

Achieving Justice for Gross Human Rights Violations in Swaziland

Key Challenges, May 2018

ICJ Global Redress and Accountability Initiative

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists (ICJ) promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

® Achieving Justice for Gross Human Rights Violations in Swaziland - Key Challenges
ICJ Global Redress and Accountability Initiative

© Copyright International Commission of Jurists
Published in May 2018

The International Commission of Jurists (ICJ) permits free reproduction of extracts from any of its publications provided that due acknowledgment is given and a copy of the publication carrying the extract is sent to their headquarters at the following address:

International Commission of Jurists
P.O. Box 91
Rue des Bains 33
Geneva
Switzerland

This study was made possible with the support of the Ministry for Foreign Affairs of Finland.



**Achieving Justice for Gross
Human Rights Violations in Swaziland**
Key Challenges, May 2018

ICJ Global Redress and Accountability Initiative

TABLE OF CONTENTS

KEY CHALLENGES

| | | |
|----------|--|-----------|
| 1 | General human rights situation in Swaziland | 3 |
| 1.1 | Political and legal system | 3 |
| 1.2 | Swaziland’s international human rights obligations and commitments | 8 |
| 2 | Sexual and gender-based violence | 9 |
| 2.1 | Domestic violence | 9 |
| 2.2 | Sexual violence | 9 |
| 2.3 | Domestic law on SGBV | 10 |
| 2.4 | Swaziland’s international human rights obligations and commitments on SGBV | 11 |
| 2.5 | The effect of culture and tradition on sexual and gender-based violence | 14 |
| 2.6 | Justice actors | 14 |
| 2.7 | The Judiciary | 14 |
| 2.8 | Access to effective remedies and reparation | 15 |
| 3 | Detention and treatment of persons deprived of liberty | 15 |
| 3.1 | Torture, ill-treatment and death of prisoners and suspects | 16 |
| 3.2 | Torture and ill-treatment by game rangers | 17 |
| 3.3 | Protection of the right to personal liberty | 18 |
| 3.4 | Presumption of innocence | 18 |
| 4 | The weaponization of the law as a means of suppressing political opponents and human rights defenders | 19 |
| 4.1 | Sedition, public order and anti-terrorism laws | 19 |
| 4.2 | Defamation | 22 |
| 4.3 | Using the law to target journalists and other human rights defenders | 22 |
| 5 | Violation of economic, social and cultural rights, focusing on land and property rights | 24 |
| 5.1 | Swaziland’s land tenure | 24 |
| 5.2 | The right to ownership of land | 25 |
| 5.3 | Deprivation of property in a constitutional dispensation | 26 |
| 5.4 | Forced eviction cases | 28 |
| 6 | Justice sector institutions and the Human Rights Commission | 28 |
| 6.1 | The Judiciary | 28 |
| 6.2 | The Police | 29 |
| 6.3 | Office of the Director of Public Prosecutions | 29 |
| 6.4 | Human Rights Commission | 29 |

ANNEX: REDRESS AND ACCOUNTABILITY FOR SGBV

| | |
|--|----|
| Workshop on enhancing redress and accountability for SGBV in Swaziland | 30 |
| Bilateral discussions on combating SGBV in Swaziland | 30 |
| Agenda for action | 30 |

KEY CHALLENGES

Executive summary

In Swaziland, key challenges are faced in achieving justice for gross human rights violations. Prevalent amongst these is the widespread occurrence of sexual and gender-based violence, with discriminatory practices based on customary laws and traditional beliefs undermining equality between men and women and the access by victims of such violence to effective remedies and reparation, as well as the holding to account of perpetrators of such violence. This is despite Swaziland's international and regional obligations and commitments that require the elimination of prejudices as well as customary and all other practices based on the idea of the inferiority or superiority and/or inequality of either of the sexes or on stereotyped roles for men and women, together with the overarching obligation of all States to protect all persons within their jurisdiction from all forms of violence. The Sexual Offences and Domestic Violence Bill 2015, first drafted over ten years ago, has still not been passed into law, including because there is a perception that some of its provisions will infringe Swazi law and custom. Legislative and policy reform is needed, as is the enhanced technical capacity and commitment of justice actors and policy makers to combat domestic and sexual violence.

Albeit that Swaziland is a party to the UN Convention against Torture, and its domestication of the prohibition against torture under the Constitution of the Kingdom of Swaziland, the State continues to be either actively involved in, or turn a blind eye to, torture and other forms of ill-treatment. Perpetrators of such acts, whether in the context of detention or action by game rangers, enjoy *de jure* and *de facto* impunity. Despite the guarantee of property rights in the Constitution, the governing of Swazi Nation Land by Swazi law and custom – alongside interpretive approaches of the highest courts of Swaziland to treat residents and users of such land as enjoying their residence and use only at the King's pleasure, through Chiefs, with no security of land tenure – means that citizens continue to face deprivation of land through procedures that lack due process and fail to guarantee prompt and adequate compensation.

The rule of law, and the need for diverse means of providing for checks and balances against potentially arbitrary and/or unlawful exercise of power, are undermined by persistent use of sedition, public order and anti-terrorism laws as well as defamation proceedings to silence, harass, intimidate and suppress dissenting political opponents, human rights defenders and journalists. Checks and balances are further undermined by powers of appointment to key justice sector positions, and to mechanisms responsible for judicial appointments, that ultimately remain vested in the King.

1 General human rights situation in Swaziland

1.1 Political and legal system

Swaziland gained independence from the Kingdom of Great Britain on 6 September 1968 through a Westminster-type Constitution.¹ The Independence Constitution set out the different arms and institutions of government, providing for the monarch, the legislature, executive and the judiciary. It included a justiciable Bill of Rights.² On 12 April 1973 King Sobhuza II jettisoned the

¹ Independence Constitution, Order No. 50 of 1968. See S Gumedze, 'Swaziland', in C Heyns (ed), *Human rights law in Africa* (Brill, 2004), pp.1580-1588.

² Independence Constitution, Chapter III.

Independence Constitution.³ He promulgated the King's Proclamation to the Nation. Declaring that the Independence Constitution was unworkable, King Sobhuza II announced that "I have assumed supreme power in the Kingdom of Swaziland and all legislative, executive and judicial powers is vested in myself".⁴

In 1986, King Mswati III ascended to the throne.⁵ In 1987 he reaffirmed that in terms of Swazi law and custom, the King holds supreme power in the Kingdom, and that all executive, legislative and judicial powers vest in the King.⁶

a) 2005 Constitution

In 2005, Swaziland adopted and enacted a new Constitution.⁷ Many human rights activists and pro-democracy groupings rejected the constitution-making process. They argued that in the presence of the King's Proclamation to the Nation, which prohibited and outlawed free political activity, the political environment was not conducive to effective and meaningful participation. They also argued that the legislation setting the process in motion expressly prohibited the participation of organisations, restricting participation to individuals only.⁸ In its report presented to the King in March 2001, the Constitution Review Commission (CRC) stated that: "Section 4 of the Constitutional Review Decree No. 2 of 1996 provided that any member of the general public who desires to make a submission to the Commission may do so in person or in writing and may not represent any one or be represented in any capacity whilst making such submission to the Commission".⁹ The CRC concluded that: "It was for this reason that group submissions were not allowed. A person wishing to make submissions appeared before the Commission in person and by himself and had his submissions recorded by both audio and video machines. Special tents were used for this exercise. No member of the public was allowed to listen to another's submissions. In a way it could be said that the collection of the submissions was done "in camera".¹⁰

Both the High Court¹¹ and the Supreme Court¹² upheld the position that only individuals were allowed to participate in the process. Thus, the right to freedom of assembly and to association as well as expression during the constitutional review and constitution-making process were severely undermined.

The International Bar Association has observed that "in order to satisfy the test of legitimacy a constitutional review and drafting process must be as conclusive as possible, as transparent as possible, as participatory as possible and it must be

³ King's Proclamation to the Nation, 12 April 1973: see Gumedze, above note 1 p.1582. Sobhuza II is the father of the current King Mswati III. He came of age on 22 December 1921, was installed as King Sobhuza II of Swaziland on 25 April 1968 and ruled over the Kingdom until his demise on 21 August 1982. See JSM Matsebula, *A history of Swaziland* (Longman South Africa, 3rd Ed, 1988), pp. 203 and 243.

⁴ King's 1973 Proclamation, para 3.

⁵ Matsebula, *ibid*, p.322.

⁶ King's Proclamation to the Nation (Amendment) Decree No. 1 of 1987, para 1.

⁷ Constitution of the Kingdom of Swaziland, Act No. 001 of 2005.

⁸ Decree No. 2 of 1996 (The King's Proclamation to the Nation of 12 April 1973), The Establishment of the Constitutional Review Commission. Section 4 of the Decree provided that: "Any member of the public who desires to make a submission on the Commission may do so in person or in writing and may not represent anyone or be represented in any capacity whilst making such submission to the Commission".

⁹ Constitutional Review Commission, *Final report on the submissions and progress report on the project for the recording and codification of Swazi law and custom* (undated), p.27.

¹⁰ *Ibid*.

¹¹ *Sithole NO (in his capacity as Trustee of the NCA Trust) and Others v The Prime Minister and Others*, Civil Case No. 2792 /2006.

¹² *Sithole NO and Others v The Prime Minister and Others*, Appeal Case No. 35/ 2008.

accountable to the people".¹³ It has been suggested that the Swaziland Constitution failed this test.¹⁴

Since the adoption of the Constitution, Swaziland purports to be a democratic country.¹⁵ The Constitution is the supreme law of the country.¹⁶ However, there is nothing in the Constitution to suggest that it is a constitutional monarchy, compared with other constitutional monarchies in the Southern Africa region.¹⁷ For instance, the King is immune from both taxation and legal proceedings under sections 10 and 11 of the Constitution.

On the face of it the Constitution provides for an impressive list of basic human rights and fundamental freedoms,¹⁸ as provided under international human rights instruments. However, "[a] careful reading of the Bill of Rights as contained in the Constitution shows that a lot individual rights are not guaranteed".¹⁹ Certain rights are instead subject to built-in restrictions, or 'claw-back clauses' that render them lacking when compared to international human rights law, including: the right to life, the right to personal liberty, protection from slavery and forced labour, protection from inhuman or degrading treatment, protection from deprivation of property, equality before the law, the right to fair hearing, the right against arbitrary search or entry, the right to freedom of conscience or religion, protection of freedom of expression, protection of freedom of assembly and association.²⁰ For example, forced labour is prohibited subject to some qualifications, including "normal parental, cultural, communal or other civic obligations, unless it is repugnant to the general principles of humanity".²¹

Notwithstanding the existence of the Constitution, Swaziland operates a dual legal system: the constitutional legal framework, which follows the Roman-Dutch common law system, as well as the system based on Swazi traditional and customary law.²² The King is the custodian of the traditional system, and his "[p]ronouncements become Swazi law when they are made known to the nation, especially at *Esibayeni* or Royal Cattle Byre".²³

b) *The legislature*

According to the Swazi Constitution, the King is the head of state and the executive authority of the country.²⁴ He appoints a Prime Minister and a Cabinet.²⁵ The Constitution also provides for a Parliament, which consists of two houses: the Senate and the House of Assembly. Election into Parliament and appointment to public office is based on "individual merit".²⁶ Consequently, citizens can only participate in an individual capacity and be voted at elections as individuals, not organised political parties. Hence, in the case of *Sithole NO and others v The Government of Swaziland and Others*, the Supreme Court observed

¹³ International Bar Association (IBA), *Striving for Democratic Governance: An Analysis of the Draft Swaziland Constitution* (August 2003), p.5.

¹⁴ TR Maseko, 'The drafting of the Constitution of Swaziland, 2005' (2008) 8(2) *African Human Rights Law Journal* 312-336.

¹⁵ Constitution of the Kingdom of Swaziland, section 1.

¹⁶ Constitution of the Kingdom of Swaziland, section 2.

¹⁷ For example, see section 44 of the Constitution of Lesotho.

¹⁸ Constitution of the Kingdom of Swaziland, Chapter III.

¹⁹ S Gumedze 'Human rights and the rule of law in Swaziland' (2005) 5 *African Human Rights Law Journal* 266-286, p.276.

²⁰ *Ibid.*

²¹ Constitution of the Kingdom of Swaziland, section 17(3)(a) – (e).

²² International Bar Association Human Rights Institute, *Swaziland – Law, Custom and Politics: Constitutional Crisis and the Breakdown in the Rule of Law* (March 2003), p.13.

²³ Constitutional Review Commission report, above note 8, p.135.

²⁴ Constitution of the Kingdom of Swaziland, section 64(1).

²⁵ *Ibid.*, section 67.

²⁶ *Ibid.*, section 79.

that "it was common cause between the parties that the right to freedom of association and assembly contained in Section 25(1) of the Constitution necessarily included the rights to form and join political parties", yet the Court held that: "Democracy is, I would suggest, like beauty, to be found in the eye of the beholder. Until the fairly recent demise of the Union of Soviet Socialist Republics ("U.S.S.R.") many of the member states and some satellites of the USSR chose to call themselves "democratic". I am under the impression that the entity which, before its merger into what is now called Germany, was formerly known as "East Germany" was then entitled the "Democratic German Republic", though many such academics and professors would have disputed its right to be called democratic."²⁷

The Supreme Court went on to say that, similarly with Swaziland, "the mere fact that it calls itself democratic does not mean that every part of its body politic must match up to every rule laid down either by law or tradition by which, say, the greater Western democracies are governed."²⁸

Accordingly, despite the provision of the rights to freedom of assembly and to association within the Constitution, political parties remain banned and prohibited in the spirit of Decree No. 11 of the 1973 Proclamation,²⁹ now entrenched in section 79 of the Constitution.³⁰ Consequently, political parties do not participate in elections, although citizens and members of political parties may do so as individuals. In this regard, the Supreme Court said: "There is certainly nothing in the Constitution that debars a member of a political party from seeking election as an independent individual and, once elected, joining up with others who think similarly to operate as a unit. Indeed, that is probably how the institution of political parties developed."³¹

Acting judge of Appeal Masuku delivered a dissenting opinion and stated that, "The majority judgment took the position that there is nothing in the Constitution that debars a member of a political party from entering the political arena as an individual once elected, and thereafter joining up with similarly minded in order to operate as a unit. In my respectful view, it is apparent that for one to attempt to enter as an independent as suggested is a means by which to circumvent the requirement of persons entering the arena on individual merit as specifically required by section 79, one is prevented by section 79 from exercising in full measure the fundamental rights otherwise endowed by section 25."³²

In so far as the legislature is concerned, the supreme authority to make law vests in the King-in-Parliament.³³ The last parliamentary elections took place in 2008; elections will again take place in 2018.

c) *The judiciary*

The judiciary has the responsibility to interpret the Constitution and to enforce the Bill of Rights, which is justiciable and enforceable.³⁴ However, the judiciary has no original jurisdiction on matters governed and regulated by Swazi law and

²⁷ *Sithole*, Appeal Case No. 50 of 2010, above note 12, para 22.

²⁸ *Ibid*, para 23.

²⁹ Decree No 11: "All political parties and similar bodies that cultivate and bring about disturbances and ill-feelings within the Nations are hereby dissolved and prohibited".

³⁰ Section 79 of the Constitution: "The system of government for Swaziland is a democratic. Participatory, *tinkhundla*-based system which emphasizes devolution of state power from central government to *tinkhundla* areas and individual merit as a basis for appointment to public office".

³¹ *Sithole*, above note 12, para 24.

³² *Ibid*, Masuku AJA Dissenting Judgment, para 24.

³³ Constitution of the Kingdom of Swaziland, section 106.

³⁴ *Ibid*, sections 35(1) and 151(2).

custom.³⁵ The Supreme Court is the apex court. Below it are the High Court and the magistracy. The courts are the ultimate interpreters of the Constitution.³⁶ The King on the advice of the Judicial Service Commission (JSC) appoints judges.³⁷ Although the financial and administrative independence of the judiciary is guaranteed by section 142 of the Constitution, it is notable that the King appoints all members of the JSC. There is thus a perception that the composition of the JSC strongly favours Royalty, compromising its independence and, by logical extension, compromising the independence of the judiciary.³⁸

Perceptions of the lack of independence and accountability of the judiciary were reinforced in 2011. During that year, the former Chief Justice of Swaziland, Michael Ramodibedi, levelled 12 charges against Justice S. Masuku, a Judge of the High Court of Swaziland. The Chief Justice called on him to show cause why he should not be removed from the office of judge of the High Court of Swaziland.³⁹ On the same day, the King suspended Judge Masuku "on full pay for the duration of the inquiry into the question of his removal from office".⁴⁰ Among the charges proffered against the judge was an accusation of "[I]nsulting His Majesty the King by using the words "forked tongue" with reference to him".⁴¹ In his judgment, Judge Masuku had said that: "it would be hard to imagine let alone accept and thus incompressible that His Majesty could conceivably speak with a forked tongue, saying one thing to his people and to do the opposite".⁴²

Following a disciplinary enquiry that was seen as falling short of the required standard of fairness in terms of the Constitution of Swaziland and also considered to be in breach of Swaziland's international obligations,⁴³ the Judicial Service Commission (JSC) recommended to the King that Judge Masuku be removed from the office of judge of the High Court in terms of section 158(4) of the Constitution. Judge Masuku's contentions about the lack of fairness, impartiality and bias of the Chief Justice were ignored. Acting on the recommendations of the JSC, the King proceeded to remove Justice Masuku from office.⁴⁴

Judge Masuku would have approached the High Court to review and to have the recommendation of the JSC to the King overturned on the grounds that it was unlawful and unconstitutional. However, given the perception that the judiciary lacks independence and impartiality, he instead opted to file a communication before the African Commission on Human and People's Rights (ACHPR).⁴⁵ At its 16th Extra-Ordinary Session, the ACHPR held that the Communication was admissible.⁴⁶ The Communication is yet to be determined on the merits.

³⁵ Ibid, sections 151(8) and 153(b).

³⁶ Ibid, Preamble para 7.

³⁷ Ibid, section 153(1).

³⁸ IBA, *Striving for Democratic Governance*, above note 13, p.21.

³⁹ Letter dated June 28, 2011.

⁴⁰ Legal Notice No. 88 of 2011.

⁴¹ In *Mkhondvo Maseko v The Commissioner of Police and Another*, High Court Case No. 2011, Masuku had opined that the King could not speak in a forked tongue when in relation to upholding the rule of law.

⁴² *Mkhondvo Aaron Maseko v The Commissioner of Police and Another*, High Court Case No. 1778/2009, para 42.

⁴³ International Commission of Jurists (ICJ), *Justice Locked Out: Swaziland's Rule of Law Crisis. International Fact-finding Mission Report* (2016), at 24.

⁴⁴ Legal Notice No. 140 of 2011, Removal of a Superior Court Judge Notice 2011, section 158.

⁴⁵ *Justice Thomas Masuku (represented by Lawyers for Human Rights (Swaziland) v Kingdom of Swaziland*, ACHPR Communication 444/2013.

⁴⁶ ACHPR 16th Extra-Ordinary Session, 20 to 29 July 2014, Kigali, Rwanda.

In 2015, the Swazi Anti-Corruption Commission (ACC) obtained a warrant of arrest against Chief Justice Michael Ramodibedi.⁴⁷ To avoid arrest, he locked himself at his residence at the Judges Complex in Mbabane.⁴⁸ The JSC proffered charges of misconduct against him.⁴⁹ Chief Justice Ramodibedi's complaint that the entirety of the members of the JSC ought recuse themselves from the matter was unsuccessful.⁵⁰ The High Court dismissed his application for the review and setting aside the decision of the members of the JSC refusing to recuse themselves. At the end of the impeachment process, the JSC recommended that the Chief Justice be removed from office.⁵¹ The King accepted the recommendation.

1.2 Swaziland's international human rights obligations and commitments

Swaziland is a party to a number of key international, regional and sub-regional human rights instruments. These include: the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Since Swaziland operates a dualist legal system, human rights instruments are not part of the domestic law unless the content of such instruments are incorporated by an act of parliament.⁵² International human rights treaties can, however, be used as aids of interpretation by national courts.⁵³

While Swaziland has become party to many of human rights instruments, its record of respect for and compliance with its international human rights obligations remains questioned. This is demonstrated by the numerous criticisms of Swazi conduct in the recommendations of the United Nations Universal Periodic Review (UPR) and the concluding observations of the UN Human Rights Committee (HRC).⁵⁴ Swaziland's human rights record should be seen in the context of its international, regional⁵⁵ and sub-regional human rights obligations and commitments.

⁴⁷ The Chief Justice and Judge Mpendulo Simelane were charged at the Magistrate Court for the District of Hhohho: see Criminal Case No. 252/2015.

⁴⁸ ICJ, *Justice Locked-Out*, above note 43, p.7.

⁴⁹ Former Chief Justice Ramodibedi was charged with three counts (all with alternative counts) of abuse of office in relation to the allocation of the matter of *Michael Ramodibedi v Swaziland Revenue Authority*, and the enrolment and hearing of the matter of Impunzi Wholesalers; Swaziland Revenue Authority, on which matters he was said to have a personal interest, and Abuse of office in order to achieve an ulterior motive – in the hearing of the estate policy matter of *Wezzy Ndzimandze and Others v Titselo Ndzimandze and Others*: see JSC Recommendation to His Majesty King Mswati III, June 2015, paras 5.5.1-5.6.2.

⁵⁰ JSC Recommendation, *ibid*, paras 6.1-6.2.

⁵¹ JSC Recommendation to the King, June 2015.

⁵² Constitution of the Kingdom of Swaziland, sections 238 and 279.

⁵³ *Dlamini v The King*, Criminal Appeal No. 41/2000; see also *Gwebu v The King*, Criminal Appeal Nos. 19 & 20/2002, para 17.

⁵⁴ Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Swaziland', UN Doc A/HRC/19/6 (2011); Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Swaziland', UN Doc A/HRC/33/14 (2016); Human Rights Committee, 'Concluding Observations on Swaziland in the absence of a report', UN Doc CCPR/C/SWZ/CO/1 (2017).

⁵⁵ Swaziland ratified the African Charter on Human and Peoples' Rights on 15 September 1995 and acceded to both the ICCPR and the ICSECR on 26 March 2004.

2 Sexual and gender-based violence

Swaziland is a deeply cultural country,⁵⁶ one that promotes patriarchy, which in turn perpetually promotes inequality resulting in prevalent violence. Violence in the country generally affects everyone, but disproportionately impacts on women and children. Global estimates show that violence against women remains a devastating phenomenon of epidemic proportions. The World Health Organization has observed that sexual and gender-based violence (SGBV) “pervades all corners of the globe, puts women’s health at risk, limits their participation in society and causes great human suffering”.⁵⁷ Across all regions of the world, there is a widespread understanding that SGBV has a “profound social and political impact” and acts as “a critical obstacle to achieving substantive equality between women and men as well as to women’s enjoyment of human rights and fundamental freedoms”.⁵⁸

2.1 Domestic violence

It has been reported that violence against female children is highly prevalent in Swaziland.⁵⁹ It has been stated that, approximately one in three women experience some form sexual violence as a child; nearly one in four women experience physical violence as a child; and approximately three in ten women experience emotional abuse as a child.⁶⁰ Boyfriends and husbands are the most frequent perpetrators of sexual violence, and male relatives the most frequent perpetrators of physical violence, while female relatives are the most frequent perpetrators of emotional abuse.⁶¹

Within the Government’s Programme of Action, the Deputy Prime Minister’s Office has indicated that it aims to reduce the percentage of women that experience violence from 79 percent to 30 percent by 2022; and the percentage of children that experience violence from 59 percent to 20 percent.⁶² The curbing of domestic violence is identified as a priority target of the Deputy Prime Minister’s Office.⁶³

2.2 Sexual violence

One in three women experience some form of sexual violence by the time they reach the age of 18 years,⁶⁴ while almost one in two (48 per cent) women experience some form of sexual violence in their lifetime. Almost one in five (18.8

⁵⁶ N Vilakati, ‘Construction of a human rights bill in a cultural community: prospects for entrenchment of women’s rights and implications for nation-building’, Discussion Paper read at the occasion of the public discussion of the Constitutional Review Report – human rights with particular emphasis on the rights of women in Swaziland, 20 October 2001.

⁵⁷ World Health Organization, *Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner violence* (Geneva, World Health Organization, 2013), p. 35.

⁵⁸ Committee on the Elimination of Discrimination against Women, *General Recommendation No 35 on gender-based violence against women, updating general recommendation No 19*, UN Doc CEDAW/C/GC/35 (2017), paras. 4 and 10.

⁵⁹ UNICEF ‘A National Study on Violence Against Children and Young Women in Swaziland’ (2007), p.6; Centre for Civil and Political Rights and other NGOs, ‘SWAZILAND: Civil Society report on the Implementation of the Covenant on Civil and Political Rights’, July 2017.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Kingdom of Swaziland, ‘His Majesty’s Government Programme of Action 2013-2018: Ministries’ Action Plans to 2018 and 2022’, pp. 61-62 (available at www.gov.sz - under tab entitled ‘Government Documents’).

⁶³ Ibid, pp. 69-70.

⁶⁴ Ibid.

per cent) women have been coerced into having sexual relations.⁶⁵ It has also been reported that at least 49.2 per cent of sex workers experience sexual violence and 33.5 per cent of these are reported to have been raped since the age of 18.⁶⁶

2.3 Domestic law on SGBV

There is no specific provision in the Swazi Constitution that addresses SGBV. However, the Constitution protects women from being forced into practising a custom to which they are opposed.⁶⁷ This provision is the only one under which a woman may seek protection from SGBV cloaked in the name of culture or custom. However, the lack of specific legislative provisions aimed at combating SGBV has made it difficult for authorities to combat and eradicate it.

The Sexual Offences and Domestic Violence Bill 2015 was first drafted over ten years ago,⁶⁸ but it has still not been passed into law, specifically because there is a perception that four of its provisions will infringe on Swazi law and custom. It has been reported that: "It has been argued that some clauses in the bill would hinder Swazi cultural practices".⁶⁹ The preservation of culture is the crutch upon which traditionalists are relying on to ensure that the Bill is not passed.⁷⁰ The provisions in question pertain to:

- *Abduction* – clause 42 seeks to protect children (anyone under the age of 18) from child marriages, sexual acts, harmful rituals or sacrifices and any other unlawful purpose. In terms of Swazi law and custom, a girl becomes of marriageable age at puberty, regardless of the child's age when reaching this stage.
- *Incest* – clause 4 of the Bill clearly specifies the classes of relatives that may not be involved in sexual relations. There is a concern among traditionalists that the classes as between uncle, aunt, nephew or niece are too broad within the Swazi context, particularly because of the extensiveness of the recognised extended family structure.
- *Flashing* – the nature of Swazi traditional attire is such that there is some display of flesh. For example, during the reed dance, young maidens and girls go around bare-chested with their breasts in full display and wearing short beaded skirts that show off their buttocks, potentially in violation of clause 47 of the Bill. The Constitution, however, protects the right to privacy as well as dignity.
- *Unlawful Stalking* – under Swazi culture, a woman may be proposed to relentlessly no matter how many times she may refuse the proposals. Traditionalists perceive this type of courting as likely prohibited under clause 10 of the proposed law.

⁶⁵ Ibid.

⁶⁶ Ministry of Health of the Kingdom of Swaziland, 'Swaziland Behavioural Surveillance Survey: HIV among High Risk Groups of 2013' (2013).

⁶⁷ Constitution of the Kingdom of Swaziland, section 29(3).

⁶⁸ Then the Sexual Offences and Domestic Violence Bill No. 10 of 2009.

⁶⁹ Wakhile Kunene, 'Sexual Offences Bill held back by law and custom', *The Nation* (January 2017.)

⁷⁰ Ibid, in which it was reported that: "When the bill came into existence in 2009, Prince Logcogco (then member of the king's body – Likoqo) made known his objection to some provisions".

2.4 Swaziland's international human rights obligations and commitments on SGBV

Amongst other relevant instruments, Swaziland is party to the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁷¹ the African Charter on Human and People's Rights, and the Protocol to that Charter on the Rights of Women in Africa (the Maputo Protocol).⁷² The legal obligations under these regional and universal instruments are predicated on the overarching principle that States must not only respect the human rights of all persons within their jurisdiction; they must also ensure the protection of all persons from impairment of their rights by third parties, including private actors.⁷³

The CEDAW Committee (the body charged with supervising States' compliance with, and interpreting the provisions of, CEDAW) explains that gender-based violence "constitutes discrimination against women under Article 1 and therefore engages all of the obligations in the Convention".⁷⁴ Recognizing that various rights are affected by SGBV, it has described gender-based violence as including "acts or omissions intended or likely to cause or result in death or physical, sexual, psychological or economic harm or suffering to women, threats of such acts, harassment, coercion and arbitrary deprivation of liberty".⁷⁵ The CEDAW Committee has likewise said that gender-based violence may "amount to torture or cruel, inhuman or degrading treatment in certain circumstances", including in cases of rape and domestic violence.⁷⁶ State practice and *opinio juris* also suggest that the prohibition of gender-based violence has evolved into a principle of customary international law.⁷⁷

While the State itself will only be directly responsible for acts of gender-based violence that are committed by State agents, the State remains responsible for ensuring that persons under its jurisdiction are protected from the impairment of their rights.⁷⁸ Article 2 of the CEDAW Convention establishes an overarching obligation "to pursue by all appropriate means and without delay a policy of eliminating discrimination against women, including gender-based violence against women".⁷⁹ The CEDAW Committee explains that, as an essential component of improving women's access to justice, States are required to: "Improve their criminal justice response to domestic violence".⁸⁰ These obligations are of an immediate nature and the Committee has emphasized that "delays cannot be justified on any grounds".⁸¹

The Maputo Protocol has a strong focus on the elimination of SGBV and requires States to "enact and enforce laws to prohibit all forms of violence against women... whether the violence takes place in private or public".⁸² The Declaration on Gender Equality in Africa calls on States to: "Galvanize national legislative

⁷¹ Acceded to by Swaziland on 26 March 2004.

⁷² Ratified by Swaziland on 5 October 2012.

⁷³ See International Commission of Jurists, *Women's Access to Justice for Gender-Based Violence* (Practitioners' Guide No 12, 2016), especially pp. 50 and 64-65 (available at URL <https://www.icj.org/womens-access-to-justice-for-gender-based-violence-icj-practitioners-guide-n-12-launched/>).

⁷⁴ CEDAW Committee, General Recommendation No 35, above note 58, para. 21.

⁷⁵ Ibid, para. 14.

⁷⁶ Ibid, para. 18.

⁷⁷ Ibid, para. 2.

⁷⁸ *Women's Access to Justice for Gender-Based Violence*, above note 73, pp. 20-21.

⁷⁹ CEDAW Committee, General Recommendation No 35, above note 58, para. 21.

⁸⁰ Committee on the Elimination of Discrimination against Women, General Recommendation No 33 on women's access to justice, UN Doc CEDAW/C/GC/33 (2015), para. 51(i).

⁸¹ CEDAW Committee, General Recommendation No 35, above note 58, para. 21.

⁸² Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol), Article 4(a).

processes to promulgate and enforce specific laws relating to violence against women in all its forms".⁸³ The 2017 Guidelines on Combating Sexual Violence and its Consequences in Africa further provides that "States must adopt and apply specific legislation that criminalizes all forms of sexual violence".⁸⁴

In practical terms, this means that Swaziland is obliged to take a range of preventive and protective measures, including through the enactment of legislation that provides for the criminalization and sanctioning of the perpetrators of all forms of SGBV.⁸⁵ It is in this context that the UN Human Rights Committee and the CEDAW Committee have both recommended to the Kingdom of Swaziland to enact the Sexual Offences and Domestic Violence Bill as a matter of priority.

In its 2014 Concluding Observations on Swaziland's implementation of its obligations under CEDAW, the CEDAW Committee expressed deep concern that the Sexual Offences and Domestic Violence Bill had not been enacted.⁸⁶ The CEDAW Committee called on Swaziland to:

"...urgently adopt the laws and policies that are pending, such as the bills on... sexual offences and domestic violence..." (emphasis added);⁸⁷ and

"...enact into law the bill on sexual offences and domestic violence without further delay and ensure that it is comprehensive, covering all forms of violence against women..." (emphasis added).⁸⁸

In its 2017 Concluding Observations on Swaziland's implementation of the Kingdom's obligations under the ICCPR, the Human Rights Committee expressed concern at the lack of adequate legislation to protect women against violence and noted the delays in enacting the Sexual Offences and Domestic Violence Bill.⁸⁹ The Committee called on Swaziland to: "...promptly adopt legislation to effectively criminalize and combat sexual offences and domestic violence" (emphasis added).⁹⁰ The need to adopt such legislation was identified by the Human Rights Committee as requiring Swaziland's immediate attention, in respect of which the Kingdom must report back to the United Nations by no later than 25 July 2018.⁹¹

During the 2016 Universal Periodic Review (UPR) of the Kingdom of Swaziland, numerous States expressed concern about the prevalence of violence in Swaziland, including SGBV and its consequences, and/or emphasized the need for urgent efforts to combat gender-based violence, including through legislation.⁹² The Government of Swaziland reported to the Human Rights Council's UPR Working Group that the Sexual Offences and Domestic Violence Bill seeks to

⁸³ African Commission on Human and Peoples' Rights, *Declaration on Gender Equality in Africa*, adopted by the Heads of State and Government of Member States of the African Union, July 2004, para. 7.

⁸⁴ African Commission on Human and Peoples' Rights, *Guidelines on Combating Sexual Violence and its Consequences in Africa*, adopted by the ACHPR, May 2017, para. 66(1).

⁸⁵ *Women's Access to Justice for Gender-Based Violence*, above note 73, p. 65. See also the specific recommendations of the CEDAW Committee on violence against women, above note 58, especially para. 29.

⁸⁶ Committee on the Elimination of Discrimination against Women, *Concluding Observations on the combined initial and second periodic reports of Swaziland*, UN Doc CEDAW/C/SWZ/CO/1-2 (2014), para. 20.

⁸⁷ *Ibid*, para. 9.

⁸⁸ *Ibid*, para. 21(a).

⁸⁹ Human Rights Committee, *Concluding Observations: Swaziland*, above note 54, para. 26.

⁹⁰ *Ibid*, para. 27(a).

⁹¹ *Ibid*, para. 55, read in conjunction with UN Doc CCPR/C/108/2 (2013), para. 6(b).

⁹² Report of the UPR Working Group, above note 54. This included interventions by: the Bolivarian Republic of Venezuela (para. 25); Armenia (para. 30); Australia (para. 31); Botswana (para. 32); Cyprus (para. 43); Montenegro (para. 79); and Ukraine (para. 101).

address all forms of sexual violence against women and children and that the Government was “making all efforts necessary to accelerate its enactment by Parliament”.⁹³ In its September 2016 replies to the report of the UPR Working Group, His Majesty’s Government stated that it would “adopt without further delay the Sexual Offences and Domestic Violence Bill and take measures to abolish practices that are harmful to women and girls”.⁹⁴

The 2016 UPR of Swaziland included nine recommendations specifically pertaining to the need for enactment of the Sexual Offences and Domestic Violence Bill, including from States within the Africa region.⁹⁵ The Government of Swaziland accepted all nine recommendations, almost all of which emphasized the need for enactment of the Bill as a matter of urgency:

“Enact into law the ‘Sexual Offences and Domestic Violence Bill’ without further delay” (emphasis added);⁹⁶

“Take the measures necessary to accelerate the enactment of the bill on sexual offences and domestic violence” (emphasis added);⁹⁷

“Urgently enact the Sexual Offences and Domestic Violence Bill...” (emphasis added);⁹⁸

“Accelerate the Parliamentary adoption procedure of the reform Sexual Offences and Domestic Violence Bill” (emphasis added);⁹⁹

“Quickly pass pending legislation related to the protection of women and children including the Sexual Offences and Domestic Violence Bill...” (emphasis added);¹⁰⁰

“Adopt the Sexual Offences and Domestic Violence Bill especially to protect women from gender-based violence”;¹⁰¹

“Enact and implement laws on sexual offences and violence to address high rates of sexual and gender-based violence”;¹⁰²

“Adopt a new comprehensive legislation to prevent and combat all forms of discrimination and violence against women”;¹⁰³

“...adopt without further delay the Bill on Sexual Offences and Domestic violence...” (emphasis added).¹⁰⁴

The Government of Swaziland also accepted UPR recommendations to: combat and prevent all forms of SGBV;¹⁰⁵ strengthen laws on SGBV;¹⁰⁶ and abolish laws and practices that encourage violence against women.¹⁰⁷

⁹³ Report of the UPR Working Group, *ibid*, para. 10.

⁹⁴ UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review: Swaziland. Addendum. Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review’, UN Doc A/HRC/33/14/Add.1 (2016), para. 20.

⁹⁵ Togo, Namibia and Botswana: see Report of the UPR Working Group, above note 54, paras. 107.39, 107.41 and 107.42.

⁹⁶ Report of the UPR Working Group, above note 54, para. 107.36.

⁹⁷ *Ibid*, para. 107.37.

⁹⁸ *Ibid*, para. 107.38.

⁹⁹ *Ibid*, para. 107.39.

¹⁰⁰ *Ibid*, para. 107.40.

¹⁰¹ *Ibid*, para. 107.41.

¹⁰² *Ibid*, para. 107.42.

¹⁰³ *Ibid*, para. 107.44.

¹⁰⁴ *Ibid*, para. 109.49, accepted by Swaziland in its September 2016 replies to the report of the UPR Working Group, above note 94, para. 20.

¹⁰⁵ Report of the UPR Working Group, above note 54, paras. 107.20, 107.21, 107.32, 107.35, 107.43 and 107.48. See also para. 109.50, accepted by Swaziland in its September 2016 replies to the report of the UPR Working Group, above note 94, para. 20.

2.5 The effect of culture and tradition on sexual and gender-based violence

Surveys on attitudes towards domestic violence have been conducted, the results of which demonstrate strong support for traditional gender roles, high levels of rape-supportive attitudes and tolerant attitudes for violence. For example, only 51 per cent of men have been surveyed as believing that a woman may refuse to have sexual intercourse with her husband, while 88 per cent believe a woman should obey her husband and 45 per cent believe a husband has a right to punish his wife if she does something he deems is wrong.¹⁰⁸

2.6 Justice actors

A Domestic Violence and Gender Unit was established in the police service specifically to handle cases of SGBV. Every police station in the country has this unit, which is manned by officers specifically trained to handle such cases. They have the mandate to work in collaboration with other stakeholders in awareness-raising programs within communities and educate traditional authorities on SGBV. The unit is faced with the challenge of under-staffing and lack of psychosocial support for them to deal with the trauma they are exposed to as they assist victims. Unit members require continuous training, particularly because previously trained officers in the unit are sometimes transferred or promoted, leaving inexperienced officers to take over.

The office of the Director of Public Prosecutions (DPP) has established a Sexual Offences Unit, mandated to prosecute cases of SGBV. The DPP's unit has indicated that its biggest challenges in prosecuting cases relate to issues of under-staffing and dealing with witnesses who seem afraid to freely give their testimonies before the courts, thereby undermining the prosecution and resulting in acquittal of persons brought to court.¹⁰⁹

2.7 The Judiciary

Judges and Magistrates handle SGBV cases strictly as criminal cases within the scope and limits of the criminal prosecution. SGBV cases are not necessarily dealt with using a human rights-based approach, but within the ambit of the Criminal Procedure and Evidence Act and the common law. For instance, reference has not been made to human rights instruments that Swaziland is a party to, such as the Maputo Protocol and CEDAW, in deciding cases on SGBV. With the adoption of the 2017 Guidelines on Combating Sexual Violence and its Consequences in Africa, courts in Swaziland should use them to guide their determination of the appropriate sentence to be imposed upon conviction.¹¹⁰ Nevertheless, it appears that the courts have handed down sufficient sentences on sexual offences, particularly rape. A review of sexual violence cases was done in the leading judgment of *Magagula v Rex*.¹¹¹ In this case the Supreme Court held that "it would appear that the appropriate range of sentences for the offence of aggravated rape in this Kingdom now lies between 11 and 18 years imprisonment - which is the mid range between 7 and 22 years - adjusted upwards or downwards, depending upon the peculiar facts and circumstances of each

¹⁰⁶ Report of the UPR Working Group, above note 54, para. 107.32.

¹⁰⁷ *Ibid*, para. 107.25.

¹⁰⁸ Swaziland Central Statistical Office and Macro International Inc., 'Swaziland Demographic and Health Survey 2006-2007', 2008.

¹⁰⁹ Presentations by the Office of the Director of Public Prosecutions (Bryan Magagula and Lomvula Hlophe) at the conference on the 'Rule of Law and Access to Justice in Swaziland: Towards SDG16 Building Effective, Accountable and Inclusive Institutions at All Levels of the Justice Delivery', 15-16 June 2017, Happy Valley Hotel, Ezulwini.

¹¹⁰ See the Guidelines, above note 84, on sentencing and applicable penalties, at p.36.

¹¹¹ *Magagula v Rex*, Criminal Appeal Case No. 32/2010 .

particular case". Courts have followed this approach in subsequent cases.¹¹² However, while courts are imposing appropriate sentences against the perpetrators of SGBV in cases where there have been successful prosecution and conviction, victims continue to be left with no remedy or reparation.

There is thus a need for continuous legal education and sensitization for judges, magistrates and prosecutors to further equip them with the necessary skills and knowledge, in particular making them aware about the body of human rights law available on the subject, to ensure that victims receive the justice they seek and deserve.

2.8 Access to effective remedies and reparation

Stakeholders believe that many cases of SGBV go unreported because the justice system is not conducive to the needs of victims and survivors. For example, legal facilities are not adequate, often lacking anatomical aids and proper waiting rooms; there is little or no privacy for the victim before, during and after the trial; and the media rarely respects the anonymity of the victim. There are normally long delays in concluding cases, exposing victims to continuous trauma. For example, one case concerning a victim who was 17 months old when the violence took place was not concluded until she reached the age of eight years, causing her considerable stress and trauma.¹¹³ SWAGAA reports that the situation has not changed to date.

There is no evidence of civil litigation to claim compensation by victims of SGBV, most likely because of lack of victims' knowledge of their right to reparation, as well as lack of the necessary financial resources to engage the services of a lawyer to pursue such cases.

3 Detention and treatment of persons deprived of liberty

As noted earlier, the Kingdom of Swaziland is party to the ICCPR and to the CAT. These instruments protect the rights of all persons to be free from torture and other forms of ill-treatment, as well as further rights applicable to persons deprived of their liberty. Swaziland has not domesticated these treaties under an Act of parliament, but has partially done so through the Bill of Rights within the Constitution.

Section 18 of the Constitution guarantees and protects the right to dignity and protection from torture, inhuman and/or degrading treatment or punishment.¹¹⁴ Section 16 protects and guarantees the rights persons deprived of their liberty.¹¹⁵ The provisions of section 16 were subject of litigation in the matter of *Dlamini and Others v The Commissioner of His Majesty's Correctional Services and*

¹¹² See, for example: *Nkosana Petros Dlamini v Rex*, Criminal Appeal Case 20/2012; *Msombuluko Mphila v Rex*, Criminal Appeal Case No. 33/12; *Ndumiso Phesheya Methula v Rex*, Criminal Appeal Case No. 15/2013; and *Mandlenkhosi Dlamini v Rex*, Criminal Appeal Case No. 3/2-11.

¹¹³ United Nations Population Fund (UNFPA), SWAGAA and Crossroads International, 'Court Watch Swaziland: 2012'.

¹¹⁴ Section 18(2) of the Constitution provides: "A person shall not be subjected to torture or to inhuman or degrading treatment or punishment".

¹¹⁵ Section 16(6) provides that: "Where a person has been arrested or detained –
 "(a) the next-of-kin of that person shall, at the request of that person be informed as soon as practicable of the arrest or detention and place of the arrest or detention.
 "(b) the next-of-kin, legal representative and personal doctor of that person shall be allowed reasonable access and confidentiality to that person; and
 "(c) that person shall be allowed reasonable access to medical treatment including, at the request of that and at the cost of that person, access to private medical treatment."

Another.¹¹⁶ In this case, Mario Masuku, leader of the People's United Democratic Movement, was arrested and detained at the Matsapha Maximum Security Institution. The State and its organization refused his friends and associates from visiting him. An application was filed challenging the decision of the Commissioner of Correctional Services to bar visitations to the accused. The Court found that section 16(6)(b) should be given a wide and broad interpretation and ordered that, "the next-of-kin, associates, friends, colleagues, legal representatives, religious counsellors and medical doctors of the 6th Applicant have a right to have reasonable access and confidentiality to him whilst he is in prison, subject to existing prison regulations relating to visitors".¹¹⁷

Notwithstanding domestication of the prohibition against torture under section 18 of the Constitution, Swaziland has taken no steps to enact national legislation to give effect to its other obligations under the UN Convention against Torture, which it acceded to in 2004. Swaziland has not ratified the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

3.1 Torture, ill-treatment and death of prisoners and suspects

Despite its party status to the CAT and its domestication of the prohibition against torture under the Constitution, the State continues to be either actively involved in, or turn a blind eye to, torture. Reports of suspects dying in police custody, workers assaulted by state police, suspects shot and killed by the army, as well as suspected poachers tortured and killed by game rangers and private farm owners have come to characterize law enforcement in Swaziland.

Amnesty International reports that, in June 2015, a Mozambican national living in Swaziland, Luciano Reginaldo Zavale, died on the day he was arrested on allegations that he was in possession of a stolen laptop.¹¹⁸ In August 2015, independent forensic evidence indicated that he did not die of natural causes. An inquest¹¹⁹ was established to investigate the death, but its findings have never been made public.

In February 2016 at the Kwaluseni campus of the University of Swaziland, a student of the University, Ayanda Mkhabela, was run over by an armoured police vehicle during a student protest and left paralysed.¹²⁰ The Commissioner of Police publicly announced that he would institute an investigation within the police service. As at the end of 2017, no public investigation had been undertaken into the incident. The Commissioner of Police had not made public the findings of the internal investigation. Generally, there was no independent mechanism for investigating abuses committed by the police.¹²¹ The students involved in the protest have instituted legal proceedings in respect of damages.¹²² The Government is defending the action.

Recent situations paint a gloomy picture about the treatment of persons in custody. A former Member of Parliament, Charles Myeza, has added credence to the serious allegations of torture at Bhalekane Correctional Facility, revealing in court papers that officers also treated him in an inhumane way. Myeza, who was

¹¹⁶ *Dlamini and Others v The Commissioner of His Majesty's Correctional Services and Another*, Civil Case No. 4548 of 2008.

¹¹⁷ *Ibid*, para 20.

¹¹⁸ Amnesty International, 'Swaziland 2016/2017', at URL <<https://www.amnesty.org/en/countries/africa/swaziland/report-swaziland/>>, p.346.

¹¹⁹ Under section 26 of the Inquest Act 1954, the Prime Minister may appoint a coroner for purposes of an inquest.

¹²⁰ Amnesty International, 'Swaziland 2016/2017', above note 115, p.346.

¹²¹ *Ibid*.

¹²² *Ayanda Mkhabela v The Commissioner of Police and Another*, Civil Case No. 286 of 2017.

-serving a custodial sentence at the facility, alleged that he was stripped naked, smacked on the buttocks and had his genitals squeezed by officers, in furtherance of a common purpose to violate his right to dignity.¹²³ The former Member of Parliament is currently suing the Government.

3.2 Torture and ill-treatment by game rangers

The Game Act of 1953 (as amended) provides for immunity of game rangers under its section 23(3). This provision provides immunity for game rangers or persons acting on their instructions for any acts or omissions done in the course of their duties. It also authorizes them to carry and use licensed firearms on official duty. Section 23(3) also gives rangers the right to use firearms in self-defence if they have reason to believe their life is in danger. The problem with such immunity is that it has given rangers a licence to maim, torture and kill poachers.¹²⁴ In itself, this has given rise to impunity.

Rangers also have the power to arrest, without warrant, any person suspected upon reasonable grounds of having contravened the provisions of the Game Act.¹²⁵ The Act authorizes rangers to use reasonable force necessary to effect arrest or to overpower any suspect, and to conduct searches without warrant.

The powers of game rangers, their immunity and the right given to them to issue instructions to non-game rangers¹²⁶ have led to the abuse of many individuals suspected of poaching. The powers given to rangers are wide and without mechanisms to check against abuse. Furthermore, while anyone can be instructed by a game ranger to exercise powers, the delegation of such powers is in almost all instances to private farm owners neighbouring game reserves, or their employees. In most cases, such instruction is not given on a case-by-case basis. Once given, the delegation is treated as running *ad infinitum*, along with the immunity provided under the Act.¹²⁷

The powers and immunity enjoyed by game rangers has opened the floodgates for State-sanctioned torture. Incidents of cruel, degrading and inhuman treatment visited upon civilians by game rangers are well documented.¹²⁸ These range from extensive beatings to victims being forced to eat their own faeces,¹²⁹ being burnt with fire or being shot execution style.¹³⁰ A simple act of driving away marauding wild animals that escape from the reserves to ravage crops often attracts a violent response from game rangers.¹³¹ All such incidents have involved action taken under the pretext of anti-poaching initiatives and almost all violations have gone unpunished due to the immunity clause in the Game Act.

¹²³ Swazi Media Commentary, 'Swaziland: Ex-MP Sues for "Jail Assault"', *allAfrica* 26 October 2017, at URL <http://allafrica.com/stories/201710260211.html>.

¹²⁴ S. Nhlabatsi, 'The persistence of colonial anti-poaching law: challenges and lessons from Swaziland', Paper presented at the Third Annual Spring Law Conference *Decolonizing the mind, knowledge and systems in Africa: South Africa coming of age*, 29 September - 2 October 2015.

¹²⁵ Game Act 1953, section 23.

¹²⁶ *Ibid*, section 23(2).

¹²⁷ *Ibid*, section 23(3).

¹²⁸ S. Nhlabatsi, above note 121.

¹²⁹ 'Rangers made me eat my faeces', *Times of Swaziland* (9 June 2005).

¹³⁰ *Mngomezulu v Rex* (380/2012) [2013] SZHC 29 (2013), para 3.

¹³¹ 'I killed and ate a hippo', *Swazi News* (12 August 2006); 'Warthogs invade community', *Swazi Observer* (21 April 2006); A Dissel and C Frank, *Policing and human rights: Assessing southern Africa's compliance with the SARPCCO Code of Conduct for Police Officers* (2012), p.149.

3.3 Protection of the right to personal liberty

The right to personal liberty is entrenched in section 16 of the Constitution of Swaziland.¹³² However, in practice the full scope of the protection guaranteed under international standards is missing.¹³³ For example, international standards of fair trial provide that anyone arrested or detained must be notified at the time of arrest of the reasons for their arrest or detention and of their rights, including their right to counsel. In the context of arrests by game rangers, however, poachers are often not told of the criminal offence they face, and are often kept in police custody for periods of time before being brought before a court that are longer than permitted under the Constitution and criminal procedure laws to be brought before a court of law.¹³⁴ This information is essential to allow detained persons to challenge the lawfulness of their arrest or detention and, if they are charged, to start the preparation of their defence. It is also essential that no detainee is held in incommunicado detention, or in a place other than an official detention centre or prison, or held in any manner intended to frustrate proper and prompt access to the detainee by legal representatives, doctors or next of kin.¹³⁵

Finally, it should be noted that section 26(6) of the Constitution contains a very far-reaching limitation clause. Section 26(6) purports to elevate Swazi law and custom above the Constitution. It provides that nothing contained or done under the authority of any provision of Swazi law and custom shall be held to be inconsistent with or in contravention of the freedom of movement. The potential abuse inherent in these provisions is evident from the history of the human rights violations committed against the families forcibly evicted from Macetjeni/Kamkhweli in 2000 and by the Government's subsequent refusal to abide by the numerous court rulings upholding the right of the families to return to their homes.¹³⁶

3.4 Presumption of innocence

Section 21(1) of the Constitution of Swaziland provides for the right to a fair public trial, except when exclusion of the public is necessary in certain limited situations. The principle of presumption of innocence is enshrined in section 21(2)(a), which provides that a person who is charged with a criminal offence shall be presumed to be innocent until that person is proved or has pleaded guilty.

Article 7 of the African Charter on Human and Peoples' Rights, to which Swaziland is party, provides that: "Every individual shall have the right to have his cause heard. This comprises... (b) The right to be presumed innocent until proved guilty by a competent court or tribunal;... (d) The right to be tried within a reasonable time by an impartial court or tribunal."

In criminal cases, and mostly in bail matters, the Courts in Swaziland have extensively quoted the South African case of *S v Acheson*, where Mahomed AJ held that: "An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in court. The court will therefore

¹³² As recognized in *Dlamini and Others v The Commissioner of His Majesty's Correctional Services*, above note 113.

¹³³ B. Dube, A Magagula and S. Nhlabatsi, 'The Law and Legal Research in Swaziland', *GlobaLex*, at URL: <http://www.nyulawglobal.org/globalex/Swaziland1.html#chapterthree>.

¹³⁴ Section 16(4) of the Constitution provides that an arrested person shall be brought before a court within 48 hours of arrest or detention.

¹³⁵ As demonstrated in *Dlamini*, above note 113, in practice this right is often violated.

¹³⁶ Amnesty International, 'Human rights at risk in a climate of political and legal uncertainty', AI Index AFR/55/004/2004 (29 July 2004), pp.43-47.

ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice."¹³⁷

The Criminal Procedure and Evidence Act is the principal statute in criminal matters. Section 96 of the Act provides for bail, predicated on the principle of presumption of innocence. Because the right to personal liberty is specially entrenched in the Constitution of Swaziland through limited grounds permitting deprivation of liberty under section 16(1), an accused is entitled to be released on bail unless doing so would prejudice the interests of justice. In the following discussion of the weaponization of the law, it is shown how both the right to presumption of innocence and the right to liberty are in practice frequently violated.

4 The weaponization of the law as a means of suppressing political opponents and human rights defenders

4.1 Sedition, public order and anti-terrorism laws

The law of sedition has consistently been used to silence, harass, intimidate and suppress dissenting political opponents and human rights defenders (HRDs) in Swaziland. There is a growing perception that the law, in particular the law of sedition, defamation, public order and anti-terrorism is systematically used to target HRDs and legitimate pro-democracy campaigners.

As far back as 1990, the Sedition and Subversive Activists Act 1938 (SSA) and the King's 1973 Proclamation to the Nation were used against HRDs and legitimate pro-democracy campaigners. Leaders of the pro-democracy banned political opposition, the Peoples' United Democratic Movement, were charged and tried for high treason for having convened a meeting to discuss the political problems in the country¹³⁸ This approach has continued, with Amnesty International recently concluding that: "Legislation continued to be used to repress dissent".¹³⁹

In 1994, members of the Swaziland Youth Congress (SWAYOCO) and the Swaziland Communist Party were arrested and charged under the Sedition Act for being in possession of seditious placards.¹⁴⁰ They were also charged under the King's Proclamation for holding either a demonstration or a political meeting without the prior written consent of the Commissioner of Police. The High Court found them not guilty on the sedition charge, but convicted them on the contravention of Decree No. 13 of the King's Proclamation.¹⁴¹

In 2001, the leader of the People's United Democratic (PUDEMO), was charged with two counts under the Sedition Act, accused of allegedly making statements that were seditious.¹⁴² At the close of the Crown's case he was acquitted and discharged of the first count, and called to his defence on the second count. He was later acquitted on the second count as well. The judiciary proved to be able to exercise its judicial function independently and impartially without fear or favour.

In 2005, a group of HRDs and legitimate pro-democracy campaigners were charged under the sedition law for allegedly committing acts of violence against

¹³⁷ *S v Acheson* 1991 (2) SA 805 (NH) at 822.

¹³⁸ *Mngomezulu and Others v The King*, Criminal Appeal Case No. 11/ 1990 (unreported).

¹³⁹ Amnesty International, 'Swaziland 2016/2017', above note 115, p.345.

¹⁴⁰ *R v Shongwe and Others* 1987-1995 (4) SLR 184.

¹⁴¹ Decree No. 13 provides: "Any person who forms or attempts to form a political party or who organizes or participates in any way in any meeting, procession or demonstration in contravention of this decree shall be guilty of an offence and liable, on conviction, to imprisonment not exceeding six months".

¹⁴² *Rex v Mario Masuku*, Criminal Case No. 84/2001.

the State. In the bail application they told the court that, while in custody, they had been subjected to torture and cruel and degrading treatment by State security agencies.¹⁴³ The court ordered that “the Prime Minister of the Kingdom of Swaziland in liaison with the Minister responsible for Justice and Constitutional Affairs, urgently, in the interest of justice and in the national interest, establish a commission of enquiry into the allegations that are before court concerning torture and denying basic human rights enshrined in our Constitution, to investigate and to report publicly the outcome within a reasonable time”.¹⁴⁴ Despite the court’s order, no such commission was set up and no report was made. The HRDs were released on bail and to date the matter has not been called for trial. Neither the applicants nor the DPP have made any follow-up on the order for an inquiry, albeit that nothing prevents the applicants from instituting contempt of court proceedings for the Minister’s failure to give effect to the court order.

In 2008, following a spate of bombings of some Government buildings and some *tinkhundla* centres,¹⁴⁵ the Suppression of Terrorism Act 2008 (STA) was enacted. As soon as the Act entered into force, PUDEMO and three other organizations were listed as terrorist organizations under section 28 of the STA.¹⁴⁶ In the same year, its leader Mario Masuku was charged under the STA and, alternatively, under the SSA.¹⁴⁷ In September 2009 he was acquitted and discharged by the High Court of Swaziland, because the State failed to prove its case.

Also in 2008, human rights lawyer Thulani Maseko was arrested and charged under the SSA.¹⁴⁸ He was released on bail and subsequently filed an application to the High Court challenging the constitutional validity of the SSA having regard to the Bill of Rights’ guarantee of the right to freedom of expression and opinion.¹⁴⁹ This case was consolidated with others that challenged the same law, together with the Suppression of Terrorism Act, discussed further below.

In 2009, another member of the listed PUDEMO, Mphandlana Shongwe, was charged under the STA for shouting a slogan “Viva PUDEMO, viva SWAYOCO” at a civil society meeting.¹⁵⁰ At his first appearance before the High Court, he was released on bail. To date, his case has not been called for trial.

In May 2014, Mario Masuku (leader of the PUDEMO) and Maxwell Dlamini (student leader and member of the PUDEMO youth league, the Swaziland Youth Congress, SWAYOCO) were charged under the SSA and STA for having addressed workers on Workers’ Day in Manzini, and shouting slogans in support of PUDEMO, an organisation listed as a terrorist organisation under the STA.¹⁵¹ Initially denied bail, they were kept in pre-trial detention from May 2014 until July 2016. They were eventually granted conditional bail and released by the Supreme Court, one of those conditions being that they should “refrain from addressing public political gatherings pending finalisation of the criminal trial”.¹⁵² Although the Order was made by consent, its effect was that, for as long as they were awaiting trial, these pro-democracy campaigners were deprived of their rights to freedom of

¹⁴³ *Nzima and Others v Rex*, Criminal Case No. 257/2005, paras 50-54. The allegations of torture were reported by one of the daily newspapers: see Sabelo Mamba, ‘9 Bomb suspects tortured’, *Swazi Observer*, 9 March 2006.

¹⁴⁴ *Nzima and Others v Rex*, *ibid*, para 55.

¹⁴⁵ Tinkhunda are the constituencies used for the purpose of electing Members of Parliament.

¹⁴⁶ Legal Notice No. 190 of 2008.

¹⁴⁷ *The King v Mario Masuku*, Criminal Case No. 348/2008.

¹⁴⁸ *The King v Thulani Maseko*, Criminal Case No. 172/2009.

¹⁴⁹ *Thulani Rudolf Maseko v The Swaziland Government*, Civil Case No. 2180/2009.

¹⁵⁰ *Rex v Mphandlana Shongwe*, Criminal Case No. 216/2009.

¹⁵¹ *Maxwell Dlamini and Another v The King*, High Court Criminal Case No. 184/2014.

¹⁵² *Maxwell Dlamini and Another v The King*, Criminal Appeal No. 46/2014.

speech, assembly and association and to take part in the discourse of public affairs.

Also in 2014, a group of seven members of the PUDEMO were arrested and charged under the STA and the SSA. They, as well as Maxwell Dlamini and Mario Masuku, filed separate applications at the High Court to challenge the constitutional validity of the SSA and the STA. All the matters challenging the constitutional validity of the two pieces of legislation were consolidated and heard by a full bench of the High Court, which, in September 2016, delivered its judgment. The relevant provisions of the SSA and STA were held to be unconstitutional and were set aside.¹⁵³ Although the Government noted an intended appeal against the judgment,¹⁵⁴ it failed to file the appeal as required by the Rules of the Supreme Court.¹⁵⁵ On 21 November 2017, the Supreme Court struck off the matter and ordered that it should not be reinstated unless with the leave of the Court.¹⁵⁶ On 5 December 2017 the Government filed an application for reinstatement. The application for leave was heard on 13 February 2018. The Supreme Court's reserved judgment allowed the appeal to be reinstated, finding that: "...the importance of the matters arising from the appeal and from the view that it would leave a bitter after taste in the Court's palate for such serious matters to be decided by default as it were, due to the confusion that seems to have reigned at the office of the Attorney-General".¹⁵⁷

The persecution through the law and prosecution of HRDs and legitimate pro-democracy campaigners continue unabated, even in the face of recommendations of the UN's Universal Periodic Review (UPR) process. Although, in both the 2011 and 2016 UPR of Swaziland, the Government accepted recommendations to fully align the SSA and TSA with the Constitution of Swaziland and the State's obligations not to impede the right to freedom of expression, association and assembly,¹⁵⁸ it has failed to do so.

In 2016, the King summoned the Swazi nation to the nation's *Sibabya*, its annual general meeting and highest policy-making institution, to express themselves about various issues affecting the country. Police subsequently arrested William Mkhalihi, an elderly sugar cane farmer from Vuvulane in North-Eastern Swaziland, after he had voiced concerns about alleged royal investments and land grabbing.¹⁵⁹ Although the charges were apparently not related to the remarks he made at the meeting, it was clear that he was being targeted.

In 2017, the Government of Swaziland amended the STA and repealed the Public Order Act (POA). The amendments to the STA are very cosmetic, while the new POA is comprehensive. Under section 28(1) of the POA, the Minister responsible for national security and the Police Service (the Prime Minister) has published the Code of Good Practice. Although the requirement of a permit for holding public gatherings and processions has been dispensed with in favour of a notice

¹⁵³ *Maseko and Others v The Prime Minister of Swaziland*, above note 146, para 42. See: sections 3(1)(a) and 5 of the SSA; and sections 2(1), 2(2)(f)-(j), 11(1), 28 and 29(4) of the STA.

¹⁵⁴ *The Prime Minister of Swaziland v Thulani Maseko and Others*, Civil Appeal Case No. 73/2016.

¹⁵⁵ Rule 30 of the Court of Appeal Rules requires that an appellant should file the record of proceedings within two months of the date of noting the appeal. In this case the record was filed on 17 July 2017, some ten months later.

¹⁵⁶ Court Order entered on 21 November 2017, per MCB Maphalala CJ, Dr. BJ Odoki, SP Maphalala, RJ Cloete, and SB Maphalala JJA.

¹⁵⁷ Judgment of 5 March 2018, para 36.

¹⁵⁸ 2011 UPR outcome document, above note 54, para 77.54, read in conjunction with UN Doc A/HRC/19/6/Add.1, para 13; and 2016 UPR outcome document, above note 54, paras 107.56-107.57.

¹⁵⁹ Amnesty International, 'Swaziland 2016/2017', above note 118, p.346.

procedure,¹⁶⁰ the local authority and/or the Commissioner of Police have the power to prohibit an intended gathering.¹⁶¹ Given the wide discretionary powers of the National Commissioner of Police to prohibit events,¹⁶² there is concern that such prohibition is may be applied in an arbitrary, unnecessary and/or disproportionate manner, contrary to international human rights standards on the regulation and policing of gatherings.¹⁶³

4.2 Defamation

Defamation has been used as a mechanism to silence voices in Swaziland.

In 2001, a defamation claim by a leading politician was won against a daily newspaper, which had published an article alleging that the politician was a card-carrying member of one of the banned political parties in Swaziland, the Ngwane National Liberatory Congress (NNLC), when in fact he was no longer a member of the NNLC.¹⁶⁴ The High Court awarded damages (equivalent to approximately \$5,350 USD), which not only had a chilling effect on freedom of the press, but also created uncertainties as to persons' freedom of association. Although it took some time, the judgment was reversed on appeal.¹⁶⁵

In 2009, an Acting Chief and President of the Senate sued the publishers of one of the daily newspapers, the Swazi News, for defamation. She alleged that the newspaper had defamed her by publishing an article to the effect that she was not of the surname she had always been known publicly, a 'Simelane', but that she was a 'Mahlangu'. The High Court granted damages in the sum of approximately \$39,300 USD.¹⁶⁶ The Court noted that defamation is, in Swaziland, a matter dealt with under the common law rather than by statute.¹⁶⁷ It continued to express the view that: "The media is a powerful tool which can be used to build or destroy innocent people and they cannot be allowed to get away lightly where they were not only deliberate but downright malicious in their publication".¹⁶⁸ The newspaper unsuccessfully appealed the judgment.¹⁶⁹ It was also unsuccessful in an application for review of the judgment.¹⁷⁰

4.3 Using the law to target journalists and other human rights defenders

In 2009, the Nation magazine published articles critical of the judiciary in the interpretation and enforcement of the Constitution's Bill of Rights, in particular the rights and freedoms of assembly and of association, guaranteed in section 25 of the Constitution. The Attorney General of Swaziland viewed the articles as being contemptuous and scandalous of the Court. He filed an application to the High Court calling upon the magazine and its editors to show cause why they

¹⁶⁰ Public Order Act 2017, section 6.

¹⁶¹ Ibid, section 9.

¹⁶² Ibid, section 16.

¹⁶³ See, for example: Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial or arbitrary executions on the proper management of assemblies, UN Doc A/HRC/31/66 (2016); African Commission on Human and Peoples' Rights, Guidelines on freedom of association and assembly in Africa (2017).

¹⁶⁴ *Albert Shabangu v Editor, Times of Swaziland and Another*, Civil Case No. 996/2001.

¹⁶⁵ *The Editor, The Times of Swaziland and African Echo (Pty) Ltd and Albert Shabangu*, Appeal Case No. 30/2006 (unreported).

¹⁶⁶ *Simelane v African Echo (PTY) LTD and Others*, Civil Case No. 2362/2009, para 65.

¹⁶⁷ Ibid, para 21.

¹⁶⁸ Ibid, para 62.

¹⁶⁹ *African Echo (PTY) LTD t/a Times of Swaziland and Others v Simelane*, Civil Appeal Case No. 77/2013.

¹⁷⁰ *African Echo t/a Times of Swaziland and Others v Simelane*, Review Application Case No. 77/2013 [2016].

should not be committed and punished for criminal contempt of court as a result of the article. The High Court found the magazine and the editor guilty of contempt of court, imposing fines in the total sum of the equivalent of approximately \$28,600 USD, suspending half the amount for a period of five years on the condition that the magazine and its editors “are not found guilty of a similar offence within the period of suspension”.¹⁷¹ The judgment had a chilling effect on the free expression of the press and of the general public in Swaziland. On appeal, the Supreme Court upheld the appeal against conviction and sentences on the first count and dismissed the appeal against the second count, although it reduced the sentence on the second count to payment of the sum of an amount equivalent to approximately \$2,150 USD.¹⁷² The editor, found to be criminally liable, was sentenced to a term of three months’ imprisonment, suspended for a term of three years, upon condition that he not be convicted for an offence of scandalizing the court during that period.

In March 2014, the editor of the Nation magazine, Bheki Makhubu, together with human rights lawyer and HRD Thulani Maseko, were arrested and charged for contempt by scandalising the Court.¹⁷³ They had published articles critical of the conduct of the then Chief Justice regarding the arrest of a public servant who had also been charged with contempt of court. Makhubu and Maseko were kept in pre-trial detention from the dates of their arrests in March 2014 throughout the duration of the trial. In finding them guilty of contempt of court, the High Court stated that: “Some journalists have this misconception that just because they have the power of the pen and paper they can say or write anything under the disguise of freedom of expression. This is a fallacy. It would be an unfathomable phenomenon to say that the right to freedom of expression is absolute with regards to our Constitution. There is justification for the restrictions placed by Section 24 of our Constitution on the right to freedom of expression. The object of the restrictions is for maintaining the integrity and dignity of the Courts and this is in the public interest. It would be absurd to allow journalists to write scurrilous articles in the manner the accused persons did. Such conduct can never be condoned by any right-thinking person in our democratic country.”¹⁷⁴ Imposing sentences of two years imprisonment on each defendant, the High Court expressed that the sentencing “will serve as a deterrent to others, in particular like minded journalists in this country”. Full analysis of the compliance of the criminal trial with international human rights law, including the right to a fair trial, is contained in the trial observation report of the ICJ.¹⁷⁵

In the latter case, Makhubu and Maseko appealed against convictions and sentences. Fifteen months after their initial detention, the Supreme Court quashed the convictions and sentences. The Court’s decision followed the earlier adoption in April 2015 of Opinion 6/2015 by the UN Working Group on Arbitrary Detention, in which the Working Group concluded that the detention and trial of Mr Maseko had run contrary to Swaziland’s obligations under Article 19 of the ICCPR (on the freedom of expression).¹⁷⁶ The Working Group further noted that, as a Commonwealth country, the *Latimer House Guidelines for the*

¹⁷¹ *The King v Independent Publishers (PTY) Ltd and Another*, Case No. 53/2010.

¹⁷² *Swaziland Independent Publishers (PTY) Ltd and Another v The King*, Appeal Case No. 08/2013.

¹⁷³ *Rex v The Nation Magazine and Others*, Criminal Case No. 120/2014.

¹⁷⁴ *Ibid*, para 63.

¹⁷⁵ ICJ, ‘The Failure of Justice: Unfair Trial, Arbitrary Detention and Judicial Impropriety in Swaziland’, ICJ trial observation report, at URL <https://www.icj.org/wp-content/uploads/2015/08/Swaziland-Maseko-Trial-Observation-Publications-Trial-observation-report-2015-ENG.pdf>.

¹⁷⁶ Working Group on Arbitrary Detention, Opinion No 6/2015 (the Kingdom of Swaziland), UN Doc A/HRC/WGAD/2015/6 (2015), para. 27.

Commonwealth are applicable to the Kingdom of Swaziland.¹⁷⁷ The Working Group drew particular attention to Principles VI.1(b)(ii) and VII(b), which respectively provide that: “The criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts”; and that: “The criminal law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial functions”.

In 2016, an Acting Judge of the Supreme Court instituted defamation proceedings against the editor of *The Nation* magazine and one of its contributors, Thulani Maseko.¹⁷⁸ The Acting Judge had sued for an amount equivalent to approximately \$71,450 USD, alleging that the article was defamatory. The judge later demanded and received a retraction and withdrew the claim.

Despite accepted recommendations from Swaziland’s 2011 and 2016 Universal Periodic Review to remove all restrictions on the full enjoyment of the right to freedom of expression¹⁷⁹ no steps have been taken to statutorily bar the possibility of criminal defamation proceedings in Swaziland.

5 Violation of economic, social and cultural rights, focusing on land and property rights

As noted, Swaziland is a party to the African Charter on Human and Peoples’ Rights and many of the key international human rights instruments. Yet some of the rights contained in the Charter, including economic, social and cultural rights (ESC rights), are omitted from the Constitution. These include the right to health and the right to the environment.¹⁸⁰ These rights are only contained in the Constitution as unenforceable ‘social objectives’.¹⁸¹ Other ESC rights, which are to be found in the constitutions of other countries in the region, such as the rights to food, water, housing and social security, are also omitted.

5.1 Swaziland’s land tenure

Swaziland’s land tenure system distinguishes land ownership into two broad categories, Swazi Nation Land (SNL) and Title Deed Land (TDL), or land that is privately owned.¹⁸² SNL is that portion of land falling under the customary law regime, held in trust by the King on behalf of the Swazi nation.¹⁸³ In other words, the King is a trustee, and the citizens are the beneficiaries of this land. Chiefs regulate land tenure under SNL since they are constitutionally an extension of the King.¹⁸⁴

Chiefs administer customary land and people access such land by paying the prescribed customary fees, these being the initial payment of livestock to the area’s Chief. This is supplemented by loyalty, tribute labour and other communal activities that residents undertake during the tenure of their stay on that land. Constitutionally, such land continues to belong to the Swazi nation, but the King holds it in trust. Government policy, however, has favoured an approach that

¹⁷⁷ *Ibid*, para. 29.

¹⁷⁸ *Robert Cloete v The Editor, Nation Magazine and Others*, High Court Case No. 1195/2016.

¹⁷⁹ 2011 UPR outcome document, above note 54, paras 76.44-76.46, 77.50 and 77.54, read in conjunction with UN Doc A/HRC/19/6/Add.1, para 13; and 2016 UPR outcome document, above note 54, paras 109.61-109.65, read in conjunction with UN Doc A/HRC/33/14/Add.1, para 27.

¹⁸⁰ African Charter on Human and Peoples’ Rights, Articles 16 and 24 respectively.

¹⁸¹ Constitution of the Kingdom of Swaziland, section 60.

¹⁸² S. Nhlabatsi, ‘Forced Evictions and Disability Rights in Africa’, *GlobaLex*, at URL: http://www.nyulawglobal.org/globalex/Forced_Evictions_Disability_Rights_Africa1.html#_5_Evictions_in.

¹⁸³ *Ibid*. See also Constitution of the Kingdom of Swaziland, section 211(1).

¹⁸⁴ Chiefs are appointed under section 233 of the Constitution.

takes away the trust component. As a result, land is largely believed to belong to the King, and residents and users of the land are only treated as being able to utilize it only at the King's pleasure. This position has also been erroneously endorsed by judicial interpretation in the highest courts of the land

5.2 The right to ownership of land

Property rights are guaranteed in the Constitution, section 39(6) of which defines property as movable, corporeal or incorporeal, of any description whatever including Swazi nation land and any right or interest lawfully held by any person in that property. Section 19(2) of the Constitution provides that a person shall not be compulsorily deprived of property, except under limited situations.¹⁸⁵ The Constitution further provides in section 34(1) that a surviving spouse is entitled to a reasonable provision out of the estate of the other spouse whether the other spouse died having made a valid Will or not and whether the spouses were married by civil or customary rites. Section 34(2) enjoins Parliament to enact laws regulating the property rights of spouses. Section 211(2) of the Constitution is intended to eliminate gender-based discrimination in access to land, but is weakened by the fact that it is not part of the justiciable Bill of Rights, and is further undermined by the broadly expressed limitation contained in section 211(1).

Notwithstanding the property rights described, SNL is governed by the dictates of Swazi law and custom, and the courts have been expressly deprived of the jurisdiction to apply Swazi land and custom as a court of first instance.¹⁸⁶ The courts have not dealt with the jurisdictional question consistently in disputes concerning SNL. In some instances, courts have found that they lack jurisdiction to deal with such cases,¹⁸⁷ while in others they have assumed jurisdiction.¹⁸⁸ Significantly, citizens continue to face deprivation of land, particularly in the case of SNL, because they have no security of land tenure.

Furthermore, in matters of land, women are the most affected and discriminated against. In rural areas, women (whether single, married or widowed) are in most instances dependent on their proximity to Chiefs for purposes of being able to access land. In most cases, women cannot access land in their own right, but instead have to do so through a male member of the family. Women still face difficulties despite the equality clause in the Constitution, and regardless that the courts have affirmed the equal rights of women.¹⁸⁹ Issues of access to land for

¹⁸⁵ Section 19(2) provides that: "A person shall not be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied –

- (a) the taking of possession or acquisition is necessary for public use in the interest of defence, public safety, public order, public morality or public health;
- (b) the compulsory taking of possession or acquisition of the property is made under a law which makes provision for –
 - (i) prompt payment of fair and adequate compensation; and
 - (ii) a right of access to a court of law by any person who has an interest in or right over the property;
- (c) the taking of possession or acquisition is made under a court order.

¹⁸⁶ Constitution of the Kingdom of Swaziland, section 151(3)(b) as read with section 115.

¹⁸⁷ See, for example: *Muzi Shongwe v Isabella Katamzi and the Master of the High Court*, Civil Case No. 40/2013; *Michel Mungama Mahlalela v Mirriam Tjengisile Dlamini and Two Others*, High Court Case No. 17/2013; *Sandile Hadebe v Sifiso Khumalo NO and Three Others*, High Court Civil Case No. 2623/2011; *Maziya Ntombi v Ndzimandze Thembinkosi*, Appeal Case No. 2/2012; and *Commissioner of Police and Attorney General v Mkhondvo Aaron Masuku*, Civil Appeal No. 3/2011.

¹⁸⁸ See, for example *Chief Zul'welihle Maseko v Thulani Maseko and Others*, High Court Case No. 1380/2017, in which a full bench of the High Court held that it had jurisdiction to hear and determine the matter concerning a dispute over land.

¹⁸⁹ *The Attorney General v Aphane*, Civil Appeal No. 12/2010.

women include not only use for construction or building purposes, but also as to the manner in which it is used.

The Constitution helps promote women's equal access to economic opportunities and redress the longstanding imbalance in the allocation of the country's resources. Sections 28(2) and 32(4) place a positive duty on the Government to improve and provide necessary facilities for the welfare of women so that they may attain their full potential and advancement. However, the Government's obligation to provide opportunities is subject to the availability of resources. In the chapter on the directive principles of State policy, section 59(5) requires the State to afford equality of economic opportunity to all citizens and, in particular, to take all necessary steps so as to ensure full integration of women into the main stream of economic development. Unfortunately, these directive principles are not included within the justiciable provisions of the Constitution and, in practice, women continue to face challenges of inequality.

5.3 Deprivation of property in a constitutional dispensation

For areas falling under SNL, forced evictions have in the past been carried out under Swazi customary law. Chiefs would issue eviction orders for customary crimes, such as where a resident defied orders from the King, or where one was convicted for serious crimes by a court, e.g. murder. Since people living on SNL do not have title over the land, but used it subject to paying allegiance to the King and the Chief, these kinds of evictions were commonplace.¹⁹⁰ The practice was to instruct the evictee to 'pass seven rivers' or 'pass seven chiefdoms' before finally settling in a new chiefdom. Today, the Constitution requires any eviction, whether relating to private or Swazi nation law, to be pursuant to due process and to be accompanied by prompt and adequate compensation.¹⁹¹

Additional to customary evictions, court-ordered evictions from privately held land (TDL) may also occur. In most instances, TDL is used for game farming and other agricultural activities. Some of the dwellers on TDL land have resided there for generations, in some cases even prior to the demarcation of the area as TDL. For a long time, matters on TDL have been governed by the Farm Dwellers Act, which provides for the procedure of dealing with people residing on the farm. There have often been disputes as to whether a certain area is a farm, with occupiers disputing the title of the holders of the land. However, because of scant historical records, such residents are usually in a weaker legal position vis-à-vis the owner of a farm. Conflicts often arise when the owner of a TDL farm intends to develop the farm and seeks the eviction of the people residing on it. The procedure under the Farm Dwellers Act has not been used effectively to assist farm dwellers. The fact that citizens can still be farm dwellers in their own country speaks to the failure to address the land question, despite the existence of the Land Management Board, established pursuant to section 212 of the Constitution.

Where disputes have arisen on farmland, landowners have often approached the High Court for an order to eject those who are alleged to be occupying the land unlawfully. In many instances, the Court has issued orders for the eviction of people from private land. More often than not, such eviction orders have been

¹⁹⁰ For example, in 2002 a number of families were forcibly evicted from the community of bithr at Macetjeni and KaMkhweli following their refusal to accept as their Chief one of King Mswati III's elder brothers, Prince Maguga Dlamini. See Amnesty International, 'Swaziland: Human rights at risk in climate of political uncertainty', above note 136, p.21.

¹⁹¹ Constitution of the Kingdom of Swaziland, section 211(3).

made without due regard for alternative settlement, nor for the welfare of the people being evicted, leaving them homeless.¹⁹²

As noted, the Constitution of Swaziland prohibits arbitrary eviction without compensation. The King's judicial powers to issue orders under customary law have been curtailed by the Constitution, section 140(1) of which provides that judicial powers shall only be vested in the judiciary. However, in 2006 the King, sitting with his advisory body (the Swazi National Council Standing Committee (SNCSC))¹⁹³ issued eviction orders for the more than 20 families residing in Farm 10/69 Hlantambita.¹⁹⁴ No compensation was provided to the more than 200 people affected, save for alternative land to relocate to.¹⁹⁵ In so doing, the right to property and the prohibition against arbitrary deprivation of land were violated.

Since Chiefs act as 'footstools' of the King, as described in the Constitution, decisions for eviction from SNL can be taken from the King or his Chiefs, and may be enforced through the Government as was the case with the people of Macetjeni and KaMhweli. Problematically, in terms of access to justice, the King is regarded as unerring and his decisions are thus not reviewable.¹⁹⁶ For example, a full bench of the High Court in one instance relied on an old customary idiom, *umlomo longacali manga* (the mouth that does not lie), in finding that the King's actions cannot be challenged, as the King is immune from public scrutiny given the immunity clause in the Constitution.¹⁹⁷ In this regard the Constitutional Review Committee noted: "Pronouncements by the King become Swazi law when they are made known to the nation, especially at *Esibayeni* or Royal Cattle Byre. The King is referred to as *umlomo longacali manga* ('the mouth that never lies')."¹⁹⁸ This has been applied to the land eviction setting through recent judicial pronouncements, which cement the now prevailing opinion that the King owns all land and can therefore deal with or dispose of it as he pleases, including through eviction orders that are not accompanied by compensation.

The case of *Sandile Hadebe v Sifiso Khumalo and Others* is illustrative of this point.¹⁹⁹ In this case, the court endorsed the eviction of the applicant by a traditional chief, constitutionally regarded as a footstool and extension of the *iNgwenyama*. *iNgwenyama* is the customary office of the King, entitled to the same immunities enjoyed by the King under section 11 of Constitution. In deciding the question of ownership of customary land, the court interpreted section 211 of the Swaziland Constitution to hold that all land in Swaziland vests in the *iNgwenyama*, without reference to the trust requirement. However, section 211 of the Constitution is clear in its wording that land vests in the *iNgwenyama*

¹⁹² Amnesty International, 'Urgent Action: Dozens left homeless after forced eviction (Swaziland: UA 71.18), available at <<https://www.amnestyusa.org/urgent-actions/urgent-action-dozens-left-homeless-after-forced-eviction-swaziland-ua-71-18/>>.

¹⁹³ Today known as the Likoqo, section 231(1) of the Constitution describes the Likoqo as an advisory council whose members are appointed by the King from the membership of princes and princesses, chiefs, and persons who have distinguished themselves in the service of the nation. Their function is to advise the king.

¹⁹⁴ Angelo Dube, 'Forced Evictions and Disability Rights in Africa', *GlobaLex*, at URL: <http://www.nyulawglobal.org/globalex/Forced_Evictions_Disability_Rights_Africa.html#5.1.Chronology_of>.

¹⁹⁵ Nhlabatsi, above n 178.

¹⁹⁶ In terms of section 11 of the Constitution, the King enjoys immunity from both civil and criminal liability.

¹⁹⁷ See, for example: *Law Society of Swaziland v Simelane N.O. and Others* [2014] SZHC 179; Dube A. and Nhlabatsi S., 'The King can do no wrong: The impact of *The Law Society of Swaziland v Simelane N.O. and Others* [2014] SZHC 179 on constitutionalism', (2016) 16(1) *African Human Rights Law Journal* 265-282.

¹⁹⁸ Constitutional Review Commission report, above note 9, at 135.

¹⁹⁹ *Sandile Hadebe v Sifiso Khumalo and Others*, Civil Case No. 2623/11.

in trust for the Swazi nation, not in his personal capacity. The court omitted reference to that condition, thereby entrenching the notion that the King owns all the land and natural resources, and that everyone else only has access to them at his mercy. This reasoning effectively negates rights that individuals may have under the Constitution, since any attempt to enforce them is treated with contempt by a Government that is implementing a policy, albeit unwritten, of protecting the King's private property.

As a matter of law, land disputes arising from SNL are to be dealt with by Swazi traditional structures in the first instance, including Swazi National Courts, and may only be heard by the High Court on review or appeal.²⁰⁰ It should be noted that customary courts do not allow legal representation,²⁰¹ despite the fact that they have the power, subject to approval of the *iNgwenyama*, to order eviction without compensation, in terms of section 11 of the Swazi Courts Act.

5.4 Forced eviction cases

Often when the courts have issued eviction orders, the evictees are subjected to the use of force and violence. At KaMkhweli and Macetjeni, the eviction of families was carried out under a joint operation of the army, the police and correctional institutions.²⁰² In Nokwane, members of the police ensured the demolition of evictees' houses.²⁰³ It should be recalled, in this regard, that the UN Committee on Economic, Social and Cultural Rights, in General Comment No. 7, stated "forced evictions are a gross violation of human rights".²⁰⁴

6 **Justice sector institutions and the Human Rights Commission**

Justice sector institutions in Swaziland - critical to the proper administration of justice, including the holding to account of perpetrators of human rights violations and abuses and the provision of effective remedies and reparation to victims of such violations - include the judiciary, the office of the Director of Public Prosecutions (DPP), the Royal Swaziland Police (Police Service), His Majesty's Correctional Institutions (the Correction Service) and the Commission on Human Rights and Public Administration (Human Rights Commission).

6.1 The Judiciary

The independence and impartiality of the judiciary, which is headed by the Chief Justice is guaranteed in the Constitution. As discussed in section 1.1(b) above, however, the composition of the JSC and appointment of its members is problematic, as is the manner and process of appointment of judicial officers.

In its report, *Justice Locked Out*, the ICJ International Fact-finding Mission noted that: "The rule of law is weak in Swaziland, and the country has a long history of disregard for the independence of the Judiciary, and violations of human rights, including the right to a fair trial. The FFM-SZ's assessment is that the above highlighted events are but a culmination of a systematic crisis."²⁰⁵ The fact that the Crown controls judicial appointments compromises judicial independence and the efficacy of the rule of law.²⁰⁶ Fombad and Gamedze further argue that the

²⁰⁰ Constitution of the Kingdom of Swaziland, section 151(3)(b).

²⁰¹ Swazi Courts Act 1950, section 11. See also the Constitution of the Kingdom of Swaziland, section 22(13)(b).

²⁰² Amnesty International, 'Swaziland: Human rights at risk in climate of political uncertainty', above note 136, p.40.

²⁰³ *Swaziland Government v Dlamini and Nineteen Others*, Case No. 1155/14.

²⁰⁴ Committee on Economic, Social and Cultural Rights, 'General Comment 7. The right to adequate housing: forced evictions', UN Doc E/1998/22, para 2.

²⁰⁵ *Justice Locked Out*, above note 43, p.10.

²⁰⁶ *Ibid*, pp.22-23.

Constitution did not change the 1973 constitutional arrangement, where the King held absolute power and authority.²⁰⁷

As a first step, it is recommended that the Constitution be reviewed to guarantee the independence of the JSC, by allowing for an open, transparent and accountable appointment process under section 173(4) of the Constitution. The Constitution should be amended so that the members of the JSC cover a wide spectrum of Swazi society, not only royal appointees.

6.2 The Police

There is no body independent of the Crown to investigate abuse of power, torture and human rights abuses by and within the police service, since the Attorney General, DPP and Commissioner of Police are appointed by the King acting on the advice of the Prime Minister. An independent mechanism to deal with such matters is needed, as is training for police officers in human rights and the Constitution, in collaboration with the Human Rights Commission.²⁰⁸

6.3 Office of the Director of Public Prosecutions

The King, on the advice of the JSC, appoints the Director of Public Prosecutions. This affects the structural independence of the DPP, as well as the public's perception of the independence of the office. There is a corresponding need to strengthen the independence of the office of the DPP, so that it can prosecute acts involving gross human rights violations without fear or favour. Increasing the technical capacity of prosecutors on the handling of such cases is also of critical importance.

6.4 Human Rights Commission

The Commission on Human Rights and Public Administration (Human Rights Commission, HRC) has the power to "investigate complaints concerning alleged violations of fundamental rights and freedoms under this Constitution".²⁰⁹ Regardless this provision, the HRC "shall not investigate a matter relating to the exercise of any royal prerogative by the Crown".²¹⁰ To be effective, the composition and functioning of the HRC should comply with the requirements of the Paris Principles.²¹¹ The Paris Principles require that human rights institutions "ensure the pluralist representation of the social forces (of civil society) involved in the promotion and protection of human rights". The Swaziland HRC is not composed in the manner envisaged by the Paris Principles. Its independence and efficacy are undermined by its composition, where the appointment of its Commissioners remain a matter within the authority of the King,²¹² thus undermining its independence and efficacy as the country's constitutional human rights body.

²⁰⁷ CM Fombad, 'The Swaziland Constitution of 2005: Can absolutism be reconciled with modern constitutionalism?' (2007) 23(1) *South African Journal on Human Rights* 93-115; S Gamedze, 'Human rights and the rule of law in Swaziland' (2005) 5(2) *African Human Rights Law Journal* 266-286.

²⁰⁸ Established in terms of section 163 of the Constitution.

²⁰⁹ Constitution of the Kingdom of Swaziland, section 164.

²¹⁰ Ibid, section 165(3)(c).

²¹¹ Principles Relating to the Status of National Human Rights Institutions (The Paris Principles), adopted by General Assembly Resolution 48/134 (1993).

²¹² Constitution of the Kingdom of Swaziland, section 163(3), which provides that all its members are appointed by the King on the advice of the Judicial Service Commission, whose members are also appointed by the King.

ANNEX: REDRESS AND ACCOUNTABILITY FOR SEXUAL AND GENDER-BASED VIOLENCE

In the preparation of this report, it was early on identified that a particularly pressing issue in Swaziland is the combating of sexual and gender-based violence (SGBV) and that the ICJ may be positioned to carry out or assist with activities that can add value to existing initiatives within the country by local actors and authorities.

Workshop on enhancing redress and accountability for SGBV in Swaziland

As a means of building on this report, and in order to consult with stakeholders and potential partners in-country to develop an ICJ plan of action for work in the country, a workshop was convened in Ezulwini, Swaziland, on 28 February 2018, in partnership with the Swaziland Action Group Against Abuse (SWAGAA) and Women's Lawyers in Southern Africa – Swaziland (WLSA).²¹³ The workshop attracted 48 participants, mainly from civil society, as well as the ICJ's Commissioner, and Principal Judge of the High Court of Swaziland, Justice Qinisile Mabuza, representatives from the Deputy Prime Minister's Office, the Royal Swazi Police and the US Embassy in Swaziland.

The workshop considered the prevalence of, and underlying issues surrounding, SGBV in the country; challenges to achieving criminal accountability of perpetrators and full and effective remedies and reparation for victims; whether the Sexual Offences and Domestic Violence Bill (under consideration by the Senate) meets those challenges; opportunities for, and means of, engagement on SGBV at the United Nations, including in 2018; and potential ways forward. Discussions reflected and expanded on the matters set out in this report (see section 2, above) and on issues calling for further attention (see agenda for action, below).

Bilateral discussions on combating SGBV in Swaziland

Alongside the workshop, the ICJ's Commissioner, Justice Mabuza, facilitated bilateral meetings with high-level officials to discuss the ICJ's development of a programme of work on SGBV in Swaziland and to identify possible avenues for collaboration with officials, namely: the Chief Justice of Swaziland; the National Commissioner of Police; the Director of Public Prosecutions and the head of the Sexual Offences Unit within the DPP; senior staff of the Correctional Services; the Director of Gender and Family Issues at the Deputy Prime Minister's Office; and the Attorney General. The ICJ's Commissioner facilitated open discussions and allowed for the identification of concrete action for the ICJ to lead and/or facilitate in collaboration with local actors and authorities.

Agenda for action

Beyond action that the ICJ is able to directly assist with, practical challenges were identified during the workshop concerning the investigation and prosecution of alleged perpetrators of SGBV. While police take measures to provide for the medical examination of victims and the collection of DNA evidence, prosecutors and the courts are too frequently left in a position where insufficient evidence is available at trial to secure conviction. Medical reports are often insufficiently detailed for prosecution purposes, a matter being addressed by the Sexual Offences Unit of the Director of Public Prosecutions in liaison with medical

²¹³ See URL: <https://www.icj.org/swaziland-workshop-on-sexual-and-gender-based-violence/>.

practitioners. Critically, Swaziland relies on outsourcing DNA analysis to forensic laboratories in South Africa, which frequently do not provide analysis reports by the time that matters come to trial because of excessive backlogs and higher priorities. In the latter respect, the ICJ recommends that the Kingdom of Swaziland urgently establish, through donor and/or development support if necessary, forensic services within Swaziland to prevent acquittals for SGBV to continue in the circumstances described. The current situation prevents the Kingdom from discharging its obligation to hold perpetrators of SGBV to account and to provide victims with justice.

With a view to leading and/or facilitating action that supports and complements national initiatives, the workshop and bilateral discussions assisted the ICJ in identifying the following agenda for action:

1. Sexual Offences and Domestic Violence Bill 2015

There is a clear and pressing need for enactment of the Sexual Offences and Domestic Violence Bill 2015. To that end, on 20 March 2018 the ICJ submitted to the Senate of Swaziland a briefing note on *Regional and global obligations and commitments of the Kingdom of Swaziland reinforcing the need for urgent enactment of the Sexual Offences and Domestic Violence Bill 2015*.²¹⁴ The briefing note concludes that:

- Enactment of the Bill is a matter required of the Kingdom of Swaziland pursuant to its international human rights law obligations, including those arising from the Africa region, to criminalize and sanction the perpetrators of SGBV.
- Compliance with those obligations is reinforced by His Majesty's Vision 2022, the aims and targets of the Deputy Prime Minister's Office and Swaziland's consensus in the adoption of the 2030 Agenda for Sustainable Development.
- Enactment of the Bill *during the current session of Parliament* will act as an essential step in complying with the recommendations of the UN Human Rights Committee and CEDAW Committee identified in the briefing note; and as a means of discharging the commitments made by His Majesty's Government during the 2016 Universal Periodic Review.

If the Bill is enacted and receives Royal assent during the course of 2018, there may be opportunities for the ICJ to lead or contribute to training / capacity building on implementation of the legislation for civil society (especially with a view to 'training of trainers' and how the legislation aligns with international standards) and of magistrates and government officials (including on how the legislation aligns with international standards, with special regard to redress and accountability for SGBV). The feasibility and timing of such activities depends on the timing of any adoption of the Bill by Senate and receipt of assent from the King.

2. Integrated meetings of governmental stakeholders in the justice chain

A possibility discussed with, and positively received by, authorities involved in different aspects of combatting SGBV in Swaziland was the convening of regular, six-monthly, meetings of governmental stakeholders in the justice chain that are involved in the investigation, prosecution and sanctioning of, and provision of redress to victims for, acts of SGBV (most

²¹⁴ See URL: <https://www.icj.org/swaziland-icj-calls-for-urgent-enactment-of-sexual-offences-and-domestic-violence-bill/>.

likely: police, medical examiners, psychosocial services, prosecutors, judiciary, correctional services and social services).

The aim of such meetings would be to facilitate an integrated approach to the combatting of SGBV in Swaziland by relevant governmental justice chain stakeholders. Each meeting could focus on a particular set of challenges faced in the combatting of SGBV (e.g. evidentiary challenges, victims' rights, sentencing, offender rehabilitation) with a view to: identifying gaps and challenges in national law, policy and practice when measured against regional/global standards and best practices (including by holding a session led by experts on relevant regional/global standards and best practices); considering potential solutions to such gaps and challenges; and agreeing on next steps, including on concrete action that aligns with and/or augments the National Strategy to End Violence.

The ICJ's Commissioner in Swaziland, and Principal Judge of the High Court of Swaziland, Justice Qinisile Mabuza, would be ideally placed to act as chairperson of such meetings. The ICJ would seek to facilitate the launch of regular and continuing meetings by supporting the convening of two meetings in June/July 2018 and January/February 2019.

3. Study and report on victims of SGBV

Workshop discussions revealed a lack of sufficient attention, including within the Sexual Offences and Domestic Violence Bill, on the rights of victims of SGBV to effective remedies and reparation (redress). The ICJ was told that remedies for such victims are usually restricted to compensation, including within the context of sentencing of offenders, but that the realities of offenders' economic status is that compensation orders are inadequate and/or rarely complied with. A level of psychosocial support is available to victims, but the precise parameters of such support were not discussed in detail.

The right of victims of SGBV to effective remedies and reparation includes various inter-linked rights, namely to: justice (including through criminal investigation, prosecution and sanctioning of perpetrators); restitution (through measures aimed at restoring, to the extent possible, victims' prior situation, such as through restoring property, employment and child custody); compensation (noting the practical limitations already mentioned); rehabilitation (through medical, psychological, social and legal care and assistance); satisfaction (including justice, already mentioned, and other measures to end the continuation of SGBV against the victim); and guarantees of non-recurrence (including through 'transformative reparation' to address the root causes of violence, such as structural discrimination, and to create conditions whereby SGBV is treated by society as not acceptable).

With this in mind, the ICJ proposes to commission a case study report on the access of a group of victims of SGBV in Swaziland to effective remedies and reparation. Such cases will include attention to lack of justice through acquittals that have been prompted by inadequate laws or procedures and/or through lack of prompt or sufficient forensic or medical evidence. The report will provide an overview and explanation of applicable regional/global standards and best practices; a review of court proceedings to identify gaps and challenges; a factual account of the experiences of victims, including of what has happened to them since and the psychosocial impact for them and their families; an analysis in each case of compliance with regional/global standards and best practices; and a comparative assessment of key gaps and challenges in law, policy and practice in achieving redress for victims of SGBV in Swaziland. If timing

allows, this report could be the subject of thematic discussion on victims' rights within the proposed January/February 2019 meeting of governmental justice chain stakeholders involved in different aspects of combatting SGBV in Swaziland (see item (2) above).

4. Engagement with UN human rights mechanisms

Workshop discussions included reference to reports that Swaziland is due to submit, in July 2018, to the UN Human Rights Committee and the Committee on the Elimination of Discrimination Against Women. Civil society representatives expressed interest in efforts to increase their capacity to engage with the Committees on the subject of SGBV. The ICJ will consider the possibility of such training and/or coordination and may itself make submissions that take up issues presented to the Senate of Swaziland concerning the Sexual Offences and Domestic Violence Bill.

Taking into account subsequent discussions with SWAGAA and WLSA, such capacity building could also include training on regional and global laws and standards on SGBV and what this means in terms of the obligations of the State; and how to use and access other UN human rights mechanisms, such as the Special Rapporteur on violence against women and the Universal Periodic Review.

5. National guidelines on SGBV in Swaziland

The Office of the Deputy Prime Minister has been taking the lead in coordinating the drafting/revision of National Guidelines for a Multi-Sectoral Response to Sexual and Gender Based Violence in Swaziland, in respect of which national consultations were held on 19-22 March 2018. The ICJ is liaising with the Office to determine the extent to which it may be able to provide feedback and assistance in that process.

6. Other capacity building

Depending on the time and resources needed for the implementation of action under items (1) – (5) above, it may be possible for the ICJ to lead on or contribute to other capacity building activities during 2018 on international human rights law standards, with a focus on the Convention on the Elimination of All Forms of Discrimination Against Women, including with authorities and/or the Law Society of Swaziland.

Commission Members

February 2018 (for an updated list, please visit www.icj.org/commission)

Acting President:

Prof. Robert Goldman, United States

Vice-President:

Prof. Carlos Ayala, Venezuela

Acting Vice-President:

Justice Radmila Dragicevic-Dicic, Serbia

Executive Committee:

(Chair) Justice Azhar Cachalia, South Africa

Ms Roberta Clarke, Barbados-Canada

Ms Hina Jilani, Pakistan

Justice Sanji Monageng, Botswana

Mr Belisário dos Santos Júnior, Brazil

Other Commission Members:

Professor Kyong-Wahn Ahn, Republic of Korea

Justice Adolfo Azcuna, Philippines

Mr Muhannad Al-Hasani, Syria

Mr Abdelaziz Benzakour, Morocco

Justice Ian Binnie, Canada

Sir Nicolas Bratza, UK

Mr Reed Brody, United States

Prof. Miguel Carbonell, Mexico

Dame Silvia Cartwright, New Zealand

Justice Moses Chinhengo, Zimbabwe

Prof. Sarah Cleveland, United States

Justice Martine Comte, France

Justice Elisabeth Evatt, Australia

Mr Roberto Garretón, Chile

Prof. Jenny E. Goldschmidt, Netherlands

Prof. Michelo Hansungule, Zambia

Ms Gulnora Ishankanova, Uzbekistan

Mr. Shawan Jabarin, Palestine

Ms Imrana Jalal, Fiji

Justice Kalthoum Kennou, Tunisia

Prof. David Kretzmer, Israel

Prof. César Landa, Peru

Justice Ketil Lund, Norway

Justice Qinisile Mabuza, Swaziland

Justice José Antonio Martín Pallín, Spain

Prof. Juan Méndez, Argentina

Justice Charles Mkandawire, Malawi

Mr Kathurima M'Inoti, Kenya

Justice Yvonne Mokgoro, South Africa

Justice Tamara Morschakova, Russia

Ms Karinna Moskalenko, Russia

Justice Willly Mutunga, Kenya

Justice Egbert Myjer, Netherlands

Justice John Lawrence O'Meally, Australia

Ms Mikiko Otani, Japan

Justice Fatsah Ouguergouz, Algeria

Dr Jarna Petman, Finland

Prof. Mónica Pinto, Argentina

Prof. Victor Rodriguez Rescia, Costa Rica

Mr Alejandro Salinas Rivera, Chile

Justice Michèle Rivet, Canada

Prof. Marco Sassoli, Italy-Switzerland

Justice Ajit Prakash Shah, India

Justice Kalyan Shrestha, Nepal

Mr Raji Sourani, Palestine

Mr Wilder Tayler, Uruguay

Justice Philippe Texier, France

Justice Lillian Tibatemwa-Ekirikubinza, Uganda

Justice Stefan Trechsel, Switzerland

Prof. Rodrigo Uprimny Yepes, Colombia



**International
Commission
of Jurists**

P.O. Box 91
Rue des Bains 33
CH 1211 Geneva 8
Switzerland

t +41 22 979 38 00

f +41 22 979 38 01

www.icj.org