventional tenets of legislative drafting. Of particular concern is the Bill's vague definition of terrorism and terrorist activity. The definition is not precise, rendering it

unclear as to whom the Bill is targeting. In our opinion if left as it is, there is possibility that legitimate expressions of political dissent may be captured within such a broad definition. Any other civil acts or activities not falling within terrorism, as we know it are also included in this definition. Is this the objective of the Bill?

This is very crucial because in our view all the measures proposed in the Bill should be necessary and proportionate in combating only the activities that are defined as terrorism. The definition of the Bill should be targeted, so that the legislation has focus and is more meaningful. Otherwise, the proposed clause could be subject to misuse and abuse. The legitimate objective of combating terrorism would then be questioned.

The International Conventions call on States to make certain conducts and acts, acts of terrorism. *We propose that the definition as it is be deleted. It should make particular conducts crimes of terrorism. This is the approach adopted by several United Nations Conventions on Terrorism. (See Appended List of Conventions). It should for example be an offence of terrorism if the following acts were committed for political, religious, social and economic aims or if they were indiscriminate without due regard to safety of others or property.*

- Intentional and unlawful delivery, placement, discharge or detonation of an explosive or other lethal device, whether attempted or actual, in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility, with the intent to cause death or serious bodily injury, or extensive destruction likely to or actually resulting in major economic loss.
- Direct involvement or complicity in the murder, kidnapping, maiming, or attack, whether actual, attempted or threatened, on a person, group of persons, in public or private institutions.
- Direct involvement or complicity in the murder, kidnapping, abducting, maiming, or attack, whether actual, attempted or threatened, on the person, official premises,

private accommodation, or means of transport or diplomatic agents or other “internationally protected persons”.

- Intentional and unlawful provision or collection of funds, whether attempted or actual, with the intention or knowledge that any part of the funds may be used to carry out any of the terrorist activities prohibited by the Bill
- Direct involvement or complicity in the seizure or detention of, and threat to kill, injure or continue to detain a hostage, whether actual or attempted in order to compel a state, an international inter governmental organisation, a person or group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.
- Unlawful seizure of aircraft, public transport, hijack of passengers or groups of person for ransom. It is noteworthy that the purpose of these acts remains terrorism.

Clause 9

This clause places the burden of proof on the accused person to prove they are not engaged in terrorist acts. The Commission is aware that Article 28(3)(a) of the Constitution recognises the presumption of innocence but also provides an exception under clause 4(a) of article 28 thereof in shifting the burden of proof to an accused. That notwithstanding, should the presumption of innocence as a legal principle to guarantee the right to fair trial be reversed despite the gravity of terrorism?

Clause 9 is also broad in its presentation. It includes a person who illegally possesses a gun. In the circumstances, an armed Karimojong or a robber is a terrorist. It captures anyone because of the ambiguity it carries. In any case, illegal possession of guns is already an offence under the Firearms Act. **The clause should be improved and restricted to the offences or defined acts of terrorism under the Bill. The “importing, selling, making, manufacturing or distributing firearms, explosives,**

ammunition or bombs should therefore be unlawful if the acts are related to the promotion and execution of acts of terrorism.

Clause 11

This clause aims at preventing promotion of terrorism by and through any institution. However, the scope of '*publishing news or other material likely to promote terrorism*' is all encompassing of any information over the print or electronic media on terrorism. The public has a right to information so that they can make objective decisions and choices on issues affecting them. Terrorism is such one problem. The media therefore becomes a conduit through which the public can be informed. It is appreciated that terrorists could promote their acts by publishing news and information, which should be limited.

To retain the clause as it is, would mean having a subjective provision that could be manipulated to inhibit freedom of the press and expression. There is need for a balance to ensure that terrorism is not promoted through publications but the public is informed and freedom of the press and expression is not abused. There is need to distinguish objective publishing of news for purposes of informing the public, from publishing news to incite the public or promote terrorism. **If this distinction cannot be drawn, the phrase 'publishing news or other material likely to promote terrorism' should be deleted. Besides the offence is adequately covered under Clause 23.**

Clause 12

The Commission acknowledges that terrorism involves syndicates and networks. It is necessary therefore that the law on terrorism should make it an offence to know about acts, plans or information about terrorists and fail to inform the appropriate authority within reasonable time. However, the crime needs to be specific. Whereas, Clause 12(1)(a) should be retained, **Clause 12(1)(b) and (2) are not necessary because the acts mentioned in them fall within the ambit of Clause 12(1)(a). The assumption that**

everybody is reasonable can prejudice many people who may not know that a colleague, a friend or a neighbour is engaged in terrorism.

The punishment for the offence under 12(1)(a) and (b) is imprisonment for life on conviction. Would anybody not a part of a terrorist network be liable to life imprisonment simply because they knew of the intended act but could not inform the appropriate authority? A penalty for an offence should be proportional to the offence. **We feel, the punishment is disproportionate and excessive and should be revised.**

Clause 13

It is not clear what is intended in having both Clause 13 and 12. Acts spelt out under Clause 13 are covered under Clause 12(1) except that Clause 13 refers to anyone who knowing that a person designs to commit or is committing an offence “under this Act”. **If it were accepted that the proposed Bill should deal only with terrorism, then clause 13 would be redundant and should be deleted. We have argued before that this Bill should only be about terrorism and should not be used for the purposes of other crimes.**

Clause 14

This clause makes provision for declaring organisations terrorist organisations. A list is spelt out in the second schedule. Any addition to the existing list in the schedule would be done by the Minister. The power granted to the Minister is wide and leaves room for abuse.

It is proposed therefore that instead of leaving it to the Minister to define or declare a terrorist organisation, the law should define what a terrorist organisation is. This would be an organisation engaged in, or whose members engage in or which promotes any of the acts outlawed under the Bill. **The law should therefore define a terrorist organisation. In declaring a terrorist organisation, the Minister would base his**

decision on the characteristics or descriptions provided by the law as the yardstick. The Minister's declaration should be subject to challenge in court.

Clause 16

This clause makes it an offence for a person to dress or wear any article that arouses *reasonable apprehension* that they are a member of or support any terrorist organisation. While the test of reasonableness may appear clear, it could be arbitrarily used to inconvenience or punish innocent people. For example, someone could unknowingly dress in imported second hand clothes with a slogan such as "I am trained to Kill" or "I am a killer". They would be suspected of terrorism.

The Clause presupposes and criminalizes the intent of such person and potentially restricts the freedom of expression. It therefore contravenes the legal principle that only a conduct is criminal and not an assumed intention.

For avoidance of abuse or unnecessary inconvenience by security agents, this clause should be deleted because it is irrelevant and serves no useful purpose. It would be acceptable if the wearing of such dress or material is expressly for the purpose of promoting terrorism or the activities of a terrorist organisation.

Clause 24

This clause falls in Part VII of the Bill on the interception of communications and surveillance. It permits a Magistrate to issue an order for surveillance and interception on application by a security officer. The Magistrate may revoke the order on her/his own motion or on application by any person aggrieved. The person under surveillance has his right to privacy, home and correspondence under potential abuse. There is need for safeguards to ensure that such surveillance and interception were absolutely necessary for the purposes of preventing or investigating terrorism. This safeguard would extend to the right to challenge the order. The Clause does not make it clear how such a person would know there was an order for his/her surveillance since the Bill presumes the order would

be applied for in the absence or without the knowledge of such person. And yet he/she is given power to challenge the order.

It is our assumption that when a surveillance order is applied for, the suspects' right to defend themselves is dispensed with. The Magistrate therefore needs to protect them by only issuing such order when reasonable and justifiable cause is provided by the security officer. The Bill offers no safeguards to ensure this. **It is imperative therefore that the Bill requires a security officer to produce sufficient cause or grounds, and evidence on application for an order before the Magistrate issues it. The Magistrate must under the Bill be required to be reasonably satisfied that there is need for surveillance over a person.**

The Commission envisages a situation where security operatives will seek this order to obtain information not related to terrorism. **It therefore recommends that the law should require the order to be specific and prohibit collection of information not related to terrorism. It is also recommended that the order should explicitly state that other information obtained but not related to terrorism should remain secret or not get divulged.**

It should also not be used to prejudice other legal and human rights of the person under surveillance or of others whom information is obtained about during the surveillance. Such information should not be admissible as evidence in court for any offence other than terrorism.

Clause 25

This clause grants the authorised officer the right to intercept communications of a person. The purpose for interception under Clause 25 (2)(a-d) is omni bus and do not relate specifically to terrorism investigations. It is also prone to abuse because it could be used to intercept communication of everybody. Surveillance should be limited to combating and preventing terrorism. If left as it is, it has the potential of violating civil liberties particularly the right to privacy.

It is therefore proposed that the clause should be deleted and amended to only allow interception where there is reasonable suspicion to do so with the view of addressing the legitimate objective of the Bill – terrorism. As it is, the Clause is a drag net allowing the authorities to use the Bill for other purposes.

Clause 25(3)(a) proposes that letters and postal packages should be intercepted. **The Commission proposes that where this should occur, the recipient of the letters and postal packages should be notified if the post and matter is found to have nothing to do with terrorism and is therefore released and delivered to the owner. This notification could be through a stamp exclusive to identifying an intercepted package. It is also important to have a provision for the mail to be returned to the owner if on checking it, it is found irrelevant by the security officers.**

Clause 26

The Bill makes anyone who obstructs an authorised officer when the officer is carrying out surveillance or interception of communication liable for an offence. As discussed above, the person under surveillance or any other person may not know of the surveillance other than security officers and the Magistrate who issued the order. How then would they know that their action amounted to obstruction within the meaning of the proposed clause of the Bill?

The acts under this part apply to covert acts of surveillance. The person obstructing the officer would have to “know” that surveillance is ongoing otherwise he/she is being held responsible for an act he/she has no knowledge of. **The Commission submits that the phrase “a person who knows and obstructs” should replace the use of “Any person who obstructs”.**

Clause 27

This clause provides for offences committed by an authorised officer. However, the list is not exhaustive. The authorised officers are granted very wide powers, which if abused or misused could result in acts that they should be punished for.

The Commission recommends that provisions of Article 44 of the Constitution should form part of the acts authorised officers should not commit in the course of their duty. It should be an offence for them to engage in:

- **Torture, inhuman and degrading treatment**
- **Illegal detention**
- **Malicious application of and use of an order for surveillance or interception**

Clause 28

The Commission regards this clause reasonable. The admissibility of evidence obtained should be directly relevant and necessary to proving acts of terrorism only.

Clause 38

Clause 38 purports to protect the police or public officers, or those assisting such officers from civil or criminal liability for acts done in good faith during the exercise of any function under the Bill. It therefore protects any officer enforcing this Bill. Implicitly it recognises that in the course of their work these officers may misuse and abuse their powers resulting in for example torture, assault and theft of property.

International human right instruments and the Constitution require that victims of human rights violations should be afforded effective remedy. Effective remedy extends to both civil and criminal redress. This clause would deny a victim the right to legal redress. It also enhances legitimised impunity amongst the officers enforcing the Bill. This should not be accepted.

In civil matters, the State should be vicariously liable while in criminal matters the officers should be personally liable. If immunity is to be extended, the State should find ways of indemnifying the officers concerned for civil liability. It is wrong in

principle and in human rights to exonerate anybody of criminal responsibility. The Commission therefore proposes that this provision should be deleted.

Clause 39

The Bill repeals Section 28 of the Penal Code. **It should also expressly repeal the Terrorism Act of 1984.**

Conclusion

The Commission emphasises the need for thorough public debate on the Bill before it becomes law. Despite the need to move quickly to address the current threat of terrorism, the measures introduced precipitously and which are overly sweeping in their application may have the effect not of combating and eliminating terrorism, but of potentially possible abuse of the wide powers proposed in the Bill. We believe that these concerns and recommendations we have put forward should be considered, as they would have the effect of legitimising the Bill.