



**SOUTHERN AFRICA
LITIGATION CENTRE**



JOINT SUBMISSION TO THE 2ND CYCLE UNIVERSAL PERIODIC REVIEW OF SWAZILAND (APR – MAY 2016)

SUBMITTED BY:

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INTRODUCTION

This submission has been prepared for the Universal Periodic Review (UPR) of the Kingdom of Swaziland in April - May 2016 by four organisations, the Southern Africa Litigation Centre (SALC), Lawyers for Lawyers (L4L), the International Bar Association's Human Rights Institute (IBAHRI) and Judges for Judges (J4J) - henceforth the organisations.

SALC is a non-governmental organisation based in Johannesburg, South Africa, which promotes and advances human rights and the rule of law in southern Africa, primarily through strategic litigation support and capacity building. It aims to provide support—both technical and financial—to human rights and public interest initiatives undertaken by domestic lawyers and local civil society organisations in southern Africa. SALC works in Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Zambia and Zimbabwe. Its model is to work in conjunction with domestic lawyers and civil society organisations in each jurisdiction who are litigating public interest cases involving human rights or the rule of law. SALC has worked on human rights concerns in Swaziland since 2005, including through providing assistance for litigation.

L4L is an independent and non-political Dutch foundation, which was established in 1986 and is funded by lawyers' donations. L4L promotes the proper functioning of the rule of law by pursuing freedom and independence of the legal profession. It supports lawyers worldwide who are threatened or suppressed in the execution of their profession. L4L has special consultative status with ECOSOC since 2013.

Established in 1947, the International Bar Association (IBA) has a membership of over 55,000 individual lawyers and 206 bar associations and law societies spanning all continents and has considerable experience in providing assistance to the global legal community. The IBA's Human Rights Institute (IBAHRI) was established in 1995 and works across the IBA helping to promote, protect and enforce human rights under a just rule of law, and to preserve the independence of the judiciary and legal profession worldwide.

J4J is an independent and non-political Dutch foundation, which was established in 1998. It was set up by judges to support fellow judges abroad who are experiencing problems whilst executing their professional duties. The idea underlying the activities of J4J is that, in a society based on the rule of law, it is the duty of the government to respect and protect the independence of the judiciary. The Foundation is dependent on private donations to fulfill its mission. J4J was part of a fact finding mission to Swaziland led by the International Commission of Jurists (ICJ), in collaboration with the Africa Judges and Jurists Forum (AJJF), and the Commonwealth Magistrates' and Judges' Association (CMJA) in May 2015.

The information contained in this shadow report is based on information obtained by the organisations in the course of their work on Swaziland. Concerns raised include the continued suppression of freedom of expression, association and assembly in the country which is often accompanied by other human rights violations; the absence of the rule of law, lack of external and internal independence of the judiciary; as well as the failure of Swaziland to guarantee effective access to legal services provided by an independent legal profession as set out in the UN Basic Principles on the Role of Lawyers.¹

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FOLLOW UP TO THE PREVIOUS REVIEW

During its first UPR in October 2011, Swaziland agreed to ratify the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict; the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; the Convention on the Rights of Persons with Disabilities; and the Optional Protocol to the Convention on the Rights of Persons with Disabilities. The country acceded to these treaties in 2012.²

Swaziland also received recommendations to ratify the first and second Optional Protocols to the International Covenant on Civil and Political Rights (ICCPR), the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT), and the Optional Protocol to Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). However, these recommendations did not receive the support of Swaziland and the treaties have not been ratified. Swaziland also did not support recommendations to extend an invitation to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and eventually extend a standing invitation to all special procedures of the Human Rights Council; or to formalise the moratorium on the death penalty with a view to its later abolition.

In 2012 and February 2015, Swaziland received requests for visits from the Special Rapporteur on the Independence of Judges and Lawyers; as well as the Special Rapporteur on the human right to safe drinking water and sanitation respectively. As far as the organisations are aware, neither of them has received an invitation to date. Nor has Swaziland extended an invitation to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression since the request made in 2003. In fact, the country does not appear to have received any visit from any UN special procedures or mechanisms.

Despite accepting the majority of the recommendations related to the protection and promotion of freedom of association, assembly and expression, these rights continue to be violated and suppressed in the country. In fact, the situation appears to have deteriorated since the last review and was particularly bad in 2014. Swaziland also accepted a recommendation to, "take concrete and immediate measures to guarantee the independence and the impartiality of the judiciary."³ However, as will be shown, there has been an apparent lack of independence of the judiciary since the last UPR, particularly under former Chief Justice Michael Ramodibedi.

THE NATIONAL HUMAN RIGHTS FRAMEWORK

Since the last review, Swaziland has taken some steps to improve the legal framework for the protection of human rights in the country. As stated above, a number of human rights treaties have been ratified and in 2012, the Children's Protection and Welfare Act⁴ was enacted in accordance with the country's undertaking during its last review. However, Swaziland still has not enacted other laws it undertook to enact. These include the Human Rights Commission Bill of 2011 and the Domestic Violence and Sexual Offences Bill of 2009. The latter was passed by parliament in June 2013, but has not yet been passed into law by King Mswati III.⁵

There are also a number of laws of concern which remain in place. The Suppression of Terrorism Act No. 3 of 2008 (Terrorism Act), and the Sedition and Subversive Activities Act of 1938 (Sedition Act) have

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still not been repealed or amended despite Swaziland's acceptance of recommendations in this regard.⁶ SALC is currently assisting with a constitutional challenge to these laws.⁷

The Kings Proclamation to the Nation of 1973, which banned political parties, also remains in force. In addition, the provision of the constitution which grants the King immunity from any suit or legal process in respect of acts or omissions by him has not been repealed.⁸ Furthermore, it appears that the explicit practice directive issued by the Chief Justice Ramodibedi,⁹ which further grants the King immunity for any claims made indirectly against him, also still remains in force. These two provisions prevent access to justice for individuals and business with a claim against the King.

THE HUMAN RIGHTS SITUATION ON THE GROUND

A number of human rights concerns, raised in Swaziland's last UPR remain and appear to have deteriorated, including the suppression of freedom of association, assembly and expression. In addition, the organisations are concerned about the apparent lack of independence of the judiciary resulting in a violation of the right of access to justice and to an effective remedy, as well as undue interference with the independence of lawyers.

Suppression of Freedom of Expression

The right to freedom of expression continues to be violated in the country. Since the last UPR, at least 13 individuals have been arrested and charged with crimes due to the peaceful expression of their opinion. At least two - human rights lawyer, Thulani Maseko and magazine editor, Bheki Makhubu - were charged and convicted of contempt of court due to articles critical of the conduct of the judiciary, specifically that of former Chief Justice Michael Ramodibedi. They were arrested in March 2014 and convicted and sentenced to 2 years imprisonment in July 2014.¹⁰ In June 2015, their conviction was overturned and they were released.

Thulani Maseko is a prominent human rights lawyer and a senior member of Lawyers for Human Rights Swaziland, as well as the Southern Africa Human Rights Defenders Network.

In February and March of 2014, Thulani Maseko, together with magazine editor, Bheki Makhubu, wrote a series of critical articles about the arrest of government vehicle inspector Mr. Bhantshana Gwebu, whose job it was to prevent corruption in government transport systems. Mr. Gwebu had arrested Judge Esther Ota's driver after the driver had taken the judge on an unauthorized journey to purchase school uniforms for her children. Chief Justice Michael Ramodibedi then issued a warrant for Mr. Gwebu's arrest for "unlawfully impounding" the judge's car. Mr. Gwebu was arrested and remained in pre-trial detention for nine days before he was released on bail. Thulani Maseko's article questioned the integrity, independence and impartiality of the judicial system in Swaziland.

Following their series of articles, Thulani Maseko and Bheki Makhubu were arrested in March 2014 and charged with 'contempt of court'. Despite a court finding in April 2014 that their arrest had been unconstitutional, they were convicted by the High Court of Swaziland on 25 July 2014. Both were sentenced to two years in prison. That sentence is much heavier than the 30-days sentence or 2,200 Euro fine that is common for the offence. The judge found, referring to the constitution, that the right of freedom of expression is not absolute but limited.

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On 30 June 2015, the Swaziland Supreme Court overturned Thulani Maseko and Bheki Makhubu's conviction on appeal and ordered their release. The State finally conceded that it had no case against them and they were set free.

Other individuals have been charged under the Terrorism Act and/or the Sedition Act. The authorities have interpreted provisions of these laws to attribute terrorist intentions to any criticism of the King or government. Since 2013, at least eleven men have been arrested and detained on charges of sedition and/or terrorism— one more than once.¹¹ These include:

- Mfanawenkhosi Mntshali, Derrick Nkambule and Maxwell Dlamini who were arrested in September 2013 for participating in an alleged unlawful rally on 19 April 2013 and holding a banner deemed to be a seditious publication;¹²
- Seven protesters, Bongani Gama, Mlungisi Makhanya, Brian Ntshangase, Mangaliso Khumalo, Bafana Magongo, Ntobeko Maseko, and Siza Tsabedze (commonly referred to as the PUDEMO 7) arrested in April 2014 and charged under the Terrorism and Sedition Acts in relation to their chanting of slogans and wearing PUDEMO branded clothing. The seven men were released on bail on 6 May 2014. They have not been brought to trial to date;¹³ as well as
- Mario Masuku and Maxwell Dlamini arrested in May 2014 in connection with a speech Mario made at a May Day rally and both their participation in the chanting of slogans. Both were charged under the Terrorism and Sedition Acts.¹⁴

Suppression of Freedom of Association and Assembly

Individuals have also been charged with terrorism and sedition for participating in peaceful assemblies and/or associating with political parties, especially the People's United Democratic Movement (PUDEMO) and the youth wing of PUDEMO, the Swaziland Youth Congress (SWAYOCO).

In 2008, PUDEMO and SWAYOCO were declared terrorist groups by the Prime Minister of Swaziland. The declaration was made in terms of section 28 of the Suppression of Terrorism Act¹⁵ and any support of such groups is seen as an act of terrorism. In at least three cases, sedition and/ or terrorism charges have been brought against individuals for wearing clothing with PUDEMO's name or for chanting slogans in support of PUDEMO.¹⁶ Mfanawenkhosi Mntshali, Derrick Nkambule and Maxwell Dlamini; as well as Mario Masuku and Maxwell Dlamini, who have been charged under the laws, launched constitutional challenges to the laws. These two cases and two others were consolidated into one case and the hearing started on 8 September 2015.¹⁷

Despite the adoption of a Constitution¹⁸ in 2005, which guarantees the right to freedom of association and assembly¹⁹, the Kings Proclamation to the Nation, which bans political parties, has not been repealed. In addition, PUDEMO, SWAYOCO and two other parties, the South African-based Swaziland Solidarity Network (SSN) and the Swaziland People's Liberation Army (Umbane) also remain branded as terrorist entities. SALC, L4L, IBAHRI and J4J are concerned that the procedure by which an organisation can be declared a terrorist organisation in Swaziland can be abused so as to suppress opposition, particularly in light of the broad definition of terrorism in the law. While a singular definition of terrorism has proven difficult to come up with, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has made it clear that terrorism and national security laws cannot be used by a state "as a justification for measures aimed at suppressing opposition or to justify repressive practices against its population."²⁰

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Violation of Rights of Arrested and Detained Individuals

Many of those charged with crimes in connection with the peaceful exercise of their rights to freedom of expression, association and assembly have also been subjected to arbitrary arrests and detentions, prolonged pre-trial detention and unfair trials. Mario Masuku and Maxwell Dlamini, for example were arrested on 1 May 2014 and remained in pre-trial detention for over a year before being released on bail on 14 July 2015 by the Swaziland Supreme Court. They had previously unsuccessfully applied for bail twice in 2014. During their appeal in July 2015, the prosecution acknowledged concern over the competence of Judge Mpendulo Simelane who had heard the first two hearings and had since been charged with defeating the ends of justice and removed as a judge.

On 1 May 2014, Mario Masuku and Maxwell Dlamini attended a May Day rally at Salesian Sports club in Manzini. At this rally, Mario Masuku spoke about his desire for a multi-party democracy in Swaziland. He further raised concern about the Tinkhundla system of governance²¹ and the absolute monarchy; the removal of Swaziland by the US from benefits under the Africa Growth and Opportunity Act (AGOA); and the lack of independence of the judiciary and the rule of law in the country. Both Mario Masuku and Maxwell Dlamini participated in the singing of songs and chanting of slogans at the rally. They were arrested as they left and charged under the Terrorism and the Sedition Acts.

Mario Masuku and Maxwell Dlamini applied for bail soon after their arrest but this was refused by Judge Mpendulo Simelane in the High Court despite Judge Mumcy Dlamini having granted bail to the seven PUDEMO members facing identical charges earlier in the year. In October 2014 they made a fresh application for bail based on the presence of new circumstances that had arisen since the initial refusal. Mario Masuku is a diabetic and his health had deteriorated significantly whilst in detention. In addition, the continued detention of Maxwell Dlamini prevented him from continuing with his studies at the University of Swaziland. The start of their criminal trial had also been delayed because a number of challenges to the constitutionality of the Terrorism and Sedition Acts. The criminal trial could not commence until the legality of the legislation had been determined.

This second bail application should have been heard on 24 October 2014, but was postponed because the prosecution had been unable to file heads of argument before the hearing. It was then scheduled to be heard on Tuesday 28 October 2014. However, the application was reassigned from the sitting Judge, Judge Mumcy Dlamini, who had granted bail to the seven PUDEMO members, to Judge Bheki Maphalala. Judge Bheki Maphalala was also reportedly instructed not to hear the case and to postpone it to a time when Judge Mpendulo Simelane, who had heard their original bail application, would be available. The bail application was eventually heard on 7 November and on 13 November 2014 Judge Mpendulo Simelane found that the application for bail was “unmeritorious” and dismissed it.

Mario Masuku and Maxwell Dlamini appealed this refusal and their appeal was heard in July 2015. The prosecution indicated that – partly due to the concern over the competence of Judge Simelane who had since been charged with defeating the ends of justice and removed as a judge – they would not oppose bail. Both were finally granted bail.

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Thulani Maseko and Bheki Makhubu were kept in pre-trial detention between March 2014 and their conviction on 25 July 2014, despite a court finding in April 2014 that their arrest had been unconstitutional. On 6 April 2014 they were released, but were arbitrarily re-arrested the next day under new arrest warrants for the same alleged crime.

There have also been reports of individuals being subjected to torture and cruel, inhuman and degrading treatment. For example, Thulani Maseko, as well as Mario Masuku and Maxwell Dlamini were reportedly subjected to solitary confinement during their period of detention.²² The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has stated that solitary confinement could amount to cruel, inhuman and degrading punishment and even torture.²³

Lack of Independence of the Judiciary

The organisations are concerned about the apparent lack of external and internal independence of the judiciary in the country, manifested through a number of irregularities in criminal proceedings brought before the courts, as well as the judicial crisis in 2015 which, like the judicial crisis in 2011,²⁴ featured Chief Justice Michael Ramodibedi as the leading figure.

Irregularities in criminal proceedings

During Chief Justice Ramodibedi's tenure, a number of irregularities occurred in criminal proceedings, particularly those of a political nature. Irregularities included judges with a vested interest in a case refusing to recuse themselves, failure to provide written judgements thus jeopardising the success of appeals and the apparent manipulation of the court roll to ensure cases are brought before certain judges. This reassigning of cases to judges appears to have been facilitated by a directive issued by Michael Ramodibedi in 2011, in terms of which the Chief Justice could personally allocate cases to judges of his choice, thereby usurping the Registrar's functions and regularly side-stepping the established practice in which the "duty judge" hears new matters and bail applications.

In the Thulani Maseko and Bheki Makhubu case, for example, the defendants had requested the recusal of the presiding judge, Mpendulo Simelane, on the grounds that he had been the High Court Registrar in the case which had triggered the article written by them, which in turn led to their criminal charges. Judge Simelane refused the recusal application, but then in his judgment convicting Thulani Maseko and Bheki Makhubu explicitly relied on his involvement in the Gwebu case²⁵ to reject the evidence of one of the defence witnesses.²⁶

In the case of Mario Masuku and Maxwell Dlamini, their second bail application was reassigned from the sitting Judge, Judge Mumcy Dlamini, to Judge Bheki Maphalala. Judge Mumcy Dlamini had granted bail to seven PUDEMO members facing similar charges earlier in the year and had also released Thulani Maseko and Bheki Makhubu earlier that year after finding that their arrest and detention were unlawful. Furthermore, Judge Bheki Maphalala was reportedly instructed not to hear the case and to postpone it to a time when Judge Mpendulo Simelane, who had heard their original bail application, would be available.²⁷ This second bail hearing was eventually heard by Judge Mpendulo Simelane and once again rejected.

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2015 Judicial crisis

As already stated, the 2015 judicial crisis featured Chief Justice Ramodibedi at the centre and negatively impacted on independence of the judiciary and access to justice and an effective remedy for individuals in Swaziland. The UN Basic Principles on the Independence of the Judiciary requires that judicial appointments should not be for improper motives,²⁸ however it seems the close relationship of Ramodibedi with the Executive both brought him to his position as Chief Justice. It also led, in 2015, to his downfall as he became too close to then Minister of Justice, Sibusiso Shongwe, and subsequently became involved in a political conflict between the latter and the Prime Minister, leading to the 2015 judicial crisis.

Chief Justice Ramodibedi, a citizen of Lesotho, was appointed acting Chief Justice of Swaziland in 2010. The Constitution of Swaziland states, "a person who is not a citizen of Swaziland shall not be appointed as justice of a superior court after seven years from the commencement of this constitution". The seven year period expired on 26 July 2012. However, Michael Ramodibedi's contract as acting Chief Justice was renewed for an indefinite period in June 2012, one month before that deadline.

Ramodibedi has also reportedly attempted to unduly influence the set-up of the judiciary. In 2014, he reportedly issued a warrant for the arrest of three High Court judges who were critical of him. In May 2014, two Supreme Court judges reportedly threatened to resign if the warrant issued by Ramodibedi was served. However, the Swazi police did not make the arrests.

In April 2015, the Anti-Corruption Commission, headed by the Prime Minister, brought an application for an arrest warrant against Minister of Justice Shongwe. Arrest warrants were also issued for Chief Justice Michael Ramodibedi, Judge Mpendulo Simelane and Jacobus Annandale, as well as High Court Registrar Fikile Nhlabatsi for defeating the ends of justice.²⁹ They were accused under the Prevention of Corruption Act No. 3 of 2006 of abusing their respective judicial functions in a manner amounting to abuse of authority and violation of their legal duties, in order to obtain a favourable result. Michael Ramodibedi and Mpendulo Simelane were in addition also charged with defeating or obstructing the course of justice. Judge Annandale was held in jail for four days. On 12 May, the charges against Judge Annandale and Registrar Nhlabatsi were withdrawn and the prosecution stopped. Michael Ramodibedi has since been dismissed and Mpendulo Simelane is on suspension prior to the commencement of his criminal trial. At the end of June 2015, seven acting judges were appointed, but concerns have been raised about the close family ties of the appointed judges and how this will affect independence of the judiciary.³⁰ In the meantime, there have been advertisements for judicial vacancies on the High Court bench.

In the past few months it appears that the judiciary has tried to rid itself of the appearance of lack of independence which prevailed during Michael Ramodibedi's tenure. It remains to be seen how the Supreme Court and High Court will be constituted in the future to ensure independence.

Undue interference with Independence of Lawyers

Reports received by the organisations, as well as information the organisations have received from lawyers in Swaziland, demonstrate that Swaziland does not always uphold the necessary guarantees for the proper functioning of the legal profession as set out in the Basic Principles on the Role of Lawyers.

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As a consequence, lawyers encounter difficulties in carrying out their profession independently. This also undermines the proper functioning of the judicial system, including the right to fair trial.

The organisations have serious concerns about the absence of guarantees for the freedom of expression of lawyers in Swaziland. Lawyers in Swaziland have been prosecuted, threatened and intimidated for expressing their opinions and for promoting human rights.

The case of Mr. Thulani Maseko shows that lawyers' freedom of expression is not respected and that lawyers have been prosecuted for expressing their opinions. This is contrary to Article 23 of the Basic Principles on the Role of Lawyers, which states that lawyers, like other citizens, are entitled to freedom of expression, belief, association and assembly. In particular they have the right to take part in matters concerning the law, the administration of justice and the promotion and protection of human rights.³¹

Furthermore, the case of Mr. Siphon Gumedze shows that lawyers in Swaziland have been threatened and intimidated by their own government.

Mr Siphon Gumedze is a human rights lawyer, who works for Swaziland Lawyers for Human Rights. In 2014, Mr. Gumedze, together with fellow human rights defender Mr Vincent Ncongwane, attended an African civil society conference, 'Towards an Action Program for Democracy', which was held in conjunction with the Africa Leaders' Summit being conducted at The White House in Washington, D.C.

While addressing Swaziland Members of Parliament (MPs) on 6 August 2014, the Swaziland Prime Minister Sibusiso Barnabas Dlamini accused Mr Gumedze and Mr Ncongwane of 'sneaking' into Washington, D.C. without properly informing the country's authorities, and followed his comment by then calling for their strangulation.

These remarks were made in the context of promoting the USA African Growth Opportunity Act (AGOA), during which the MPs requested information on what the government was doing to regain their eligibility for assistance from the AGOA. Swaziland was suspended from the AGOA, effective 1 January 2015, by US President Barack Obama over concerns about the standards of democracy and human rights in the country. In addition, Prime Minister Dlamini accused Mr Gumedze and Mr Ncongwane of opposing the lifting of Swaziland's suspension from the AGOA. Prime Minister Dlamini said that they should be strangled by authorities upon their return from the USA.

RECOMMENDATIONS FOR ACTION BY THE STATE UNDER REVIEW

SALC, L4L and IBAHRI call on the government of Swaziland to:

International human rights treaties and bodies

- ratify all outstanding international human rights treaties, including those it refused to ratify during the last UPR;
- extend an invitation to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the Independence of Judges and Lawyers; and the Special Rapporteur on the human right to safe drinking water and sanitation in accordance with their request;

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- extend a standing invitation to invitation to all special procedures of the Human Rights Council;

The national human rights framework

- incorporate into national laws the provisions of treaties already ratified by Swaziland;
- amend the Terrorism and Sedition Acts to bring them in line with international human rights standards, as already accepted by Swaziland during the previous UPR;
- amend national laws so as to lift the ban on political parties;

Freedom of expression

- respect, protect and promote the right to freedom of expression, in accordance with its undertaking during the 2011 UPR, including by ensuring that people are not arbitrarily arrested, detained or subjected to politically-motivated trial for the peaceful expression of their opinion and criticism of government and the judiciary;
- end the abuse of the Sedition and Terrorism Acts, as well as other legislation in suppressing the right to freedom of expression;

Freedom of association and assembly

- in accordance with recommendations accepted during the previous UPR, respect the rights of all its citizens to freedom of assembly and freedom of association, which are guaranteed by the Swazi Constitution and by international human rights instruments particularly by allowing labour, political and civil society groups to assemble peacefully, free from Government interference;
- ensure that political parties, organisations and associations with peaceful objectives are not labelled terrorist groups merely because they are critical of the government;

Violation of Rights of Arrested and Detained Individuals

- immediately put in place and implement measures to prevent, investigate and prosecute all cases of torture and inhuman or degrading treatment as agreed during its previous UPR;
- ensure access to justice and adequate redress for victims of arbitrary arrests and illegal detentions, including by investigating reported cases and ensuring that those responsible for them are held accountable through disciplinary and criminal proceedings;

Independence of the judiciary

- take measures to ensure the independence of the judiciary, including by ensuring the appointment of impartial judges, as well as prosecuting and punishing those responsible for acts undermining the independence or impartiality of judicial proceedings;
- ensure the rules relating to the appointment and removal of judges are in line with the Basic Principles on the Independence of the Judiciary, including by ensuring necessary

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safeguards are put in place guaranteeing judges' security of tenure,³² that the disciplinary procedures against judges are in compliance with articles 17-20 of the Basic Principles on the Independence of the Judiciary,³³ and ensuring a transparent and fair merit-based appointment procedure for judges in accordance with article 10;

Independence of Lawyers

- ensure that lawyers or not subjected to prosecution, sanctions or threats thereof for any action taken in accordance with recognized professional duties;
- take all measures necessary to prevent the threat of or actual prosecution, disciplinary action or other sanctions against lawyers on improper grounds, in accordance with articles 16(c) and 26, 27, 28 and 29 of the Basic Principles on the Role of Lawyers;³⁴ and
- raise awareness of the Basic Principles on the Role of Lawyers among lawyers, judges and prosecutors, amongst others, by giving them periodically, appropriate mandatory education and training on the Basic Principles, to ensure that its provisions are respected and taken into account before national courts and in pre-trial stages.

¹ Basic Principles on the Role of Lawyers, adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

² See <http://indicators.ohchr.org/> (accessed 8 September 2015)

³ See recommendation 36 made by Canada during the last review, <http://www.upr-epu.com/ENG/country.php?id=249> (accessed 8 September 2015)

⁴ Children's Protection and Welfare Act 6 of 2012, <http://www.osall.org.za/docs/2011/03/Swaziland-Childrens-Protection-and-Welfare-Act-6-of-2012-Part-1.pdf> (accessed 8 September 2015)

⁵ Joy as Sexual Offences Act of 2009 is passed, <http://www.times.co.sz/news/88712-joy-as-sexual-offences-act-of-2009-is-passed.html> (accessed 8 September 2015)

⁶ See recommendation 77 made by France, 129 by Norway and 132 by Sweden, all of which were accepted. <http://www.upr-epu.com/ENG/country.php?id=249> (accessed 8 September 2015)

⁷ See: Court Diary: Swaziland constitutional challenges

<http://www.southernafricalitigationcentre.org/2015/09/08/court-diary-swaziland-constitutional-challenges/>

⁸ Article 11

⁹ no. 4/2011 issued by the Chief Justice Ramodibedi on 16 June 2011

¹⁰ For further information see <http://www.southernafricalitigationcentre.org/cases/completed-cases/swaziland-human-rights-lawyer-and-editor-charged-with-contempt-of-court/>

¹¹ Maxwell Dlamini was arrested with three others in September 2013 (and charged under the Sedition Act) and with Mario Masuku in May 2014 (and charged under the Sedition and Terrorism Acts).

¹² Mfanawenkhosi Mntshali, Derrick Nkambule and Maxwell Dlamini - For further information see: <http://www.southernafricalitigationcentre.org/cases/ongoing-cases/swaziland-activists-challenge-constitutionality-of-the-sedition-and-subversive-activities-act/>

¹³ PUDEMO 7 - For further information see: <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/08/Swaziland-Briefing-Paper-Freedom-of-Expression.pdf>

¹⁴ Mario Masuku and Maxwell Dlamini - For further information see:

<http://www.southernafricalitigationcentre.org/cases/ongoing-cases/swaziland-challenging-the-suppression-of-terrorism-act-and-the-sedition-and-subversive-activities-act/>

¹⁵ This section states, "(1)Where the Attorney-General, the Commissioner or person responsible for the prevention of corruption or other investigative or financial body has reasonable grounds to believe that an entity has knowingly committed, attempted to commit, participated in committing or facilitated the commission of, a terrorist act,... [such person]... may recommend to the Minister that a notice be made ... in respect of that entity. (2)Where the Minister



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is satisfied that there is material to support a recommendation made under subsection (1), the Minister may by notice published in the Gazette declare the entity in respect of which the recommendation has been made to be a specified entity.”

¹⁶ Mfanawenkhozi Mntshali, Derrick Nkambule and Maxwell Dlamini; PUDEMO 7; and Mario Masuku and Maxwell Dlamini cases, Ibid

¹⁷ See: Court Diary: Swaziland constitutional challenges

<http://www.southernafricalitigationcentre.org/2015/09/08/court-diary-swaziland-constitutional-challenges/> and

Court Diary: Swaziland constitutional challenges, Day 2

<http://www.southernafricalitigationcentre.org/2015/09/09/court-diary-swaziland-constitutional-challenges-day-2/> (accessed 9 September 2015)

¹⁸ The Constitution Of The Kingdom Of Swaziland Act, 2005(Act No: 001 Of 2005)

¹⁹ Article 25 guarantees the right to freedom of association and assembly. In terms of Article 25(3), “Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision - (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; (b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons; or (c) that imposes reasonable restrictions upon public officers.”

²⁰ Protection of human rights and fundamental freedoms while countering terrorism, A/61/150, paragraph 20 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/477/03/PDF/N0647703.pdf?OpenElement>

²¹ The Tinkhundla system is the political system which prohibits the participation of political parties in elections and permits King Mswati III to appoint unilaterally just under 30 percent of the members of the two houses of Parliament.

²² Statement: The Southern Africa Litigation Centre Condemns The Use Of Solitary Confinement Against Swazi Lawyer, Thulani Maseko, <http://www.southernafricalitigationcentre.org/2015/03/23/statement-the-southern-africa-litigation-centre-condemns-the-use-of-solitary-confinement-against-swazi-lawyer-thulani-maseko/> (accessed 8 September 2015)

²³ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or Punishment to the Sixty-sixth session of the Human Rights Commission, 5 August 2011, A/66/268 <http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf> (accessed 14 September 2015)

²⁴ In the summer of 2011, Chief Justice Ramodibedi suspended Justice Thomas Masuku of the High Court of Swaziland, stating that Masuku had insulted him and King Mswati III. Justice Masuku had in the past made several rulings in favour of human rights. After a deeply flawed procedure before the Judicial Services Commission (JSC) Masuku was sacked on 27 September 2011 by the king for “serious misbehaviour.” David Matse, the Swaziland Minister for Justice, was fired from his job because he refused to sign the dismissal letter for Masuku. In addition, in August 2011 the Law Society of Swaziland instituted a boycott of the courts that lasted four months to protest two directives instituted by the Chief Justice – one that gave the king immunity from claims made indirectly against him and another that allowed the Chief Justice to personally allocate cases to judges of his choice. The directives were viewed as interference not only with the administration of the courts, but also as a denial of the fundamental right to access justice.

²⁵ Bhantshana Gwebu, a government vehicle inspector whose job it is to prevent corruption in government transport systems, had arrested Judge Esther Ota’s driver after the driver had taken the judge on an unauthorized journey to purchase school uniforms for her children. The Chief Justice then issued a warrant for Gwebu’s arrest for “unlawfully impounding” the judge’s car.

²⁶ In paragraph 23 of the judgment Judge Simelane states: “I should interpose at this stage and state that I take judicial notice that the contention by the Accused that Bhantshana was denied his right to legal representation is far-fetched. This, I say because I was in attendance when the said Bhantshana was remanded. That I was in attendance is confirmed by the defence. It is an uncontroverted fact.”

²⁷ The first bail application, made soon after their arrest in May 2014, was refused by Judge Mpendulo Simelane in the High Court despite Judge Mumcy Dlamini having granted bail to the seven PUDEMO members facing identical charges earlier in the year.

²⁸ Article 10, “Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of

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race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.”

²⁹ The warrants were issued in terms of a March 2015 application for their arrest on 23 charges, including abuse of power, brought by the Anti-Corruption Commission, headed by the Prime Minister.

³⁰ See: Judiciary family affair, <http://www.observer.org.sz/news/74077-judiciary-family-affair.html> (accessed 8 September 2015)

³¹ Supra at footnote 1

³² Article 12, “Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.”

³³ Article 17, “A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.”

Article 18, “Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.”

Article 19, “All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.”

Article 20, “Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.”

³⁴ Article 16(c) of the Basic Principles provides:

"16. Governments shall ensure that lawyers (...) (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics."

Articles 26, 27, 28 and 29 of the Basic Principles provide:

"26. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms.

27. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.

28. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.

29. All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles."