

BALANCING NATIONAL SECURITY AND HUMAN RIGHTS: INTERNATIONAL AND DOMESTIC STANDARDS APPLYING TO TERRORISM AND FREEDOM OF SPEECH¹

Professor Jeremy Sarkin²

Introduction

Human rights are universally enjoyed. This statement is only true in theory. While rights are meant to be inherent, universal, indivisible, and inalienable, in practice this is far from true. All countries have human rights problems; it is the degree of abuse that is different around the world. Some countries commit gross human rights abuse against many of their inhabitants.³ In practice, therefore, rights are not given the respect they are due or are entitled to. Some nations respect human rights in very limited respects. Some States are not able to respect and protect rights, while others do not want to. Some of the most egregious violators of human rights against their own people include Eritrea, the Democratic Republic of the Congo (DRC), the Democratic People's Republic of Korea (DPRK), Belarus, Syria, Sudan, South Sudan, and Somalia.

The events of 11 September 2001, and the terrorist acts of the last few years, have seen terrorism being used to justify enormous State intrusion into the lives of their citizens.⁴ Much of these intrusions were done secretly without legal justification, even in democratic societies. Such processes only became known to some degree because of individuals such as Edward Snowden who leaked the information. Today more States are seeking lawful authority to carry out surveillance on the stated basis of fighting terrorism.

Thus, terrorism and the threat of terrorism is increasingly being used as a reason to justify intrusions and limit privacy. States are using terrorism to justify the limitation and, at times, the total restriction or abrogation of fundamental rights.⁵ It is true that rights sometimes clash against each other. One person's right often clashes against another person's right. The State often

- 1 This paper emerges from an affidavit filed by the author in the High Court in Swaziland in support of the applications of Mario Masuku and Maxwell Dlamini to have parts of the Swaziland Suppression of Terrorism Act and Sedition and Subversive Activities Act declared unconstitutional. The Swaziland High Court in September 2016 found in favour of the applicants. At the time of writing, the State had appealed the decision of the High Court.
- 2 B.A. LL.B (Natal), LL.M (Harvard) LL.D (University of the Western Cape) Attorney, South Africa; Attorney, New York, USA; Professor of Law, University of South Africa (UNISA) and Distinguished Visiting Professor, and member of CEDIS, Nova Law School, Lisbon, Portugal.
- 3 See P Zeleza and P McConaughay "The Struggle for Human Rights in Africa" *Human Rights, the Rule of Law, and Development in Africa* (2004) 1-20; see also J Sarkin "Humanitarian Intervention and the Responsibility to Protect in Africa" in D Zimber and J Okopari *Africa's Human Rights Architecture* (2008) 45-67.
- 4 See J Banda, A Katz and A Hübschle. "Rights versus justice: issues around extradition and deportation in transnational terrorist cases" *African Security Studies* 14.4 (2005) 59-67; see also R Powell "The Concept of Security" *University of Oxford Socio-Legal Review* (2012).
- 5 C Gearty "Terrorism and human rights" (2007) 42(3) *Government and Opposition* 340.

wants to restrict people's rights especially where national security is concerned.⁶ A major test of a democracy is how a State balances national security and human rights matters.⁷ However, far too often a supposed clash of rights is used to justify the overbroad constraint of rights.⁸ One or more rights can be used to attempt to justify restrictions on other rights, especially by undemocratic States or States that want to achieve a certain limitation of a right. Nowhere is this truer than with the use of terrorism as a means to challenge the exercise or claim of certain rights.⁹ In circumstances where a State limits rights, it is important for an independent court to be the ultimate arbitrator on whether the justifications are adequate and legal.

The Sustainable Development Goals (SDGs),¹⁰ as outlined in the 2030 Agenda for Sustainable Development, are a useful lens to examine such issues in domestic States as the SDGs set out certain goals that are supposed to be attained. The SDGs were adopted by all 193 UN Member States in September 2015, and are comprised of seventeen Goals.¹¹ Goal 16 is Peace, Justice and Strong Institutions. It has objectives that promote peaceful and inclusive societies to attain sustainable development, deliver access to justice for everyone and construct successful, accountable and inclusive institutions.¹² There are twelve targets within Goal 16. Only the targets that are relevant to States promoting the rule of law and promoting and respecting human rights will be examined in this paper.¹³ In Goal 16, target 16.3 promotes the use and observance of the rule of law at all levels, including domestically. Target 16.10 promotes a number of matters including the protection of fundamental freedoms, in line with domestic law and international processes. Target 16.a actually mentions terrorism, and calls for processes to strengthen national institutions to combat terrorism.¹⁴ This does not deal with the complexities around the use of terrorism as a means to ensure greater State fiat and limit transparency and accountability. Rather, those complexities are confronted in target 16.6 which deals with the matter of developing "effective, accountable and transparent institutions" at all levels. This includes the courts, especially when independence and accountability are problematic.

In this context, this paper examines the use of terrorism legislation to limit freedom of speech in Swaziland. It examines the case of Mario Musuku and Maxwell Dlamini who were being prosecuted under terrorism and sedition legislation for actions and statements they made which would be considered acceptable political expression in most democratic States.

6 C Walker "Legal Aspects of Counter-Terrorism and Intelligence in the Prevention of Terrorism" (2008) *International Legal Dimension of Terrorism* 147-172.

7 See Z Akhtar "Extraordinary Rendition: A Comment" (2006) 11.2 *Judicial Review* 210-212.

8 A Chaskalson "The widening gyre: counter-terrorism, human rights and the rule of law" *The Cambridge Law Journal* 67.01 (2008): 69-91.

9 M Ranstorp and P Wilkinson *Terrorism and human rights* (2013).

10 United Nations General Assembly *Transforming Our World: The 2030 Agenda for Sustainable Development* (25 September 2015) A/RES/70/1. The SDGs are meant to complete the Millennium Development Goals (MDGs); see JD Sachs "From millennium development goals to sustainable development goals" (2012) 379 *The Lancet* 2206.

11 United Nations General Assembly Resolution *Transforming our world: the 2030 Agenda for Sustainable Development* (25 September 2015) A/RES/70/1.

12 T Pogge, and M Sengupta. "Assessing the sustainable development goals from a human rights perspective" (2016) 32.2 *Journal of International and Comparative Social Policy* 83-97.

13 ID Bunn "Rule of Law and the 2015 UN Sustainable Development Goals" (2015) 21.2 *Southwestern Journal of International Law* 257-509.

14 See BX Lee et al. "Transforming Our World: Implementing the 2030 Agenda through Sustainable Development Goal Indicators" (2016) 37.1 *Journal of Public Health Policy* 13-31.

The Masuku and Dlamini Case in Swaziland¹⁵

On 1 May 2014, Mario Masuku and Maxwell Dlamini attended an International Workers' Day celebration at a school sports ground in Manzini, Swaziland. Masuku addressed the crowd gathered at the event. Dlamini participated in the singing of songs and chanting of slogans. Both the speeches and the songs were critical of the Swazi government, accusing them of not adhering to their constitutional obligations, questioning the legitimacy of the governance system, and its absolute monarchy. They called on the government to restore the independence of the judiciary and the rule of law, and raised issues surrounding the African Growth and Opportunity Act (AGOA) agreement with the USA.¹⁶ The speeches were intended to protest, non-violently, the actions of the Swazi officials, which they believed to be inconsistent with the Constitution of Swaziland and not in the democratic interests of Swazi society.

As a result of their actions, Masuku and Dlamini were charged with contravening sections 11(1) (a) and (b) of the Suppression of Terrorism Act¹⁷ (STA) and section 4(a), (b), (c) and (e) and 5(1) of the Sedition and Subversive Activities Act.¹⁸ The accused then challenged the constitutionality of various laws, including the Suppression of Terrorism Act before the High Court of Swaziland. Masuku and Dlamini's case was joined to three other cases, also challenging the constitutionality of provisions in the STA and the Sedition and Subversive Activities Act. The provisions of the STA that were challenged were aspects of the definition of "terrorist act" that criminalised conduct which "involves prejudice to national security or public safety"¹⁹ and conduct which is an offence "within the scope of a counter-terrorism convention";²⁰ the provisions which make it an offence to support an organisation designated as a terrorist entity under the Act;²¹ and the provisions empowering the authorities to declare an organisation a terrorist entity.²²

The Overreach of the Suppression of Terrorism Act and its Violation of the Right to Freedom of Expression

Swaziland is a country with an authoritarian regime in power.²³ Swaziland protects rights in its Constitution and its laws in theory.²⁴ However, this protection is very limited and non-existent when rights come up against State control and State power.²⁵ Swaziland, as with many other similar countries, attempts to be a respected member of the international community. It has signed

15 *R v Masuku and Another* Case No. 184/14 (criminal case); *Masuku and Another v Prime Minister of Swaziland and Others* Case No. 1703/2014 (constitutional challenge).

16 Others have made similar calls on Swaziland, M Ramdeen and S Ngubane "Swaziland" (2015) 11 *Africa Yearbook* 491-495.

17 Act 3 of 2008.

18 Act 46 of 1938.

19 See paragraph (2)(j) of the definition of "terrorist act" in section 2 of the Act.

20 See paragraph (1) of the definition of "terrorist act" in section 2 of the Act.

21 See sections 11(1)(a) and (b) of the Act.

22 See section 28 and 29(4) of the Act.

23 See B Masuku and P Limb "Swaziland: the struggle for political freedom and democracy" (2016) 43.149 *Review of African Political Economy* 1-10.

24 MN Shongwe "Protection of children's rights in the Swaziland legal system: achievements and challenges" (2016) 17.1 *Child Abuse Research in South Africa* 58-67.

25 A Dube and S Nhlabatsi. "The King can do no wrong: The impact of the Law Society of Swaziland v Simelane NO and Others on constitutionalism" (2016) 16.1 *African Human Rights Law Journal* 265-282.

and ratified a variety of international treaties. It conducts itself as a member of the United Nations, serves on committees and processes that deal with democratic and human rights matters, but at home does not respond in kind. Thus, Swaziland, and most other totalitarian States have at least some domestic and international obligations to ensure the enjoyment of human rights. These States have many obligations to respect human rights domestically, in line with their treaty obligations and also State responsibility. They are duty bound to ensure the enjoyment of human rights within their borders by all, without discrimination.

The STA defines “terrorism” and “terrorist group” using very broad, vague and open-ended language. The definition of terrorism in the legislation includes acts which “involves prejudice to national security or public safety”, without including any guidance on what type of conduct is criminalised under this provision. The conduct it can cover may have nothing to do with terrorism, and may do nothing to stop terrorism, terrorist attacks or those bent on such activities. It can also cover activities that may not be connected to terrorism. While these may be acts that are criminal, they should not necessarily be contained in this law as that would overreach the purported reason for the Act: to combat terrorism. The law is vague, in the definition of terrorism impugned by the applicants, in that it fails to give reasonable notice of what is covered by it. The law allows for arbitrary and discriminatory enforcement. It gives the executive wide and unchecked powers.

The United Nations Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has noted that precision in the definition is a critical requirement that 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.”²⁶

The Human Rights Committee, as well as other tribunals and institutions, has held that overbroad and imprecise definitions of “terrorist acts” in domestic laws renders that law contrary to the provisions of the ICCPR.²⁷ For that reason a law on terrorism must be directed at terrorist activities in the narrow sense, and not just crime in general. Terrorism needs to be legally defined in line with the generally accepted definitions of what it is, rather than to leave it loose and allow other activities to fall within the confines of its definition. A law that permits many activities to be captured within it is seen to be in violation of international law and specifically the various treaties that Swaziland has ratified.²⁸

A law dealing with terrorism must not be so overbroad as to restrict legitimate democratic activities. To do so violates both international and domestic laws. While there is no universally accepted definition of terrorism it is generally seen to be acts of violence that target civilians for political or ideological aims.

26 E/CN.4/2006/98 (28 December 2005) para. 46.

27 See also R Foot “The United Nations, Counter Terrorism and Human Rights: Institutional Adaptation and Embedded Ideas” (2007) 29.2 *Human Rights Quarterly* 489-514.

28 Swaziland has ratified: International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights (ICCPR); International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; and Convention on the Rights of the Child.

Schmid and Longman reviewed over 100 definitions of terrorism to develop a list of common elements on what terrorism laws ought to contain. They discovered that there were 22 common elements to these definitions, the most shared being “violence”, “force”, “political”, “threat” and “fear, terror emphasised”.²⁹ Weinberg and others found that within the 73 definitions they examined, the most frequently used elements were “violence, force, political and threat.”³⁰

The central tenet of a counter-terrorism law should be aimed at preventing and dealing with violence and threats of violence. The fact that some the aspects of the definition of a “terrorist act”, in the Swaziland STA are not limited to dealing with the threat of, or actual use of violence renders the law problematic. Parts of the definition of terrorism in the STA are so wide that it allows it to be used in many circumstances that should not fall within the ambit of the law. This is how the law was used against Masuku and Dlamini.

While there are many definitions of what comprises terrorism around the world, in 1994, the General Assembly’s Declaration on Measures to Eliminate International Terrorism³¹ stated that terrorism includes:

“criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes [and that such acts] are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them”.

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

“that an act is criminal does not, by itself, make it a terrorist act ... Crimes not having the quality of terrorism ... 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 2004, the Security Council stated that the following offences are “within the scope of... terrorism”:³³

“criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a Government or an international organization to do or to abstain from doing any act”.³⁴

Also in 2004 the UN Secretary General’s High-level Panel on Threats, Challenges and Change described terrorism as any act “intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a

29 AP Schmid and A Jongman *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature* (1988).

30 L Weinberg, A Pedahzur and S Hirsch-Hoefler “The Challenges of Conceptualizing Terrorism” (2004) 16.4 *Terrorism and Political Violence* 777-794.

31 A/Res/49/60 (9 December 1994).

32 E/CN.4/2006/98 (28 December 2005) paras. 39 and 47.

33 S/RES/1566 (8 October 2004) para. 2.

34 *Id.*

population, or to compel a Government or an international organisation to do or to abstain from doing any act”³⁵ and identified a number of key elements, with further reference to the definitions contained in the 1999 International Convention for the Suppression of the Financing of Terrorism and Security Council Resolution 1566 (2004).³⁶

In 2006 the UN Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism noted that the definition of terrorism at the domestic level should be 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.”³⁷

The UN Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has argued that conduct must be defined as that which is “genuinely of a terrorist nature”.³⁸ He also argued that terrorism includes only acts or attempted acts “intended to cause death or serious bodily injury” or “lethal or serious physical violence” against one or more members of the population, or that constitute “the intentional taking of hostages” for the purpose of “provoking a state of terror in the general public or a segment of it” or “compelling a Government or international organisation to do or abstain from doing something.”³⁹ Additionally, in a 2006 report to the UN General Assembly, he argued that how “terrorist act” and “terrorist group” are defined are critical to determining whether the limitations on various rights in the law are permissible or not.⁴⁰

Thus, legislation dealing with terrorism cannot be so wide so as to restrict ordinary activities that are necessary in democratic societies. Such activities include legitimate opposition protests and speech. A law that deals with terrorism must not be used to curb the democratic rights of political opponents, civil society organisations, trade unions, or human rights defenders.

The UN Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has also noted that crimes not specifically described in the relevant international treaties may be criminalised in the domestic context only where it “is strictly necessary and provided that the definition or proscription complies with the requirements of legality”.⁴¹

States that adopt counter-terrorism laws need to do so by striking the right balance between

35 United Nations Secretary General’s High-level Panel on Threats, Challenges and Change “A more secure world: Our shared responsibility” (2004) para. 164(d).

36 S/RES/1566 (8 October 2004).

37 A/61/267 (16 August 2006) para. 44.

38 *Id* para. 17.

39 Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism A/HRC/16/51 (December 22, 2010) para. 28.

40 A/61/267 (16 August 2006) paras.17-19, 23.

41 *Id* para. 44.

national security and human rights. While some argue that there are no worthy policy reasons that warrant a separate, parallel regime of counter-terrorism law,⁴² it is clear that counter-terrorism regimes have become commonplace in many countries.

The very fact that there is a debate about whether a separate counter-terrorism regime is necessary, highlights the need for specificity in those separate terrorism laws. This should be in both purpose and means. The laws drafted for such purposes should be clearly and specifically focused to address terrorism rather than to be catchall pieces of legislation that can be used for many purposes that are not specifically defined in the law. This gives wide discretion to the executive that can be abused. Rather, legislation should be couched in careful narrow terms to ensure that constitutional rights and international laws are not violated. Terrorism laws must be crafted in a way that balances the competing rights of State and citizen.

To obtain the correct balance between national security and democratic principles and human rights, a realistic assessment needs to be made about the extent to which terrorism is a real threat to the State, as well as the extent and nature of that threat.

Governments like to overestimate the threat of terrorism and claim that the threat is larger than it is, or to claim that the law should be widened to allow other threats to fall within its ambit. However, States may not claim that measures that limit the ordinary rights of people are being adopted to protect national security, when they are in fact much wider than what is necessary for the circumstances, and when the effect is to suppress political opponents. Counter-terrorism laws may not target purposes outside of what is deemed terrorism. For this reason, the Special Representative of the Secretary General on Human Rights Defenders has stated clearly that:

“any organization has the right to defend human rights; that it is the vocation of human rights defenders to examine Government action critically; and that criticism of Government action, and the freedom to express these criticisms, is an essential component of a democracy and must be legitimized in law and practice. States may not adopt laws or practices that would make activities for the defence of human rights unlawful.”⁴³

Where States enact draconian or extremely broad laws, it can have consequences of driving opposition groups underground. That is one of the dangers of trying to use terrorism laws for such purposes.

In 2005 then United Nations Secretary General Kofi Annan noted that:

“compromising human rights ... facilitates achievement of the terrorist’s objective - by ceding ... the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is most likely to find recruits. Upholding human rights is not merely compatible with successful counter-terrorism strategy. It is an essential element.”⁴⁴

42 See M Palmer “Counter-Terrorism Law” (2002) *New Zealand Law Journal* 456.

43 A/59/401 (1 October 2004) paras. 49, 51.

44 K Annan “Address to the closing plenary of the International Summit on Democracy, Terrorism and Security” SG/SM/9757 (10 March 2005).

The Swaziland STA is therefore out of step with internationally applied standards because some of the measures in the law to counter terrorism are not proportionate, and not in line with the Constitution, international law and democratic principles.

Swaziland is obliged to follow international law on these issues in that it has ratified various international treaties that give guidance on these issues. Some rights have also attained international customary law status including many of the rights contained in the ICCPR. Thus, compliance with these is obligatory.

Amnesty International has therefore argued that the STA “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.”⁴⁵

The STA, in the challenged parts, is vague, uncertain, overbroad, and strikes the wrong balance between national security and human rights. It transgresses the Constitution of Swaziland and international law that Swaziland is bound to uphold.

Conclusion

It is clear that the terrorism law of Swaziland touched on in this paper is incompatible with Swaziland’s own laws and certainly its international obligations. This was found to be so in the majority decision of the High Court in September 2016. The Court indeed found that the laws were incompatible with the Swaziland Constitution as alleged by the applicants. This is a major step forward for democracy and human rights in the country.

The need to find the right balance between competing rights and competing interests is fundamental in all States.⁴⁶ Principles contained in the rule of law ensure that such balancing must be done by independent and fair judges. Courts that the State can rely on consistently have a legitimacy deficit. They are institutions that citizens neither trust nor approach to have their matters adjudicated. This undermines the State and ensures that those in the State will find extra-democratic means to resolve their concerns.

Terrorism is a scourge that needs to be dealt with, but it must not be used as a means to limit or fight usual democratic opposition in a State.⁴⁷ Political freedom of speech, which is legitimate in a democratic State, needs to be protected and allowed to flourish. States that attempt overbroad restrictions on speech and democratic opposition activities are not democratic. It is for that reason that many international laws protect freedom of speech and freedom of association besides a range of other rights. The extent to which a State does not comply with its international obligations is an indictment of its commitment to these values and the significance of democracy itself.

The Sustainable Development Goals are meant to ensure that States achieve a range of objectives

45 Amnesty International *Suppression of Terrorism Act Undermines Human Rights in Swaziland* (2009) 11; see also T Deby “Culture and resistance in Swaziland” (2014) 32.3 *Journal of Contemporary African Studies* 284-301.

46 C Csanyi “Terrorism and Human Rights” (2016) 1 *Journal of Eastern-European Criminal Law* 176-179.

47 LD White “Terrorism and Human Rights” (2014) 104 *Analyzing Different Dimensions and New Threats in Defence against Terrorism* 41.

including in the areas of human rights and democratic freedoms. That some States will do so is without question. The difficulty is with the States that continue to trample upon or disrespect the rights of its citizens. It is in these countries where the SDGs will be most meaningfully tested. Much more needs to be done to make these States accountable and ensure that they don't use terrorism and a range of other legitimate problems as a means to illegitimately go after its political opposition. Human rights must be available to all regardless of who they are and where they are living in the world. At the moment there are still many States where rights are not upheld and the State is the primary violator. Even in democratic States, ensuring the correct balance between competing rights remains a continuing challenge. This can only be done where those doing the arbitrating are independent and do not simply do the State's bidding.