

“No Situation is Permanent”

Repression, intimidation, harassment
and killing of lawyers in Eswatini

February 2025

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® **“No Situation is Permanent” – Repression, Intimidation, Harassment and Killing of Lawyers in Eswatini**

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“NO SITUATION IS PERMANENT” – REPRESSION, INTIMIDATION, HARASSMENT AND KILLING OF LAWYERS IN ESWATINI

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“What keeps us going is the knowledge that no situation is permanent. We have seen many countries in the midst of trouble overcoming their problems and moving into a better future. And that gives us hope. But fundamentally it gives us hope that the people of this country themselves at their individual levels in their communities have taken up the struggle. You know for a long time we have been the voice of the voiceless: now the voiceless are the voice themselves.”¹ – Thulani Maseko

This report addresses the independence of judges and lawyers in Eswatini with a particular focus on the perceptions and experiences of lawyers representing clients in cases relating to issues of public interest and human rights. It continues from the International Commission of Jurists (ICJ) long term advocacy for the protection of the rule of law, judicial independence and human rights in Eswatini (formerly Swaziland), dating back to the 1980s.²

Following a surge of events signalling the deterioration of an already precarious human rights and rule of law situation in Eswatini, the ICJ received repeated requests from Eswatini lawyers to undertake an investigation and make recommendations on the independence of lawyers and judges in Eswatini in 2023.

Responding to this request, in late 2023 and early 2024, the ICJ conducted interviews of approximately 30 individuals, 25 of whom are legal professionals working in Eswatini. Some interviews were conducted in person and others were conducted online. They were then transcribed for the purpose of their use in this report. Interviews were undertaken under the strict agreement of anonymity, which was considered necessary due to security considerations and quotes are used in this report with express permission of those interviewed.

The objectives of the research include:

- to build upon and update ICJ’s existing publications in respect of legal and judicial independence in Eswatini;
- to document and highlight the challenges faced by lawyers in operating in Eswatini both generally, but specifically subsequently to June 2021; and
- to make recommendations to Eswatini authorities on how to protect, guard and ensure legal and judicial independence.

This report, which at the core is based on the experiences and perceptions of the lawyers interviewed, does not include a comprehensive analysis on independence of the judges and lawyers, the administration of justice and other human rights questions that were the subject of previous ICJ reports. Instead, it identifies the generally applicable international standards on the independence of lawyers and judges, as well as providing a summary of more detailed reports. A summary of communications decisions of the African Commission on Human and People’s Rights relevant to the independence of judges and lawyers is also provided as an annex to report.

¹ *The Delve*, ‘An Uprising in Eswatini’ [Interview with Thulani Maseko], 1 December 2021, audio podcast available at: <https://podcasters.spotify.com/pod/show/thedelve/episodes/An-Uprising-in-Eswatini-e1b2knj>.

² As example, see: ICJ, Centre for the Independence of Judges and Lawyers Bulletin Nos.19 and 20, April-October 1987, available at: <https://icj2.wpenginepowered.com/wp-content/uploads/2013/10/CIJL-Bulletin-1920-1987-eng.pdf>.

The ICJ has reached out to a number of Eswatini authorities with a view to eliciting comments or responses to the preliminary finding in the report. On 12 December 2024, the ICJ addressed letters which included summaries of the preliminary findings of the report and various allegations in respect of human rights violations uncovered during this research, to relevant Eswatini authorities, namely: the Minister of Justice;³ the Prime Minister;⁴ the Chief Justice;⁵ and the President of the Law Society of Eswatini.⁶ A confirmation of receipt was received on the same day from the office of the Minister of Justice. On 10 January 2025, follow up reminders were sent in respect of these letters.

On 11 January 2025, the Minister of Justice addressed a letter to the ICJ in which he requested an extension on the deadline for a response to the ICJ until 31 January 2025 to give it time to conduct “consultations with multiple stakeholders, including relevant government entities and the judiciary”.⁷ On 4 February 2025, the ICJ received another letter from the Minister of Justice containing its comments.⁸ These comments are incorporated, where substantively responsive, throughout this report. In general, the Minister of Justice takes the position that there is “no repression and harassment of lawyers in Eswatini”, though noting one example of a report by a lawyer to the police “which nothing came out [of] due to insufficient facts”.⁹

On 14 January 2025, the ICJ received a response from the President of the Law Society of Eswatini, the details of which are included in Section C, titled “the execution of the Law Society’s mandate”.¹⁰ The Law Society adopts the same general position as the Minister of Justice in respect of independence of lawyers and judges in Eswatini.

The ICJ thanks the Minister of Justice and President of the Law Society for their engagement with the ICJ on the report. We note, however, that neither of the responses, which are reproduced in full in annexes attached to this report, address in material terms most of the substantive findings presented in this report.

Section B briefly summarizes international, including regional, standards relating to the independence of judges and lawyers, including by referring to the application and implementation of such standards – or lack thereof – within Eswatini’s legal framework.

Section C of the report documents the experiences of lawyers in Eswatini with a particular focus on the aftermath of June 2021 and the killing of Thulani Maseko. Their perceptions and views of these lawyers in respect of the independence of judges and lawyers in Eswatini is also presented.

Section D makes recommendations to Eswatini authorities in respect of the issues raised by lawyers in interviews with the ICJ and in terms of Eswatini’s legal obligations in terms of international law and standards.

³ Honourable Minister of Justice and Constitutional Affairs, Prince Simelane.

⁴ His Excellency Russell Mmiso Dlamini.

⁵ Chief Justice Bheki Maphalala.

⁶ Mr Mangaliso Magagula.

⁷ See Annex G.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

Section E is an Annex to the report which provides summary information of ICJ's publications on the independence of judges and lawyers in Eswatini prior to this publication.

Section F is an Annex to the report which provide summaries of communications decisions of the African Commission on Human and People's Rights relevant to the independence of judges and lawyers in Eswatini.

Section G is an Annex to the report which is the correspondence between the ICJ and Eswatini authorities in respect of this report.

A. Background and Context

Swaziland, renamed Eswatini by the King Mswati III in 2018,¹¹ obtained its independence from the United Kingdom, the colonial power for most of the 20th century, in 1968. Its initial independence Constitution included provision for a clear separation of powers between judicial, executive and legislative authorities.¹² It also allowed for a multiparty system.

The 1968 Constitution was abrogated by a proclamation of the former King, Sobhuza II in 1973, by which the King was declared the supreme authority in the Kingdom of Swaziland and given all legislative, executive and judicial power.¹³ The proclamation also dissolved Parliament and banned all political parties. In the words of the King through the Proclamation: "I have assumed supreme power in the Kingdom of Swaziland and that all Legislative, Executive and Judicial power is vested in myself."¹⁴ In 2002, the High Court found that, while the repeal of the 1968 Constitution had been unlawful,¹⁵ the Proclamation had become the country's "settled *grundnorm*" over

¹¹ *Aljazeera*, 'Swaziland king changes country's name to Kingdom of Eswatini,' 18 April 2018, available at: <https://www.aljazeera.com/news/2018/4/19/swaziland-king-changes-countrys-name-to-kingdom-of-eswatini>. This name change was made unilaterally by the King, without following any consultation process with the public, and was therefore almost immediately subject to a legal challenge: *Mail & Guardian*, 'Swaziland's name change challenged in court,' 28 August 2018, available at: <https://mg.co.za/article/2018-08-28-swazilands-name-change-challenged-in-court/>. The ICJ, including in this report, refers to the country as "Eswatini", the name recognized by the United Nations . Thulani Maseko, *The Nation* (May 2018), argued:

"The name of the country is secured in the Constitution, and one assumes that for anything to change that is contained in the Constitution, there must be a constitutional and legislative process. Constitutional amendment is ... provided for in the Constitution ... There must be a parliamentary process; and there should be public involvement...

But there is another issue to this name change: this is the arbitrariness of the decision. One had assumed that since the coming about of the Constitution, which in Section 2, states that it is the supreme law of Swaziland, the king no longer has the power to proclaim law."

¹² John Baloro (1994), *The Development of Swaziland's Constitution: Monarchical Responses to Modern Challenges*, *Journal of African Law*, 38, pp 19-34. Baloro, however, notes that the independence constitution gave extensive powers to the King and reflected a "tilt [in] the balance of power in the country very much in favour of the monarchy and traditionalism".

¹³ The full proclamation is available here: <https://www.icj.org/wp-content/uploads/2014/06/sz1973proclamation.pdf>.

¹⁴ *Ibid.* In 2005, the African Commission on Human and Peoples' Rights (ACHPR) declared this proclamation to be inconsistent with the rights in the African Charter and the principle of separation of powers and recommended that Eswatini "take constitutional measures forthwith to give effect to all the provisions of the African Charter." See: *Lawyers for Human rights v. Swaziland*, ACHR, Comm. No. 251/2002 (2005), available here: www.icj.org/wp-content/uploads/2014/06/lawyers-for-human-rights-v-swaziland.pdf, para 56.

¹⁵ *R v Bhembe* (20 of 2000) [2002] SZHC 31 (27 September 2002), available at: <https://eswatiniilii.org/akn/sz/judgment/szhc/2002/31/eng@2002-09-27>, which reads in relevant part:

"there was clear recognition that the procedure set out for altering the Constitution was not followed as it was regarded as impracticable. In any event, it is abundantly obvious that the object was not to amend or alter the Constitution but to repeal it altogether because of its perceived negative effects. It therefore does not appear as to where the power and authority to repeal the Constitution was derived and that being the case, it is my view that the repeal of the Constitution was unlawful. Furthermore there appears to be no source of the King's power to issue the 1973 Decree and the ensuing ones. This was not provided for in the Constitution or in any other law. The irresistible conclusion, in view of the foregoing is that the King did not have such power."

decades and was therefore “binding”.¹⁶

Although a new Constitution containing a Bill of Rights was adopted in 2005 as supreme law,¹⁷ Eswatini remains one of the world’s last remaining absolute monarchies.¹⁸ Some doubt remains about the continued applicability of the Proclamation, which has never been explicitly repealed. Some aspects of the Proclamation, for example in respect of the exclusion of political parties from the electoral process, are entrenched in the post 2005 constitutional dispensation.¹⁹ More generally, constitutional rights have typically not been made effective through necessary implementing legislation and are often not respected in practice.

Swazi courts have typically failed to construe and interpret domestic laws consistently with international, including African, human rights law and standards.²⁰ For instance, in 2008, reasoning that “democracy... like beauty is in the eye of the beholder”, the Supreme Court dismissed an application which had argued that the Constitution should be interpreted to permit political party participation in elections.²¹

Under the 2005 Constitution, the King remains the “hereditary Head of State”.²² Executive authority vests in the King, which he may exercise directly or through the Cabinet or a Minister.²³ Supreme legislative authority vests in the King too.²⁴

The Constitution provides that the judiciary “shall be independent and subject only to this Constitution and shall not be subject to the control or direction of any person or authority.”²⁵ Despite this provision, ICJ has documented that deficiencies in the

¹⁶ Ibid.

¹⁷ The Constitution of the Kingdom of Swaziland Act 2005, section 2(1).

¹⁸ The ICJ shares the concern of a number of Swazi jurists concerning the legitimacy and overall propriety of the 2005 Constitution and the process by which it was drafted. See, for example, Thulani Maseko, *The Nation* (November 2020):

“While 2005 ought to have been a watershed moment for the country and its people in terms of breaking with an oppressive past with the adoption and coming into force of the Constitution, the constitutional review project was hijacked. It was so hijacked such that it was used as a process to give constitutional legitimacy to the Tinkhundla system. The 2005 Constitution entrenched the inequality and oppression of Tinkhundla on the basis of royal supremacy. That the basis of appointment to any public office is allegiance to the political doctrine and ideology of Tinkhundla deprives many qualified and competent Swazis access to public office.” See also: Thulani Maseko (2008), *The Drafting of the Constitution of Swaziland, 2005, African Human Rights Law Journal*, 8, pp. 312-336.

¹⁹ See Annex G. In its letter to ICJ in respect of this report the Minister of Justice of Eswatini indicated that “the Proclamation and Decree referred to are no longer in force, as [they] were repealed by [the] coming into force of the 2005 Constitution”.

²⁰ As examples, see: ICJ, ‘Eswatini: Supreme Court decision upholding repressive security laws is a blow to human rights,’ 30 August 2024, available at: <https://www.icj.org/eswatini-supreme-court-decision-upholding-repressive-security-laws-is-a-blow-to-human-rights/>; Amnesty International, ‘Eswatini: Authorities must quash convictions and sentences of former MPs,’ 16 July 2024, available at: <https://www.amnesty.org/en/latest/news/2024/07/eswatini-authorities-must-quash-convictions-and-sentences-of-former-mps/>; and Southern Africa Litigation Centre, ‘Supreme Court Ignores Rights Violations: Upholds Sedition,’ 14 August 2024, available at: <https://www.southernafricalitigationcentre.org/eswatini-supreme-court-upholds-sedition-offences/>.

²¹ *Jan Sithole and Others v Government of Kingdom of Swaziland and Others*, Appeal case No.50/08, para 22, on file with the ICJ. While accepting that there is a right to join and form political parties in terms of the Constitution, the Court explicitly reasons that: “There is certainly nothing in the Constitution that debars a member of a political party from seeking election as an individual and, once elected, joining up with others who think similarly to operate as a unit”.

²² The Constitution of the Kingdom of Swaziland Act 2005, section 4(1).

²³ Ibid, section 64.

²⁴ Ibid, section 106(a).

²⁵ Ibid, section 141 (1).

guarantees and exercise of judicial independence have been commonplace throughout Eswatini's constitutional dispensation. In evaluating the State of judicial independence in 2014 the ICJ concluded:

"In Swaziland, despite constitutional guarantees and safeguards, the judiciary is not independent. The executive does not consistently respect the principle of judicial independence. Further, among other things, the King controls judicial appointments and there have been concerns about the independence of procedures related to judicial accountability, as well as about judges upholding the integrity of their office."²⁶

The ICJ also underscored the lack of availability of legal services and the independence of the legal profession in Eswatini amidst:

"reports of intimidation, harassment and interference with the work of lawyers in Swaziland. Among other things, lawyers' freedom of expression is not always respected either, and concerns have been raised regarding the implementation of disciplinary proceedings."²⁷

The available information suggests that over the decade since this evaluation was undertaken, these fundamental challenges to the independence of judges and lawyers persist.²⁸ Indeed, many of the lawyers interviewed for this report observed a deterioration in the operation of the rule of law, including in respect of the independence of judges and lawyers over this time, but particularly since June 2021.

To provide the context necessary to explain this deterioration, three critical and emblematic events are summarized below. They are: 1) the June 2021 unrest in Eswatini and the government's responses thereto; 2) the extrajudicial killing of Thulani Maseko on 21 January 2023; and 3) the conviction and sentencing of two members of Parliament, Bacede Mabuza and Mthandeni Dube, to lengthy sentences for remarks made by them in the context of the June 2021 protests.

1. June 2021 unrest

While a full treatment of the events in June 2021 in Eswatini is beyond the scope of this report, both the events of June 2021 and the government's responses thereto provide essential context for understanding the present operation of the rule of law in the country.

²⁶ ICJ, 'Swaziland: Country Profile Prepared by the ICJ Centre for the Independence of Judges and Lawyers,' 2014, available at: <https://www.icj.org/wp-content/uploads/2014/06/CIJL-Country-Profile-Swaziland-June-2014.pdf>, p 1.

²⁷ Ibid.

²⁸ See, as examples, ICJ, 'Achieving Justice for Gross Human Rights Violations in Swaziland: Key Challenges, May 2018,' 2018, available at: <https://www.icj.org/wp-content/uploads/2018/05/Swaziland-GRABaselineStudy-Publications-Reports-Thematic-reports-2018-ENG.pdf>; and SADC LA, 'Report on the Independence of the Judiciary in Eswatini, Zambia and Zimbabwe,' 2021, available at: https://www.derebus.org.za/wp-content/uploads/2021/06/SADC_LA_Judicial_Report_On_Eswatini_Zimbabwe_and_Zambia_2021.pdf.

Overall, various factors appear to have contributed significantly to motivating the popular protests that occurred during June 2021, include:²⁹

- the extrajudicial killing by police officers of Thabani Nkomonye, a 25-year-old law student at the University of eSwatini, whose eyes were gouged out and three holes drilled in his body in a field in Nhlabeni.³⁰ His body was found on 14 May 2021. Protests demanding justice for Thabani³¹ led to widespread pro-democracy demonstrations in June 2021;³²
- a ban placed on the petitioning of local Members of Parliament through Tinkhundla Centres,³³ on 24 June 2021, through an announcement of the Acting

²⁹ ICJ, 'Eswatini: ICJ makes submissions to the African commission on Human and People's Rights (ACHPR) in advance of its examination of Eswatini's Report,' 22 November 2021, available at: <https://www.icj.org/eswatini-icj-makes-submissions-to-the-african-commission-on-human-and-peoples-rights-achpr-in-advance-its-examination-of-eswatinis-report/>.

³⁰ Sazi Bongwe, 'The King vs. The People: The Struggle to Bring Democracy to eSwatini,' *Harvard Political Review*, 3 August 2023, available at: <https://harvardpolitics.com/king-vs-people/>.

³¹ Wendy Magagula, 'UNESWA students demand justice for Thabani Nkomonye, police says he died in a car accident,' *Swaziland News*, 14 May 2021, available at: <https://www.swazilandnews.co.za/fundza.php?nguyiphi=1163>; Zweli Martin Dlamini, 'Eswatini youth: 'Nothing to lose', *Mail & Guardian*, 21 Dec 2021, available at: <https://mq.co.za/africa/2021-12-21-eswatini-youth-nothing-to-lose/>.

³² Amnesty International, 'End the crackdown on freedom of expression in Eswatini', available at: <https://www.amnesty.org/en/petition/end-the-crackdown-on-freedom-of-expression-in-eswatini/>.

³² Human Rights Watch, World Report 2023: 'Eswatini (formerly Swaziland): Events of 2022,' 2023, available at: <https://www.hrw.org/world-report/2023/country-chapters/eswatini-formerly-swaziland>.

³³ Information about Tinkhundla centres available here: <https://www.gov.sz/index.php/tinkhundla-centres>. See also Musa Njabulo Shongwe, "The Tinkhundla Decentralisation System: Is this a Blend of Traditional and Modern State Governance that Works?" in C Fombad and N Steytler (eds.), *Decentralisation and Constitutionalism in Africa*, Oxford University Press, 10 September 2019, pp.520-538, available at: <https://oxcon.ouplaw.com/display/10.1093/law/9780198846154.001.0001/law-9780198846154-chapter-21>, describing Tinkhundla Centres as:

"Tinkhundla centres would also carry out other socio-economic and political functions, including those of serving as electoral centres, implementing national policies at grassroots level, coordinating cultural activities, identifying priority development projects within constituencies, and keeping the central government informed of all political activities taking place...."

"Tinkhundla act as centres of local development and as political constituencies. The architects of the system perhaps overlooked the possible conflict between development and politics by assuming that Swazis would not concern themselves so much with political matters as with bread and butter issues. However, it is the case that the *tinkhundla* system is more than simply a local government system: it is a system that underpins Swazi politics, elections, laws, and the entire functioning of government."

See also: Patrick Bongani Mkhonta 'Local Government in Swaziland: Requirements for Competent Administration in Urban Areas' (2007), available: <https://repository.up.ac.za/bitstream/handle/2263/29481/00front.pdf?sequence=1&isAllowed=y>, Chapter 2.

"As electoral centres, which is a political function, Tinkhundla serve as constituencies from which aspiring politicians may stand for national parliamentary elections; thus a candidate who wins the elections may represent his inkhundla (constituency) in the national Parliament. As local councils, which have an administrative function, Tinkhundla are considered (by government) to be the main vehicle of decentralisation; and from the latter perspective, the Tinkhundla (councils) help to promote grassroots participation in areas outside the towns and cities by bringing government and public services closer to the people."

Prime Minister. Expressing frustration with their inability to affect the country's governance, corruption, and economic stagnation, many individuals had taken to petitioning their local Members of Parliament.³⁴

- The arbitrary arrest of Mduduzi Bacede Mabuza and Mthandeni Dube, members of Parliament who expressed support for the continuation of protests and the continued delivery of petitions to Tinkhundla Centres despite the ban announced by the Acting Prime Minister.

In addition to these three more proximate factors, it is also clear that poor service delivery as a result of apparent corruption and maladministration, which were deepened by the COVID-19 pandemic contributed to the overall frustration in the lead up to June 2021.³⁵ The COVID-19 had many devastating socio-economic consequences, including the exacerbation of poverty and unemployment and increased

Ntombini Marrengane (2021), Local Governance and Traditional Authority in the Kingdom of Eswatini: The Evolving Tinkhundla Regime, *African Studies*, 80 (2), p 2:

"it is essential to define the term tinkhundla, which is at the heart of the urban governance in Eswatini. The word (plural of inkhundla) means "communal meeting places or centres" (Mamba 2006; Sihlongonyane & Simelane 2017) that serve as sites of local governance as led by traditional authorities as representatives of the Swazi monarch (Sihlongonyane & Simelane 2017; Simelane 2017). In policy documents, tinkhundla is described as clusters of chiefdoms that are defined as a single constituency (GOS 2005; Simelane 2017). These plain descriptions belie the sophisticated system of hierarchies that define the traditional authority system that covers the length and breadth of the country."

³⁴ See the announcement made by the Eswatini Government on X (formerly Twitter) suspending the delivery of petitions to Tinkhundla, here: <https://x.com/EswatiniGovern1/status/1408074737243148288>. Also see the full statement of the announcement of the ban on 21 June 2021, available here: <https://www.gov.sz/images/CORONA/APM-Statement-24-June-2021.pdf>: In announcing this ban, the Prime Minister of Eswatini said:

"what we are seeing of late are elements who have hijacked these concerns to further their own agenda, mainly to shake the foundations that define this country with an intention to achieve regime change. These protests have degenerated into disorder and violent scenes in several instances, putting the lives of citizens, public and private property in danger. We have seen some protestors deliberately provoking the police who have continued to restrain themselves under serious provocation and attacks....

This kind of unruly behavior is unacceptable and cannot be allowed to continue without consequence. Our Tinkhundla system, as encapsulated in the Constitution, ably provides the structures and procedures to be followed when raising concerns at community or constituency level. Delivering petitions is not one of them...

...In light of the above, Government has reached the decision to stop with immediate effect the delivery of petitions to Tinkhundla Centres."

³⁵ Statista, 'Impact of coronavirus (COVID-19) on projected real GDP growth in Eswatini from 2019 to 2022,' available at: <https://www.statista.com/statistics/1194985/impact-of-covid-19-on-projected-real-gdp-growth-in-eswatini/>; Siphephelo Mabundza, 'Assessment of the Impact of the Coronavirus (Covid-19) on the Economy and Labour Market in Eswatini,' (a report), June 2020, available at: <https://business-eswatini.co.sz/wp-content/uploads/2021/07/Report-on-Impact-of-Assessment-of-COVID-19-Eswatini-Final.pdf>; Adrienne Lees, Giulia Mascagni, and Fabrizio Santoro, 'Simulating the Impact of COVID-19 on Formal Firms in Eswatini,' MTI Practice Notes, World Bank Group, 31 August 2020, available at: <http://documents.worldbank.org/curated/en/794881600975346533/Simulating-the-Impact-of-COVID-19-on-Formal-Firms-in-Eswatini>; ILO, 'The Next Normal: The Changing Workplace in Eswatini,' 27 June 2022, available at: https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/--act_emp/documents/publication/wcms_849640.pdf.

food insecurity.³⁶ Indeed, some of these challenges were acknowledged by the Acting Prime Minister in his announcement of the ban on petitions.³⁷

These deep challenges to the enjoyment of the right to an adequate standard of living were in sharp contrast to what has been widely perceived as continued opulence and over-indulgence of the King and the royal family.³⁸ As one interviewee for this reported indicates, while “[Eswatini] has always been a country that has tension”, COVID-19 and the dire state of the economy “took a toll on a lot of people” because:

“people were losing employment, people were going hungry and it was affecting everybody, even those that were unaffected even those that were not interested and apathetic in the first place. It was now affecting them on their standard of living and how they provide for their families.”³⁹

Finally, dissatisfaction with the system of government, had continued to grow and pro-democracy anti-monarchy sentiments were prevalent at protests during June 2021. As one interviewee noted:

“people were beginning to see that their problems are not literally the problems of the country not having money but the mismanagement of funds and issues pertaining to the government system”.⁴⁰

Another observed that the crumbling of rule of law, which had occurred over time, contributed to the situation:

“So, there's like, there's no leader in this country anymore. This country is running on its own. And so, the space, it was just ripe for the taking. And for the next three years, I'd say that the King had lost the country. It's just that nobody raised their hand to say, and now I'm in charge. Otherwise, he had lost grip of it, it was gone, you know.”⁴¹

³⁶ IPC, ‘Eswatini: Acute Food Insecurity Projection Update December 2021 - March 2022 (Projection update of the August 2021 Analysis),’ 25 January 2022, available at: <https://www.ipcinfo.org/ipc-country-analysis/details-map/en/c/1155401/?iso3=SWZ>.

³⁷ Statement by the Government of Eswatini, 21 June 2021, available at: <https://www.gov.sz/images/CORONA/APM-Statement-24-June-2021.pdf>:

“We are alive to public concerns of lack of adequate jobs and service delivery anxieties, among others, which are by and large a global concern. These are issues that Government has always taken on board hence we have put in place several strategies and interventions to address them within the constraints of our budget...

... While the world and the Kingdom of Eswatini continue to grapple with the negative effects of the COVID-19 pandemic which has plunged many global economies into severe strain, we remain committed to not losing sight and pace of our primary mandate - to uplift the lives of all emaSwati and attain sustainable economic development, peace and prosperity.”

³⁸ IOL, ‘Look: King Mswati III buys each of his (many) wives a R10m Rolls Royce,’ 30 October 2019, available at: <https://www.iol.co.za/news/africa/look-king-mswati-iii-buys-each-of-his-many-wives-a-r10m-rolls-royce-36386397>; Zweli Martin Dlamini, ‘COVID-19 CRISIS: Extravagant Eswatini King appeals for more donations few months after splashing R1billion on Rolls Royce and BMWs,’ *Swaziland News*, 1 July 2020, available at: <https://www.swazilandnews.co.za/fundza.php?nguyiphi=488>; John Eligon, ‘Africa’s Last Absolute Monarchy Convulsed by Mass Protests,’ *The New York Times*, 2 July 2021, available at: <https://www.nytimes.com/2021/07/02/us/africa-monarchy-eswatini-protests-swaziland.html>.

³⁹ Interviews conducted by ICJ, Interview #15.

⁴⁰ Ibid.

⁴¹ Interview with Bheki Makhubu.

In addition to the banning of petitions, and the arrest and criminal prosecution of Mduduzi Bacede Mabuza and Mthandeni Dube, the authorities of Eswatini responded to the protest with a heavy-handed show of force through the deployment of the police and the military. Unnecessary or disproportionate force and the use of live ammunition were common.⁴² The government also imposed a curfew,⁴³ and, after people continued to protest and organize protest through social media, it sent instructions to internet service providers to shutdown access on various occasions.⁴⁴ According to one interviewee:

"I found myself very, very scared, and also for my family. I saw another version of Swaziland, of Eswatini which I've never seen before. It was like being in a war zone. You would see clouds of smoke. You would hear sounds of gun fire at night and during the day. There was no public transport. Police stations were closed. Business was closed generally- shops, supermarkets; they were all closed. You had the soldiers on the streets with heavy weapons and trucks full of soldiers. It was something different, something I've never seen. And I was afraid that within a space of a week we were going to run out of food."⁴⁵

On 29 October 2021, the Eswatini Commission on Human Rights and Public Administration/Integrity issued a report titled "Preliminary Assessment Report on Civil Unrest in the Kingdom of Eswatini – June 2021".⁴⁶ The report records and verifies at least 46 deaths arising from the June 2021 unrest, including two children, seven women, seven young people, two elderly people and 30 men. It also confirmed the arrest and detention of at least 337 people and gunshot injuries were sustained by at least 245 people. This is certainly a significant undercount.⁴⁷

More generally, a number of Swazi civil society organizations have documented the "clamp down on peaceful protests and the use of brutal force by security officers, especially the army and members of the paramilitary wing of the police service, the Operational Support Services Unit (OSSU)".⁴⁸

The Commission recommended that the authorities initiate prompt, independent, impartial and transparent investigations into allegations of the death of civilians at the

⁴² The Foundation for Socio-Economic Justice in Swaziland, 'Eswatini Shadow Report to the African Commission on Human and People's Rights,' available here: <https://www.icj.org/wp-content/uploads/2021/11/FSEJ-Eswatini-Shadow-Report-November-2021.pdf>.

⁴³ *Aljazeera*, 'Tensions runs high in Eswatini as pro-democracy protests continue,' 30 June 2021, available at: <https://www.aljazeera.com/news/2021/6/30/tensions-run-high-eswatini-pro-democracy-protests-continue>.

⁴⁴ ICJ's Submission to the African Commission on Human and People's rights in Advance of the Examination of the Kingdom of Eswatini's Combined 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, and 9th Report (2001-2020), 15 November 2021, available here: <https://www.icj.org/wp-content/uploads/2021/11/ICJ-Shadow-Report-Submission-to-ACHPR-16.11.2021.pdf>; ICJ, 'eSwatini: ICJ urges multinational mobile telecommunications company MTN to immediately restore internet access in eSwatini,' 2021, available at: <https://www.icj.org/resource/eswatini-icj-urges-multinational-mobile-telecommunications-company-mtn-to-immediately-restore-internet-access-in-eswatini/>.

⁴⁵ Interviews conducted by ICJ, Interview #16.

⁴⁶ ICJ's Submission to the African Commission on Human and People's rights in Advance of the Examination of the Kingdom of Eswatini's Combined 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, and 9th Report, op. cit.

⁴⁷ The Foundation for Socio-Economic Justice in Swaziland, 'Eswatini Shadow Report to the African Commission on Human and People's Rights,' available here: <https://www.icj.org/wp-content/uploads/2021/11/FSEJ-Eswatini-Shadow-Report-November-2021.pdf> para 11.

⁴⁸ *Ibid*, para 14.

hands of the security agents during the unrest of June 2021, with the object of bringing those responsible to account and providing reparations to families of victims. As this report will show this recommendation was not acted upon, nor has it been to date.⁴⁹ Instead, State authorities have largely focused their efforts on the criminal prosecution of those involved in protests in June 2021, coupled with the harassment and surveillance of lawyers. There are credible allegations of State involvement in targeted attacks on lawyers including killings and attempted killings.

The call for independent investigation has been echoed by the African Commission on Human and People's Rights⁵⁰ and the UN High Commissioner for Human Rights.⁵¹

In a podcast interview, Thulani Maseko summarized the situation after June 2021 as follows, noting that this period of June 2021 was possibly best described as a "calm before the real storm" because "tension continues to grow as people are frustrated":

"As we speak now, there are many Swazis who are languishing in jail following the June uprising. Many of them have appeared before the courts, they've been made to pay excessive amounts of bail, which they can't afford obviously. So, they continue to languish in jail. Many of them have been charged in terms of what we call the public order laws of our country. Many of them have been charged with looting and vandalism and so they continue to stay in jail.

But the situation outside, even though there is some bit of calm, because of the violence of the State against innocent citizens people are now sort of scared to come out and express themselves because in response the government has been using live rounds of bullets to shoot and kill and maim citizens.

But there is no question that the calm is merely just perhaps a calm just before the real storm, because the tension continues to grow as people are frustrated – now they've got no way to express themselves. Because whatever means they have employed the government responds violently through the army and the police and all forms of security organs of the state – just to suppress the will of the people.

So right now, one can say that even though it appears that there is some calm that people on the ground are very upset, they are very angry, they continue to organise and very soon we understood the crisis will escalate once more and then we may see more lives being lost. We may see many more people being injured. Actually, we may even see many more people fleeing the country, because many young people have left the country because the police are looking for them. They want to arrest them, they want to charge them, they even want to kill them."⁵²

⁴⁹ Human Rights Watch, 'Eswatini: Still No Justice for 2021 Violence,' 26 June 2023, available at: <https://www.hrw.org/news/2023/06/26/eswatini-still-no-justice-2021-violence>.

⁵⁰ ACHPR, 'Statement on human rights situation in the Kingdom of eSwatini,' 17 July 2021, available at: <https://achpr.au.int/en/news/press-releases/2021-07-17/press-statement-human-rights-situation-kingdom-eswatini>.

⁵¹ OHCHR, 'Press briefing notes on Eswatini,' 6 July 2021, available at: <https://www.ohchr.org/en/2021/07/press-briefing-notes-eswatini>.

⁵² *The Delve*, 'An Uprising in Eswatini' [Interview with Thulani Maseko], 1 December 2021, audio podcast available at: <https://podcasters.spotify.com/pod/show/thedelve/episodes/An-Uprising-in-Eswatini-e1b2knj>.

2. Killing of Thulani Maseko

Thulani Maseko was a human rights lawyer and a vocal proponent of democratic reform in Eswatini. He frequently acted in litigation against the Eswatini government and directly criticized the King and his government for its repression of human rights defenders. The ICJ has documented his harassment and persecution, including through the targeted criminal prosecution under the Sedition and Subversive Activities Act and the Suppression of Terrorism Act. In 2009 he made a public speech on Worker's Day in which he "portrayed as freedom fighters two men who died [in 2008] in what the government claims to have been a botched terrorist attack".⁵³

Maseko successfully challenged the constitutional validity of these laws in the High Court. However, the High Court's ruling was more recently overturned by Swaziland's Supreme Court in a highly problematic judgment.⁵⁴

The charges that led to the above decisions were the second time Maseko had been arrested and charged with sedition and terrorism.⁵⁵

Maseko prominently criticized the government's response to the June 2021 unrest, and provided legal representation to those targeted for their involvement in protests in June 2021. He was the chair of a multi-stakeholder forum consisting of a broad-based coalition of political parties and civil society groups formed in August 2021 to call for democratic reform in the country. In that position Maseko repeatedly called for the end the monarchy and for other constitutional reform. The view among all those interviewed was that both this role and his legal work had made him what one described as a "thorn in the side" of Swazi authorities.

In January 2023, writing in his monthly column for *The Nation* magazine, Maseko reiterated these calls for peaceful dialogue towards democratic reform, warning that "when diplomacy fails violence will take over".⁵⁶ He indicated that while "dialogue

⁵³ Southern Africa Litigation Centre, 'Thulani Maseko arrested and charged under Swaziland's Suppression of Terrorism Act,' 2 June 2009, available at: <https://www.southernafricalitigationcentre.org/salc-news-release-thulani-maseko-a-prominent-human-rights-lawyer-has-been-arrested-and-is-currently-in-police-custody-he-was-initially-charged-under-swazilands-recently-enacted-suppressio/>; Lawyers for Human Rights, 'Centre For Human Rights Calls for Release of Swazi Human rights Lawyer, available at: <https://www.lhr.org.za/archive/news/2009/centre-for-human-rights-calls-for-release-of-swazi-human-rights-lawyer.html>.

⁵⁴ ICJ, 'The Failure of Justice: Unfair Trial, Arbitrary Detention and Judicial Impropriety in Swaziland,' ICJ Trial Observation Report 2015, available at: <https://www.icj.org/resource/trial-observation-unfair-trial-arbitrary-detention-and-judicial-impropriety-in-swaziland/>; ICJ, 'Eswatini: Supreme Cort decision upholding repressive security law is a blow to huma rights', 30 August 2024, available at: <https://www.icj.org/eswatini-supreme-court-decision-upholding-repressive-security-laws-is-a-blow-to-human-rights/>; Southern Africa Litigation Centre, 'Supreme Court Ignores Rights Violations: Upholds Sedition,' 14 August 2024, available at: <https://www.southernafricalitigationcentre.org/eswatini-supreme-court-upholds-sedition-offences/>.

⁵⁶ *The Nation* (January 2023), on file with author. His first arrest was in 2009 for a public speech made on Worker's Day in 2009 in which Maseko "portrayed as freedom fighters two men who died [in 2008] in what the government claims to have been a botched terrorist attack" Southern Africa Litigation Centre, 'Thulani Maseko arrested and charged under Swaziland's Suppression of Terrorism Act,' 2 June 2009, available at: <https://www.southernafricalitigationcentre.org/salc-news-release-thulani-maseko-a-prominent-human-rights-lawyer-has-been-arrested-and-is-currently-in-police-custody-he-was-initially-charged-under-swazilands-recently-enacted-suppressio/>; Lawyers for Human Rights, 'Centre For Human Rights Calls for Release of Swazi Human rights Lawyer, available at: <https://www.lhr.org.za/archive/news/2009/centre-for-human-rights-calls-for-release-of-swazi-human-rights-lawyer.html>.

represents the people's highest political act of self-determination", "there are still no signs that the king is willing to give the dialogue a chance". However, the King appeared to be "girding for war" and Eswatini was indeed "enduring a low-key civil war". He believed that "the eye for an eye mentality seems to have grabbed the nation", and that the "violence has reached alarming levels."

This was to be Thulani Maseko's last column. On 21 January 2023 he was shot and killed in his home in front of his wife, Tanele Maseko, and his two children.⁵⁷ Thulani's killing came hours after a speech given by the King in which he claimed that those opposing the government and the monarchy had started the violence, that "more trouble was coming for them" and that "people should not shed tears and complain about mercenaries killing them".⁵⁸

For those who knew him well, Maseko's commitment to non-violence was repeatedly emphasized in our interviews:

"Thulani was one person who never advocated for violence. I've sat many, many days with Thulani and he would always say "do not associate me with that trash. I'm not a party to that". What I saw Thulani doing was one man who said, 'we must sit and talk'. He always said that we are going to sit and we are going to talk. And I was very close to him. We would have our disagreements but he's never, ever, in all the years that I've known Thulani, has he ever advocated for violence."⁵⁹

His commitment to dialogue was sometimes described as by interviewees as almost absolute:

"Thulani, since he believed that there would be dialogue in this country, and he genuinely believed that. And he was pushing it hard. I think in my view perhaps they knew something that we don't because he was not going to give up on that."⁶⁰

"I think before Thulani's killing, the country had been calling for dialogue and Thulani was one of the lone voices who called for a peaceful engagement with the system."⁶¹

As will be explained below, the impact of Maseko's killing on other lawyers and human rights defenders in Eswatini has been dramatic and will be covered in detail below.

⁵⁷ Human Rights Watch, 'Activist, Rights Lawyer Brutally Killed,' 25 January 2023, available at: <https://www.hrw.org/news/2023/01/25/eswatini-activist-rights-lawyer-brutally-killed>; Amnesty International, 'Eswatini: Investigation into Thulani Maseko's killing must be independent and transparent, 21 February 2023, available at: <https://www.amnesty.org/en/latest/news/2023/02/eswatini-investigation-into-thulani-masekos-killing/>.

⁵⁸ *The Guardian*, 'Eswatini: murder of pro-democracy activist prompts outrage', 24 January 2023, available at: <https://www.theguardian.com/world/2023/jan/24/eswatini-of-pro-democracy-activist-prompts-outrage>; Zweli Martin Dlamini, 'King Mswati to Political Activists: Don't cry about mercenaries killing you, more trouble coming,' *Swaziland News*, 22 January 2023, available at: <https://www.swazilandnews.co.za/fundza.php?nguyiphi=3733>.

⁵⁹ Interviews conducted by ICJ, Interview #21.

⁶⁰ Interviews conducted by ICJ, Interview #5.

⁶¹ Interviews conducted by ICJ, Interview #7.

Governmental authorities have denied the involvement of State agents in Maseko's killing and endeavoured to ensure it was investigated,⁶² describing his death as a "loss for the nation". The police issued a statement in September 2023 indicating investigations were progressing.⁶³ On 29 December 2023,⁶⁴ a government spokesperson released a statement indicating that "the police have further prioritised investigations into all these killings", referring to Maseko's killing and "all other deaths which occurred as a consequence of the June 2021 civil unrest".⁶⁵

The authorities have targeted Maseko's widow, Tanele Maseko publicly,⁶⁶ and have subsequently harassed and detained her, seizing her mobile phone.⁶⁷ Tanele has been interrogated by police officers in the absence of her legal representatives.⁶⁸

Tanele Maseko has, like many others, has accused the King of being responsible for Thulani's killing, a position that has been described by government spokesperson Alpheous Nxumalo as "treasonous".⁶⁹ Tanele Maseko confirmed in an interview in late September 2024 with the ICJ during the compilation of this report, she had still not been interviewed in relation to Thulani Maseko's killing. She also indicated that, to her knowledge, other than questioning her neighbours in the immediate aftermath of Thulani Maseko's killing, no other persons have yet been interviewed.⁷⁰ At the time of writing no further information has been made publicly available and the status of the investigation remains unclear more than 18 months after Thulani Maseko's killing.⁷¹

⁶² Zweli Martin Dlamini, 'Eswatini government slams 'speculation' over murder of human rights lawyer Thulani Maseko,' *Mail & Guardian*, 24 January 2023, available at: <https://mg.co.za/africa/2023-01-24-eswatini-government-slams-speculation-over-murder-of-human-rights-lawyer-thulani-maseko/>; *Aljazeera*, 'Unknown gunmen kill popular Eswatini opposition,' 23 January 2023, available at: <https://www.aljazeera.com/news/2023/1/23/gunmen-kill-eswatini-opposition-politician>.

⁶³ Amnesty International, 'Eswatini: One year after Thulani Maseko's killing: justice remains elusive,' 22 January 2024, available at: <https://www.amnesty.org/en/latest/news/2024/01/eswatini-thulani-masekos-killer-roam-free-a-year-on/>.

⁶⁴ Human rights Watch, 'Eswatini Authorities Target Activist's Widow,' 28 March 2024, available at: <https://www.hrw.org/news/2024/03/28/eswatini-authorities-target-activists-widow>.

⁶⁵ See: Eswatini Government Spokesperson Alpheous Nxumalo's statement on X (formerly Twitter) on 29 December, available at: <https://x.com/EswatiniGovern1/status/1740749738184790120>.

⁶⁶ Human rights Watch, 'Eswatini Authorities Target Activist's Widow,' 28 March 2024, available at: <https://www.hrw.org/news/2024/03/28/eswatini-authorities-target-activists-widow>.

⁶⁷ Amnesty International, 'Eswatini: Authorities must stop harassment and intimidation of Tanele Maseko,' 28 March 2024, available at: <https://www.amnesty.org/en/latest/news/2024/03/eswatini-authorities-must-stop-harassment-and-intimidation-of-tanele-maseko/>; Southern Africa Litigation Centre, 'Eswatini Must Put an End to the Harassment of Tanele Maseko,' 28 March 2024, available at: <https://www.southernafricalitigationcentre.org/eswatini-must-put-an-end-to-the-harassment-of-tanele-maseko/>; and Human rights Watch, 'Eswatini Authorities Target Activist's Widow,' 28 March 2024, available at: <https://www.hrw.org/news/2024/03/28/eswatini-authorities-target-activists-widow>. Tanele initiated litigation to recover her phone in April 2024, see: Kwanele Dlamini and Sibusiso Zwane, 'Late Lawyer Thulani's Wife Accused of Refusing with Hubby's 2 Phones,' *Times of Swaziland*, 3 April 2024, available at: <http://www.times.co.sz/news/144550-late-lawyer-thulani-s-wife-accused-of-refusing-with-hubby-s-2-ph.html>.

⁶⁸ Khulekani Nene, 'Troubled Kingdom: Widow of murdered Eswatini human rights lawyer refuses state interrogation without legal team present,' *Daily Maverick*, 3 April 2024, available at: <https://www.dailymaverick.co.za/article/2024-04-03-widow-of-murdered-eswatini-human-rights-lawyer-refuses-state-interrogation-without-legal-team-present/>. Tanele has informed the ICJ that after initiating the litigation the police returned her phone. The matter was set down for hearing but postponed.

⁶⁹ *The Nation* (January 2024), p 21.

⁷⁰ Interview with Tanele Maseko.

⁷¹ Amnesty International, '500 Days of Impunity: Demand Justice for Thulani Maseko,' 19 June 2024, available at: <https://amnesty.org.za/action/500-days-of-impunity-demand-justice-for-thulani-maseko/>.

The failure to expeditiously and independently investigate Thulani Maseko's killing is a violation of Eswatini's international human rights obligations. Three independent experts (Special Procedures) of the UN Human Rights Council condemned Eswatini's response in January 2024 asserting that:⁷²

"Investigations conducted into Thulani's death have made no substantive progress over the course of an entire year. This is outrageous and creates a climate of impunity and a chilling effect on the human rights movement in Eswatini...

The lack of progress in the investigation into the tragic apparent targeted killing of such a prominent human rights defender and lawyer sends the message that the safety and protection of human rights defenders, civil society actors and lawyers is not guaranteed and not a priority for the State."

3. Conviction and sentencing of Bacede Mabuza and Mthandeni Dube

In July 2021, MPs Mduduzi Bacede Mabuza and Mthandeni Dube, were arrested and charged with sedition, terrorism and murder.⁷³ They have been held in arbitrary detention, having been denied bail more than once,⁷⁴ and their children's attempts to visit them during their continued incarceration have been frustrated first by the executive and later the courts.⁷⁵

The charges against the two MPs related to utterances made by them in support of the submission of petitions to Tinkhundla Centres and the continuation of protests against the government. Before court, certain of these comments were alleged by the Crown to have caused or contributed to deaths, injuries and damage to property in the context of the June 2021 protests. The charges have been characterized by the African Commission on Human and People's Rights as "politically motivated".⁷⁶ None of the evidence before the court illustrated that either of the accused encouraged the commission of any acts of violence.

⁷² The experts are: Ms. Mary Lawlor, Special Rapporteur on the situation of human rights defenders; Mr. Morris Tidball-Binz, Special Rapporteur on extrajudicial, summary or arbitrary executions; Ms. Margaret Satterthwaite, Special Rapporteur on the independence of judges and lawyers; and Mr. Clément Nyaletsossi Voule, Special Rapporteur on freedom of peaceful assembly and of association. See, OHCHR, 'Eswatini: Un experts commemorate human rights defender Thulani Maseko, deplore lack of accountability for his killing,' 22 January 2024, available at: <https://www.ohchr.org/en/press-releases/2024/01/eswatini-un-experts-commemorate-human-rights-defender-thulani-maseko-deplore>.

⁷³ *Phumlani Mabuza and 2 Others v The National Commissioner for His Majesty's Correctional Services and Another* (2472/2023) SZHC 47 (20 March 2024), available at: <https://eswatiniilii.org/akn/sz/judgment/szhc/2024/54/eng@2024-03-20/source.pdf>.

⁷⁴ ICJ, 'Eswatini: ICJ makes submissions to the African Commission on Human and People's rights (ACHPR) in Advance of the Examination of Eswatini's Report, 22 November 2021, available at: <https://www.icj.org/eswatini-icj-makes-submissions-to-the-african-commission-on-human-and-peoples-rights-achpr-in-advance-its-examination-of-eswatinis-report/>; *Registrar of the High Court, Eswatini N.O., the Honourable Chief Justice of Eswatini N.O. Vs Mduduzi Bacede Mabuza and Mthandeni Dube* (5 of 2022) [2022] SZSC 8 (6 May 2022), available at: <https://eswatiniilii.org/akn/sz/judgment/szsc/2022/8/eng@2022-05-06>.

⁷⁵ *The King v Mabuza and Another* (213 of 2021) [2023] SZHC 502 (1 June 2023), available at: <https://eswatiniilii.org/akn/sz/judgment/szhc/2023/502/eng@2023-06-01>.

⁷⁶ ACHPR, 'Resolution on the Situation of Human Rights in the Kingdom of Eswatini – ACHPR/Res.554 (LXXV) 2023, available at: <https://achpr.au.int/en/adopted-resolutions/554-resolution-situation-human-rights-kingdom-eswatini>.

Mduduzi Bacede Mabuza and Mthandeni Dube were subsequently convicted⁷⁷ and sentenced⁷⁸ to lengthy terms of imprisonment of 58 and 85 years respectively, including for violations of the Suppression of Terrorism Act⁷⁹ as well as the Sedition and Subversive Activities Act.⁸⁰

The High Court conviction decision and the extraordinarily lengthy sentences appear to constitute the abusive invocation of such laws to punish and chill the exercise of freedom of expression and public and political participation, rights that are protected under international human rights law. The High Court provides significant detail of the utterances of accused, which were directly critical of the government and the monarchy and emphatic on the lawfulness of people exercising their democratic rights to deliver petitions (despite the ban imposed) and protest. It then concludes that, in the context of the protests and the COVID-19 pandemic, both accused said things which resulted in the violence that followed and that, because they foresaw this as a possibility, they should be held criminally liable. For example, the court says that one of the accused:

“planted acrimony among the listeners and the Government. Violence as a result of such words therefore became apparent. His call that there should be no violence was muzzled by such utterances, or should I say, that call not to engage in violence in light of such words in his speech was indication that he appreciated that the people might turn to anger and thereby cause violence”.⁸¹

This obviously illogical finding thereby turns the accused’s explicit call *against* violence on its head and imputes to a call against violence an understanding that what he was saying may encourage violence.

In respect of the other accused, the court, for example, notes an acknowledgment by him that in *some* instances there was “harassment and bullying” involved in delivering petitions. Indicating that “harassment and bullying” are forms of violence, the Court thereafter jumps to conclude that given this knowledge, his encouragement of people to continue delivering petitions was “akin to a call for a furtherance of violence,” despite no credible factual information being cited in which the accused actually made calls to violence.⁸²

In its sentencing decision, the High Court appears to attribute wide-ranging violence, death, injury and damage to property during June 2021 directly to the speech of the accused. The Court merely cites a bible verse – “even so the tongue of fire is a little member, and it can boast great things. See how much wood or how great a forest a tiny spark can set ablaze. And the Tongue is a fire” – in concluding that it is the remarks of the accused that led any number of criminal acts committed by other persons.⁸³

⁷⁷ *The King v Mabuza and Another* (213 of 2021) [2023] SZHC 502 (1 June 2023), available at: <https://eswatiniilii.org/akn/sz/judgment/szhc/2023/502/eng@2023-06-01>.

⁷⁸ *The King vs Mduduzi Bacede Mabuza and Another* (213/2021) [2021] SZHC 40 (15 July, 2024), available at: <https://eswatiniilii.org/akn/sz/judgment/szhc/2024/40/eng@2024-07-15/source>.

⁷⁹ Suppression of Terrorism Act, 2008, Act 3 of 2008.

⁸⁰ Sedition and Subversive Activities Act, 1938, Act 46 of 1938.

⁸¹ *The King v Mabuza and Another* (213 of 2021) [2023] SZHC 502 (1 June 2023), available at: <https://eswatiniilii.org/akn/sz/judgment/szhc/2023/502/eng@2023-06-01>, Para 188.

⁸² *Ibid*, Para 197.

⁸³ *The King vs Mduduzi Bacede Mabuza and Another* (213/2021) [2021] SZHC 40 (15 July, 2024), available at: <https://eswatiniilii.org/akn/sz/judgment/szhc/2024/40/eng@2024-07-15#page-18>, paras 114-117.

The conviction of Bacede Mabuza and Mthandeni Dube vividly illustrates the dangers inherent in overly broad criminal laws such as the Suppression of Terrorism Act⁸⁴ as well as the Sedition and Subversive Activities Act.⁸⁵ At the time they were charged, portions of both these laws had been declared unconstitutional by the High Court,⁸⁶ though the Supreme Court overturned this decision in an ill-considered judgment handed down on 13 August 2024.⁸⁷ In so doing, the Supreme Court largely upheld criminal legal provisions which serve to effectively criminalize freedom of expression, target human rights defenders, and harass, intimidate, and ultimately silence those who exercise their right to public and political participation, including the political opposition in the country.⁸⁸

In its response to ICJ concerning this report, the Minister asserts these pieces legislation are compliant with Eswatini's international human rights obligations and drew the ICJ's attention to the judgment of the Supreme Court.⁸⁹

As ICJ has noted, the legal provisions under which Bacede Mabuza and Mthandeni Dube were convicted are vague and overbroad, in contravention of the principle of legality, and non-compliant with Eswatini's international legal obligations to protect freedom of expression, association, assembly, and political participation.⁹⁰ The Inter-Parliamentary Union⁹¹ conducted an independent trial observation of the process of the prosecution of the two accused concluding, in respect of the judgments, that:

"If we examine the statements attributed to them (Mr. Mabuza and Mr. Dube) by the learned judge, a careful analysis in fact does not reflect criminal intent. Throughout the evidence as appears in the record, there is no exhortation on the Swazi public to rise up in insurrection, overthrow the Monarchy and establish a

⁸⁴ Suppression of Terrorism Act, 2008, Act 3 of 2008.

⁸⁵ Sedition and Subversive Activities Act, 1938, Act 46 of 1938.

⁸⁶ *Maseko and Others v Prime Minister of Swaziland and Others* (2180 of 2009) [2016] SZHC 180 (16 September 2016), available at: <https://eswatini.liko.org/akn/sz/judgment/szhc/2016/180/eng@2016-09-16>.

⁸⁷ ICJ, 'Eswatini: Supreme Court decision upholding repressive security laws is a blow to human rights,' 30 August 2024, available at: <https://www.icj.org/eswatini-supreme-court-decision-upholding-repressive-security-laws-is-a-blow-to-human-rights/>.

⁸⁸ Ibid. However, see Southern Africa Litigation Centre, 'Supreme Court Ignores Rights Violations: Upholds Sedition,' 14 August 2024, available at: <https://www.southernafrialitigationcentre.org/eswatini-supreme-court-upholds-sedition-offences/>, which notes that "the Supreme Court upheld both laws, albeit with a more restrictive reading of the offence of sedition to include an element of violence or disorder" and Polity, 'Eswatini Supreme Court Reminisces on History of Monarchy: Upholds Sedition Offences,' 16 August 2024, available at: <https://www.polity.org.za/article/eswatini-supreme-court-reminisces-on-history-of-monarchy-upholds-sedition-offences-2024-08-16>, where it is acknowledged that in terms of the sedition act the Court now has acknowledged that "an element of violence" is now required by the Court "which ensures that the offence aligns with international human rights standards, which specify that expression should be restricted only to instances of incitement to violence or when there's a direct connection between the expression and the potential for violence".

⁸⁹ See Annex G.

⁹⁰ ICJ, 'Eswatini: Supreme Court decision upholding repressive security laws is a blow to human rights' (30 August 2024), available: <https://www.icj.org/eswatini-supreme-court-decision-upholding-repressive-security-laws-is-a-blow-to-human-rights/>.

⁹¹ According to the Inter-Parliamentary Union's (IPU) website it is:

"the global organization of national parliaments. We promote democratic governance, institutions and values, working with parliaments and parliamentarians to articulate and respond to the needs and aspirations of the people. We work for peace, democracy, human rights, gender equality, youth empowerment, climate action and sustainable development through political dialogue, cooperation and parliamentary action.

See: the IPU website here: <https://www.ipu.org/about-us>.

government of the people. In fact, the accused are very deferential towards the Monarchy, almost religiously so. The entire case rests on the response by the accused to the declaration by the government that it was banning the production of petitions and for the appointment of the Prime Minister by election. The incidents of civil unrest occurred on 24 June 2021. It is abundantly clear from the gravamen of the charges, that the accused were no way near the scene of the crime. It is the effect of what they stated that reflects what the State says is the foundation of their criminal conduct: that they encouraged people in their public statements to disobey the lawful appointment of the Prime Minister and in the process encouraged civil disobedience. But, with respect, how can civil disobedience be equated with terrorism and sedition? There was no armed insurrection, no taking up of arms with revolutionary slogans against the State, no intentional destruction of the most visible manifestations of state power. How encouraging people to disobey the government on the issue of denying the filing of petitions automatically led to arrests for terrorism without showing a direct link between rhetoric and causation is difficult to appreciate".⁹²

In reference to questions about the conviction and sentencing of the MPs, the Minister of Justice, in its response to the ICJ, asserted that the government "will not interfere with the Director of Public Prosecutions' decision to prosecute" and that it "will allow due process of the criminal justice system" including decisions of the courts.⁹³

4. Lawyers' Experiences

While the responses and perspectives of the lawyers interviewed by the ICJ varied, the ICJ's research concludes that the following key issues are widely held among lawyers in Eswatini who are particularly vulnerable based on the nature of their legal work and kinds of cases they litigate, including human rights cases:

- **Lawyers fear being extrajudicially killed.**
- **Lawyers are followed, harassed, threatened and intimidated.**
- **Women lawyers are threatened with sexual violence.**
- **Lawyers are associated with the actions of their clients in the course of carrying out their legitimate professional functions**
- **Lawyers face adverse economic consequences for taking on cases or clients perceived as "political".**
- **Lawyers perceive their to be challenges in respect of the Law Society of Eswatini's execution of its mandate.**
- **Lawyers indicate that legal professionals operate in an environment that inhibits their ability to act independently.**
- **Lawyers allege that the judiciary is not independent.**
- **Lawyers consider that the Chief Justice abuses his power.**
- **Lawyers experience significant obstacles and pressures in relation to cases emanating from the June 2021 unrest.**
- **Lawyers are adversely impacted by the killing of Thulani Maseko.**
- **The shrinking of civic space more broadly.**

⁹² IPU, 'Eswatini: Decision adopted unanimously by the IPU Governing Council at its 213th session (Geneva, 27 March 2024), available at:

https://www.ipu.org/sites/default/files/documents/eswatini-e_0.pdf; 'Trial Observer Report: Eswatini - March 2023,' 15 March 2023, available at: <https://www.ipu.org/documents/2023-03/trial-observer-report-eswatini-march-2023>; and 'Trial Observer Report: Eswatini - February 2024,' 25 March 2024, available at: <https://www.ipu.org/documents/2024-05/trial-observer-report-eswatini-february-2024>.

⁹³ See Annex G.

The ICJ also obtained other pertinent and generally corroborating information from secondary sources. The ICJ considers that the views expressed can be taken to represent the actual experiences of a significant number of lawyers, extending beyond those interviewed directly, who engage in work falling broadly under the categories of human rights and other public interest work or other politically sensitive or contentious.

As the lawyers interviewed unanimously clarified, such work includes work which is a universal and standard part of the professional function of lawyers, such as: 1) representing individuals charged with minor crimes relating to protests; 2) representing individuals who are members of opposition political movements who advocate for democracy and/or human rights (human rights defenders); 3) representing individuals in legal conflicts of any kind with members of the royal family or companies and individuals related to it. The lawyers interviewed were, in the main, selected because of their participation in such cases which are considered "sensitive", "political" or "controversial" in Eswatini. The bases of the findings listed above is provided in detail in Section C below.

B. International Law and Standards on Independence of Judges and Lawyers

This section briefly summarizes the principal applicable international law and standards on the independence and accountability of judges and lawyers, including commentary by UN and African Commission on Human and People’s Rights (African Commission) authorities in respect of judicial independence.⁹⁴ It surveys some key concerns raised consistently by the ICJ and such regional and global human rights sources in respect of the legal and institutional frameworks providing for judicial independence in Eswatini. The section complements more detailed analysis in a range of ICJ publications specifically focusing on judicial independence in Eswatini over the past two decades. For convenience, summaries of key publications are provided in Annex in section E and F to this report.

1. Universal International Law and Standards

The independence of judges and lawyers, as well as their accountability, is a core rule of law principle.⁹⁵ The UN Human Rights Council, in repeated resolutions most recently in 2023, has affirmed that:

“an independent and impartial judiciary, and independent legal profession, an objective and impartial prosecution able to perform its functions accordingly and the integrity of the judicial system **are essential prerequisites for the protection of human rights and fundamental freedoms** and the application of the rule of law and for ensuring fair trials without discrimination.”⁹⁶ (Emphasis Added).

All States agreed in the 1993 Vienna Declaration and Programme of Action, that:

“The administration of justice, including law enforcement and prosecutorial agencies and, especially, **an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments**, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development”.⁹⁷ (Emphasis Added).

⁹⁴ For a summary of international law and standards in this area, See ICJ Practitioners Guide No. 1 on International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, available at: <https://www.icj.org/wp-content/uploads/2012/04/International-Principles-on-the-Independence-and-Accountability-of-Judges-Lawyers-and-Prosecutors-No.1-Practitioners-Guide-2009-Eng.pdf>.

For a summary of international law and standards on judicial accountability, see ICJ Practitioner’s Guide No. 13 on Judicial Accountability, available at: <https://www.icj.org/wp-content/uploads/2016/06/Universal-PG-13-Judicial-Accountability-Publications-Reports-Practitioners-Guide-2016-ENG.pdf>.

⁹⁵ ICJ, ‘The Tunis Declaration on Reinforcing the Rule of Law and Human Rights,’ March 2019, available at: <https://www.icj.org/wp-content/uploads/2019/04/Universal-ICJ-The-Tunis-Declaration-Advocacy-2019-ENG.pdf>.

⁹⁶ UN HRC, Resolution A/HRC/RES/53/12, available at: <https://documents.un.org/doc/undoc/gen/q23/146/03/pdf/q2314603.pdf>.

⁹⁷ Vienna Declaration and Programme of Action, adopted by the world Conference on Human Rights in Vienna on 25 June 1993, para. 27.

Independence of the judiciary

Regarding **judicial independence**, the primary universal standards are contained in the UN Basic Principles on the Independence of the Judiciary.⁹⁸ They are also reflected as a strict legal obligation under human rights treaty law. To that end, Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), to which Eswatini is party, provides that:

“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

The UN Human Rights Committee, the supervisory body providing the authoritative interpretation of the ICCPR, has given further clarity to Article 14(1), summarizing the obligation to respect and ensure independence in its General Comment 32:

“The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.”

To ensure the fulfilment of these requirements of independence, States must therefore:

“take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.”⁹⁹

Furthermore, the Committee stresses, in particular, the need to protect judges from “conflicts of interest and intimidation”, by, among other things, ensuring that:

“the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement [are] be adequately secured by law.”¹⁰⁰

⁹⁸ UN Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (Basic Principles on the Independence of the Judiciary), available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary>.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

The primary standards related to judicial accountability are contained in the Bangalore Principles of Judicial Conduct;¹⁰¹ and the Judicial Integrity Group's Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct.¹⁰² Judicial accountability is safeguarded through ensuring the underlining elements: transparency, political accountability, personal accountability, and public accountability.¹⁰³ In terms of the Bangalore Principles, the six core values that underpin judicial independence include: independence;¹⁰⁴ impartiality;¹⁰⁵ integrity;¹⁰⁶ propriety;¹⁰⁷ equality;¹⁰⁸ and competence and diligence.¹⁰⁹ A detailed analysis of international law on judicial accountability can be found in the ICJ's practitioners Guide on that subject.¹¹⁰

As the analysis in section C shows, particularly in the subsections pertaining to judicial independence and the role of the Chief Justice, these principles have been applied in a range of more specific contexts giving international law and standards on judicial independence further content. For example, in respect of case management and allocation, the UN Special Rapporteur on the independence of judges and lawyers has characterized the method for assigning cases within the Judiciary as "paramount for guaranteeing the independent decision-making of judges".¹¹¹ The Implementation Measures for the UN Bangalore Principles of Judicial Conduct, elaborated by the Judicial Integrity Group, indicate that the "division of work among the judges of a court, including the distribution of cases, should ordinarily be performed under a

¹⁰¹ UNODC, The Bangalore Principles of Judicial Conduct, 2018, available at: <https://www.unodc.org/documents/ji/training/bangaloreprinciples.pdf>.

¹⁰² The Judicial Integrity Group, Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct (The Implementation Measures), 2010, available at: https://judicialintegritygroup.org/images/resources/documents/BP_Implementation%20Measures_Engl.pdf.

¹⁰³ see ICJ Practitioner's Guide No. 13 on Judicial Accountability, available at: <https://www.icj.org/wp-content/uploads/2016/06/Universal-PG-13-Judicial-Accountability-Publications-Reports-Practitioners-Guide-2016-ENG.pdf>; Africa Judicial Independence fund (AJIF), the State of Judicial Independence in Africa: Key Findings for a Landscape Scan, March 2024, available at: <https://ajif.online/wp-content/uploads/2024/07/The-State-of-Judicial-Independence-in-Africa-AJIF-report.pdf>, p 14.

¹⁰⁴ Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects. See Bangalore Principles, Value 1.

¹⁰⁵ Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made. See Bangalore Principles, Value 2.

¹⁰⁶ Integrity is essential to the proper discharge of the judicial office. See Bangalore Principles, Value 3.

¹⁰⁷ Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge. See Bangalore Principles, Value 4.

¹⁰⁸ Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office. See Bangalore Principles, Value 5.

¹⁰⁹ Competence and diligence are prerequisites to the due performance of judicial office. See Bangalore Principles, Value 6.

¹¹⁰ ICJ Practitioner's Guide No. 13 on Judicial Accountability, available at: <https://www.icj.org/wp-content/uploads/2016/06/Universal-PG-13-Judicial-Accountability-Publications-Reports-Practitioners-Guide-2016-ENG.pdf>.

¹¹¹ Leandro Despouy, Special Rapporteur on the Independence of Judges and Lawyers, Report to the Human Rights Council, UN Doc. A/HRC/11/41 (2009), para. 46. The Special Rapporteur is an independent expert appointed by the UN Human Rights Council (and prior to 2006, its predecessor body, the UN Human Rights Commission) to address the situation of judges, lawyers and prosecutors around the world. See <https://www.ohchr.org/en/special-procedures/sr-independence-of-judges-and-lawyers>.

predetermined arrangement provided by law or agreed by all the judges of the relevant court".¹¹²

The ICJ has also elsewhere extensively analysed the inadequacy of the Swaziland Judicial Service Commission, institutionally, and the inappropriateness of judicial appointments procedures and processes in Eswatini which compromise the independence of the judiciary.¹¹³

Independence of Lawyers

Regarding the independence of lawyers, the primary international standards are contained in the UN Basic Principles on the Role of Lawyers. They assert that "adequate protection of the human rights and fundamental freedoms to which all persons are entitled... requires that all persons have effective access to legal services provided by an independent legal profession".¹¹⁴

The Basic Principles further identify lawyers as "essential agents of the administration of justice" who "shall at all times maintain the honour and dignity of their profession".¹¹⁵ They stipulate that the institutional independence as a whole should be guaranteed,¹¹⁶ and that at an individual level, the State must take measures to ensure that lawyers "are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference".¹¹⁷

Threats to the lives and well-being of lawyers and their families undoubtedly impedes lawyer's ability to perform their functions and their independence. As recalled by the UN Human Rights Council, States have a:

"duty to uphold the integrity of judges, prosecutors and lawyers and to protect them, and their families and professional associates, against all forms of violence, threat, retaliation, intimidation and harassment resulting from the discharging of their functions, and to condemn such acts and to bring perpetrators to justice".¹¹⁸

According to the UN Special Rapporteur on the Independence of Judges and Lawyers:

"States have a duty to ensure that persons who practise law can exercise their profession without undue restrictions. They must therefore take the necessary

¹¹² Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct, S. 3.2.

¹¹³ ICJ, 'Justice Locked Out: Swaziland's rule of Law Crisis' (International Fact-finding Mission Report), 2015, available at: <https://www.icj.org/wp-content/uploads/2016/02/Swaziland-Justice-locked-out-RoL-crisis-Publications-Fact-Finding-Mission-Report-2016-ENG.pdf>, p 18-28.

¹¹⁴ UN, Basic Principles on the Role of Lawyers, adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba on 7 September 1990 (Basic Principles on the Role of Lawyers), available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-role-lawyers>

¹¹⁵ UN Basic Principles on the Independence of the Judiciary, op. cit., principle 12.

¹¹⁶ UN Basic Principles on the Role of Lawyers, op. cit., principle 24; Human Rights Council, Resolution 23/6, Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers, UN Doc. A/HRC/RES/23/6 (2013), Preamble.

¹¹⁷ Basic Principles on the Role of Lawyers, op. cit., principle 16.

¹¹⁸ Human Rights Council, Resolution 35/12, Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, UN Doc. A/HRC/RES/35/12 (2017), para.9. See also Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa, 2003, Adopted by the ACHR, available at: <https://achpr.au.int/index.php/en/node/879>, G(3)(d).

steps to ensure that such persons can perform their professional duties without any kind of interference, harassment, threats or intimidation.”¹¹⁹

States are required to investigate and provide reparations for violations of the rights of lawyers when their independence is impinged, including through violence, interference, harassment, threats and intimidation. In the context of women lawyers, Article 2(e) of the CEDAW Convention, which is binding on Eswatini, provides that States must take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. In terms of this Article, States carry an obligation to exercise “due diligence” in investigating, prosecuting, punishing and providing reparations for gender-based violence against women. This obligation exists irrespective of whether such violence is perpetrated by State or non-state actors.¹²⁰

The CEDAW Committee has indicated that the failure to take all appropriate measures to “prevent acts of gender-based violence” in situations in which “authorities are aware or should be aware of the risk of such violence, or the failure to investigate, to prosecute and punish perpetrators and to provide reparations to victims/survivors of such acts” provides “tacit permission or encouragement to perpetrate acts of gender-based violence against women”.¹²¹ These obligations undoubtedly apply where such threats are directed at women lawyers or women human rights defenders more broadly.

The effective functioning of independent bar means that States must take several safeguards for lawyers.¹²² In addition to preventing the targeting and threatening of lawyers, for example, States are required to ensure that disciplinary proceedings against lawyers are “subject to an independent judicial review”.¹²³ Courts are also explicitly prohibited from “refus[ing] to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with [the UN Basic Principles on the Role of Lawyers]”.¹²⁴

The UN Basic Principles on the Role of Lawyers further affirm that lawyers play an essential role in the justice system and in the protection of human rights.¹²⁵ Principle 14 in particular specifies that:

“Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.”

¹¹⁹Human Rights Council, Protection of lawyers against undue interference in the free and independent exercise of legal profession, Report of the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, UN Doc. A/HRC/50/36, 22 April 2022, para 102.

¹²⁰ CEDAW Committee, General recommendation No.35 on gender-based violence against women, updating general recommendation No.19, CEDAW/C/GC/35, 26 July 2017, para 24.

¹²¹ Ibid.

¹²² ICJ Practitioners Guide No. 1 on International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, available at: <https://www.icj.org/wp-content/uploads/2012/04/International-Principles-on-the-Independence-and-Accountability-of-Judges-Lawyers-and-Prosecutors-No.1-Practitioners-Guide-2009-Eng.pdf>, p 64-66.

¹²³ UN Basic Principles on the Role of Lawyers, op. cit., para 28.

¹²⁴ Ibid, para 19.

¹²⁵ ICJ Practitioners Guide No. 1, op.cit., p. 63.

Moreover, Principle 17 indicates that:

“Lawyers like other[s]... are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.”

Critically in the context of Eswatini, while lawyers are of course entitled to their own political opinions and affiliations, international law and standards are clear that “lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions”.¹²⁶

The primary international instrument on prosecutors is the UN Guidelines on the Role of Prosecutors.¹²⁷ Under the Guidelines, Prosecutors are enjoined “to perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.” They must also be “able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.”

Relatedly, any form of economic sanction against lawyers for the execution of their duties towards their clients is a violation of international law and standards.¹²⁸

Commentary and Recommendations of UN and African bodies related to Eswatini

In 2017, the UN Human Rights Committee issued its concluding observations to Eswatini in the absence of the filing of a report from the Government of Eswatini. Eswatini was in breach of its obligations to submit its periodic report pursuant to ICCPR article 40. There the Committee expressed concern about “reports of political interference in the judiciary by the executive” and noted that “recent measures taken by the State party [we]re insufficient to guarantee the independence and impartiality of the judiciary”.¹²⁹ It therefore recommended that:

¹²⁶ UN Basic Principles on the Role of Lawyers, op. cit., principle 18; ICJ Practitioners Guide No. 1, op.cit., page 66; Report of the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, op. cit., paras 34, 114. See also Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa, 2003, Adopted by the African Commission on Human and People’s Rights, available at: <https://achpr.au.int/index.php/en/node/879>, G(3)(e).

¹²⁷ UN Guidelines on the Role of Prosecutors, adopted on 07 September 1990 by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/guidelines-role-prosecutors>

¹²⁸ Report of the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, op. cit., para 15; UN Basic Principles on the Role of Lawyers, op. cit., principle 16; Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa, 2003, Adopted by ACHR, available at: <https://achpr.au.int/index.php/en/node/879>, G(3).

¹²⁹ UN Human Rights Committee, Concluding observations on Swaziland in the absence of a report, CCPR/C/SWZ/CO/1, 23 August 2017, available at: <https://documents.un.org/doc/undoc/gen/g17/245/25/pdf/g1724525.pdf>, para 38.

“The State party should put in place specific constitutional guarantees to protect judges and prosecutors from any form of political influence in their decision-making and effectively ensure that they are free of pressure and interference in the performance of their work.”¹³⁰

Various UN Special Rapporteurs on the Independence of Judges and Lawyers have raised various similar concerns about the administration of justice in Eswatini over the years. In 2002, the then-UN Special Rapporteur Dato’ Param Cumaraswamy, issued a statement denouncing the government’s indication that it intended to not implement certain judgments of courts.¹³¹ According to the Special Rapporteur, this “pitted the executive Government of Swaziland not against just the independent Court of Appeal, its judges and their decisions but against the majesty of the rule of law which is the very foundation of a democratic State”.¹³²

In 2003, Special Rapporteur Cumaraswamy again expressed “his grave concern over the continued deterioration of the rule of law” in Eswatini, noting that the “justice system cannot function in this environment of mistrust”. He concluded that that “Swaziland needs today, more than ever, a separation of powers between its executive and judicial branches of government in order to function as a fully democratic nation”.¹³³

In January 2023, the present Special Rapporteur, Meg Satterwaite, in a joint statement with other UN Special Procedures experts, condemned the killing of Thulani Maseko, expressing “extreme concern that Thulani may have been directly targeted in retaliation for his work as a human rights lawyer and advocate for democracy”. The statement calls on Eswatini authorities “to guarantee an effective, impartial and independent investigation into the killing” and called on authorities to “ensure the safety of all human rights defenders, civil society actors and lawyers in Eswatini”.¹³⁴

In a follow up in January 2024, the Special Rapporteur, in a joint statement with other UN Special Procedures, noted that the investigations in Maseko’s killing had “made no substantive progress over the course of an entire year.” The experts expressed the view that “this is outrageous and creates a climate of impunity and a chilling effect on the human rights movement in Eswatini”¹³⁵ and called for an effective, impartial and independent investigation.

The UN Human Rights Council Universal Periodic Review process is a chance for all UN Member States to receive and accept recommendations from States of the Human Rights Council to improve their compliance with international law and standards. There are several recommendations relevant emanating from Eswatini’s Universal Periodic

¹³⁰ Ibid, para 39.

¹³¹ UN, UN human rights expert concerned over deteriorating rule of law in Swaziland, 4 December 2002, available at: <https://news.un.org/en/story/2002/12/53262>.

¹³² Ibid.

¹³³ UN OHCHR, Swaziland’s Judicial and Legal System Nearing Crisis, Urgent Reforms Required, Says UN Rights Experts, 15 April 2003, available at: <https://www.ohchr.org/en/press-releases/2009/10/swazilands-judicial-and-legal-system-nearing-crisis-urgent-reforms-required>.

¹³⁴ OHCHR, Eswatini: Experts condemn killing of human rights defender Thulani Maseko, demand accountability, 26 January 2023, available at: <https://www.ohchr.org/en/press-releases/2023/01/eswatini-experts-condemn-killing-human-rights-defender-thulani-maseko-demand>.

¹³⁵ OHCHR, Eswatini: UN experts commemorate human rights defender Thulani Maseko, deplore lack of accountability for his killing, 22 January 2024, available at: <https://www.ohchr.org/en/press-releases/2024/01/eswatini-un-experts-commemorate-human-rights-defender-thulani-maseko-deplore>.

Review, including in 2022, relating to the independence of the judiciary. These include:¹³⁶

- Intensify the reform of the judicial system and implement constitutional protections to ensure the independence of the judiciary and Parliament;
- Fully implement Constitutional provisions in order to ensure the enjoyment of the right to freedom of expression and the independence of the judiciary and the Parliament.

These recommendations in Eswatini's 2022 Universal Periodic Review repeat various similar recommendations from previous reviews.¹³⁷

2. African regional and other international law and standards

African regional level standards, complement these universal standards. Article 26 of the African Charter on Human and People's Rights provides that:

"States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

Specifically in connection with the right to a fair trial, Article 7(1)(d) provides for the right "to be tried within a reasonable time by a competent and an impartial court or

¹³⁶ UN General Assembly, Report of the Working Group on the Universal Periodic Review, A/HRC/33/14, available: <https://www.refworld.org/docid/57cd691f4.html>, p.16. See Annex G. In its letter responding to the ICJ in respect of this report, the Minister of Justice notes broadly that 70.3% of recommendations from the Universal Periodic Review were accepted and that Eswatini is "making progressive efforts to implement these recommendations." The Minister fails to specify any actions taken in respect of independence of judges and lawyers. See also United Nations "Eswatini has accepted 70.3% human rights recommendations" (8 Feb 2023), available: <https://eswatini.un.org/en/218319-eswatini-has-accepted-703-human-rights%C2%A0recommendations>.

¹³⁷ In 2016, in its second cycle of UPR review, available at: <https://documents.un.org/doc/undoc/gen/g16/150/90/pdf/g1615090.pdf>, the following recommendations were issued:

- Strengthen constitutional protections that ensure the independence of the judiciary and Parliament (South Africa);
- Intensify the reform of the judicial system, in particular the plan of access to justice and its independence and impartiality (Cabo Verde);
- Take effective measures to guarantee the impartiality and independence of the judiciary, in accordance with Swaziland's international commitments and obligations, including the United Nations Basic Principles on the Independence of the Judiciary and the International Covenant on Civil and Political Rights (Canada);
- Adopt measures to safeguard the independence of the judiciary in line with the provisions of the United Nations Basic Principles on the Independence of the Judiciary (Mexico)
- Strengthen the independence of the judiciary in line with the United Nations Basic Principles on the Independence of the Judiciary (Czech Republic)

In its first cycle of UPR review in 2011, available at: <https://www.refworld.org/reference/countryrep/unhrc/2011/en/84973>, the following recommendations were issued:

- Take concrete and immediate measures to guarantee the independence and the impartiality of the judiciary (Canada);
- Accelerate the improvement of the judicial, policial and prison systems and training to the police force in line with international human rights standards (Holy See).

tribunal". Such courts or tribunals necessarily must comply with the independence elements set out in Article 26.

The standards on judicial independence are further developed in the African Union's, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,¹³⁸ which was developed and adopted by the African Commission on Human and People's Rights. In many ways these standards echo the UN Basic Principles but are more detailed.

Regarding independence of judges, the Principles and Guidelines affirm that "[t]he independence of judicial bodies and judicial officers shall be guaranteed by the constitution and laws of the country and respected by the government, its agencies and authorities".¹³⁹ In addition, "[a]ll judicial bodies shall be independent from the executive branch."¹⁴⁰ Like the UN Basic Principles, the Principles and Guidelines enjoin against "any inappropriate or unwarranted interference with the judicial process."¹⁴¹

In respect of judicial appointments, judges must be appointed on the "sole criteria" of their "suitability" for appointment "by reason of integrity, appropriate training or learning and ability".¹⁴² The Principles and Guidelines also mirror international standards in respect of security of tenure of judges and strict and limited conditions under which they may be removed from office.¹⁴³

In reference to independence of lawyers in particular, the Principles and Guidelines, Principle I, pertaining directly to "independence of lawyers", specifically affirms that States should ensure that lawyers:

- "(1) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;
- (2) are able to travel and to consult with their clients freely both within their own country and abroad;
- (3) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics."¹⁴⁴

The principles also specify that protecting such independence of lawyers requires:

- **Immunity:** Lawyers are entitled to immunity for statements and arguments made by them in good faith in legal documents and before judicial authorities;¹⁴⁵

¹³⁸ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Adopted by the African Commission on Human and People's Rights, available at: <https://achpr.au.int/index.php/en/node/879>. Also relevant is the Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officer, is a sub-regional standard developed by Chief Judges in the Southern Africa, available here: <https://sacjforum.org/sites/default/files/about/files/2020/Lilongwe%20Principles%20and%20Guidelines%20on%20the%20Selection%20and%20Appointment%20of%20Judicial%20Officers.pdf>.

¹³⁹ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Adopted by ACHR, available at: <https://achpr.au.int/index.php/en/node/879>, Principle A(4)(a).

¹⁴⁰ Ibid, Principle A(4)(g).

¹⁴¹ Ibid, Principle A(4)(f).

¹⁴² Ibid, Principle A(4)(i).

¹⁴³ Ibid, Principle A(4)(l)-(r).

¹⁴⁴ Ibid, Principle I(b)(1)-(3).

¹⁴⁵ Ibid, Principle I(e).

- **Security:** Where lawyers' security is threatened because of their role as lawyers they must be "adequately safeguarded by the authorities";¹⁴⁶
- **Non-identification with clients:** Lawyers must not be "identified with their clients or their clients' causes" on basis of their professional role in representing such clients.¹⁴⁷
- **Freedom of expression:** Lawyers are entitled to freedom of expression, belief, association and assembly. This includes the right to participate in "public discussion of matters concerning the law, the administration of justice and the promotion and the protection of human rights" and to "join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization".
- **Complaints against lawyers:** Such complaints should be processed "expeditiously and fairly under appropriate procedures" and in terms a "fair hearing".¹⁴⁸
- **Disciplinary proceedings:** Such proceedings should be brought before an "impartial disciplinary committee established by the legal profession, before an independent statutory authority, or even before a judicial body", and must be "subject to an independent judicial review". All disciplinary action against lawyers should be "determined in accordance with the code of professional conduct, other recognized standards and ethics of the legal profession and international standards".¹⁴⁹

The Commonwealth, of which Eswatini is a member State, has also produced standards in this area, Commonwealth Latimer House Principles on the Three Branches of Government.¹⁵⁰ Chapter IV of the Principles affirm that "[a]n independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. These principles address other issues consistent with the UN Basic Principles relating to such matters as appointments, conditions and security of tenure and discipline.

Jurisprudence of the African Commission on Eswatini

The African Commission on Human and People's Rights has a quasi-judicial function in deciding individual complaints (communications) alleging violations of rights under the African Charter. The Commission has decided at least two such communications related to the inadequacy of protections provided for judicial independence in Eswatini in particular:¹⁵¹

- In *Lawyers for Human Rights v. Swaziland (2005)*, the African Commission reaffirmed the importance of the independence of the courts under the ACHPR, stating that "it is the duty of all government and other institutions to respect and observe the independence of the judiciary."¹⁵² It found that Eswatini's legal

¹⁴⁶ Ibid, Principle I(f).

¹⁴⁷ Ibid, Principle I(g).

¹⁴⁸ Ibid, Principle I(n).

¹⁴⁹ Ibid, Principle I(o)-(p).

¹⁵⁰ Commonwealth Parliamentary Association, Commonwealth Latimer House Principles on the Three Branches of Government, November 2003, available at: https://www.cpahq.org/media/kaf14zuf/commonwealth_principles_cpa_sept_2023-v2_single.pdf.

¹⁵¹ Fuller summaries of these and other communications decisions pertaining to Eswatini determined by the ACHPR are included in an Annex to this report.

¹⁵² *Lawyers for Human Rights v. Swaziland*, ACHR, Communication 251/2002 (2005), available here: www.icj.org/wp-content/uploads/2014/06/lawyers-for-human-rights-v-swaziland.pdf, para 55.

framework, and in particular the 1973 Proclamation of King Sobhuza II,¹⁵³ which, among other things, vested power to the Head of State to hire or fire judges directly threatened the independence of judges and the judiciary as a whole and was therefore in violation of various ACHPR provisions. It concluded that by concentrating the powers of all three government structures into one person, the doctrine of separation of power was undermined and subject to abuse.¹⁵⁴ The 2005 Constitution now asserts itself as the supreme law of Eswatini, arguably replacing and overriding the 1973 Proclamation.¹⁵⁵ Despite this, a public debate continues in respect of whether the Proclamation has been abrogated or continues to operate.¹⁵⁶ An African Union election observation mission to Eswatini, for example, in 2018 noted that “despite the constitutional and legal reforms undertaken... the 1973 decree passed by King Sobhuza II, which dissolved and prohibited all political parties and similar bodies in Eswatini remains in force”.¹⁵⁷

- In the *Justice Thomas S. Masuku v. The Kingdom of Swaziland (2021)* communication, the Commission again found that Eswatini had acted in violation of Article 26 of the African Charter by charging Justice Masuku with serious misbehaviour, warranting removal from judicial office, partly on the basis of language which he had used in a written judgment. It found that by doing so Eswatini had directly threatened both Justice Masuku and the judiciary's independence.¹⁵⁸ The Commission therefore urged Eswatini to review legal framework relating to Eswatini's Judicial Service Commission in various respects.¹⁵⁹

¹⁵³ See: Proclamation by His Majesty King Sobhuza II, 12th April 1973, available here: <https://www.icj.org/wp-content/uploads/2014/06/sz1973proclamation.pdf>.

¹⁵⁴ *Lawyers for Human Rights v. Swaziland*, op. cit., para 56, which reads:

“By entrusting all judicial powers to the Head of State with powers to remove judges, the Proclamation of 1973 seriously undermines the independence of the judiciary in Swaziland. The main *raison d'être* of the principle of separation of powers is to ensure that no organ of government becomes too powerful and abuses its power. The separation of power amongst the three organs of government - executive, legislature and judiciary ensure checks and balances against excesses from any of them. By concentrating the powers of all-three government structures into one person, the doctrine of separation of power is undermined and subject to abuse.”

¹⁵⁵ The Constitution of the Kingdom of Swaziland Act 2005, section 2(1). See also *Sithole No and others v The Prime Minister and others* (35 of 2007) [2008] SZSC 22 (23 May 2008), available at: <https://eswatini.ii.org/akn/sz/judgment/szsc/2008/22/eng@2008-05-23>, in which the Supreme Court indicated at para.8:

“Prior to the coming into being of the present Constitution, which is now, in terms of Section 2 (1) of Act 1 of 2005, declared to be the Supreme Law of Swaziland, the supreme law of Swaziland was the King's Proclamation of 1973: Made before the nation on 12 April 1973 by His Majesty King Sobhuza II, it repealed the previous Constitution which had commenced when Swaziland achieved its independence from Britain on 6 September 1968.”

¹⁵⁶ Mfanukhona Nkambule, ‘The 1973 Decree Puzzle,’ *Times of Swaziland*, 8 December 2013, available at: <http://www.times.co.sz/news/94017-the-1973-decree-puzzle.html>.

¹⁵⁷ African Union, ‘Preliminary Statement: African Union Election Observation Mission to the 2018 General Elections in the Kingdom of Eswatini, 24 September 2018, available at: <https://au.int/en/pressreleases/20180924/preliminary-statement-african-union-election-observation-mission-2018-general>.

¹⁵⁸ *Justice Thomas S. Masuku v. The Kingdom of Swaziland*, ACHR, Comm. No. 444/13 2021, ACHPR 518 (2021) available at: <https://africanlii.org/akn/aa-au/judgment/achpr/2021/518/eng@2021-07-19>, para 192.

¹⁵⁹ *Ibid.*, para 196(iv-v).

For a more detailed summary of these Communications decisions of the ACHPR, please see the Annex to this report in Section F.

3. Eswatini's domestic legal framework

The Constitution

Section 21 (1) of the Constitution of the Kingdom of Swaziland provides:

“In the determination of civil rights and obligations or any criminal charge a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by law.”

Chapter V of the Constitution sets out “Directives Principles of State Policy,”¹⁶⁰ including a detailed provision headed “Objectives on the Independence of the Judiciary”.

This provision indicates, among other things that:¹⁶¹

- “all governmental and other institutions” have a “duty to respect and observe the independence of the judiciary”;
- Judicial officers must decide cases “impartially, on the basis of facts and in accordance with the law” without any “restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason”;
- There must not be any “inappropriate or unwarranted interference with the judicial process”;
- In respect of judicial appointment, all judicial officers must be “individuals of integrity and ability with appropriate training or qualifications in law” and methods of judicial selection must “safeguard against judicial appointments, promotion or transfer for improper motives”.
- Regarding security of tenure judges must enjoy “independence, security, adequate remuneration, conditions of service, pensions”. These aspects as well as the age of retirement must be “adequately secured by law”.

The Constitution also includes, in addition, a separate chapter on “The Judicature”. Section 138 of Constitution provides that “[j]ustice shall be administered in the name of the Crown by the Judiciary which shall be independent and subject only to this

¹⁶⁰ Section 62 of the Constitution of the Kingdom of Swaziland Act 2005, reads in full:

Objectives on independence of the judiciary: (1) The independence of the judiciary as enshrined in this Constitution or any other law shall be guaranteed by the State. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary. (2) The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. (3) The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue is within its competence as defined by law. (4) There shall be no inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review in accordance with the law. (5) Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments, promotion or transfer for improper motives. (6) The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

¹⁶¹ Ibid, Section 62.

Constitution". The judiciary is described as consisting of the Supreme Court, High Court, specialised courts such as the Industrial Court and magistrates' courts.¹⁶²

Section 141(1), specifically concerning the "independence of the judiciary" provides that:

"In the exercise of the judicial power of Swaziland, the Judiciary, in both its judicial and administrative functions, including financial administration, shall be independent and subject only to this Constitution, and shall not be subject to the control or direction of any person or authority".

Section 141(2) follows this clear statement of principle by prohibiting legislative and executive officials and actors from "interfer[ing] with Judges or judicial officers, or other persons exercising judicial power, in the exercise of their judicial functions". Indeed, section 141(3) places a positive obligation upon the "all organs and agencies of the Crown" to "give to the courts such assistance as the courts may reasonably require protecting the independence, dignity and effectiveness of the courts under this Constitution".

Section 141(5)-(7) includes safeguards for judicial officers' financial and administrative independence, including by indicating that judicial remuneration "shall not be varied to the disadvantage of that Judge or judicial officer or other person" and provide that the judiciary itself "shall keep its own finances and administer its own affairs".

Section 153 sets out processes for the appointment of "superior court justices", who are ultimately appointed by the King "on the advice of the Judicial Service Commission". In addition:

- Section 153(3) appears to create a separate process of the appointment of Acting Judges by the King, on the advice of the Chief Justice, "for a short duration" if for "any reason" the "prescribed complement" of judges on the High Court or the Supreme Court is otherwise "unlikely to be realised". The only criterion listed by the section for such appointment is that such a person is "a qualified person to act in that Court for that duration".
- Section 153(4) clarifies that such an "acting appointment shall not exceed a single renewable period of three months".
- Section 153(5) provides a separate process for the appointment of acting judges for an "unrenewable" term which "does not exceed one month", with the

¹⁶² Section 139 of the Constitution reads as follow:

(1) The Judiciary consists of

- (a) the Superior Court of Judicature comprising -

(i) The Supreme Court, and

(ii) The High Court;

- (b) such specialised, subordinate and Swazi courts or tribunals exercising a judicial function as Parliament may by law establish.

(2) The Judiciary has jurisdiction in all matters civil and criminal, including matters relating to this Constitution, and such other jurisdiction as may by law be conferred on it.

(3) The superior courts are superior courts of record and have the power to commit for -- contempt to themselves and all such powers as were vested in a superior court of record immediately before the commencement of this Constitution.

(4) Except as may otherwise be provided in this Constitution or as may otherwise be ordered by a court in the interest of public morality, public safety, public order or public policy, the proceedings of every court shall be held in public.

(5) Subject to the provisions of this Constitution, the Chief Justice is the head of the Judiciary and is responsible for the administration and supervision of the Judiciary.

single procedural requirement being that the Chief Justice is required to “consult” with the Judicial Service Commission before doing so.

Provision is made for the continuation of a term of an acting appointment for a “period not exceeding three months” to allow such a judge to “enable that person to deliver judgement or to do any other thing in relation to proceedings that were commenced before that person previously to the expiry of the acting appointment”.¹⁶³

Section 154 sets qualification requirements to be appointed as a judge in Eswatini. In addition to high moral character and integrity, the requirements to be appointed as a Judge at the Supreme Court are:

- “(i) that person is or has been a legal practitioner, barrister or advocate of not less than fifteen years practice in Swaziland or any part of the Commonwealth or the Republic of Ireland; or,
- (ii) that person is, or has served as, a Judge of the High Court of Swaziland or Judge of a superior court of unlimited jurisdiction in civil and criminal matters in any part of the Commonwealth or the Republic of Ireland for a period of not less than seven years ; or,
- (iii) that person is, or has served as, such legal practitioner, barrister or advocate as mentioned in paragraph (a) (i), and as such Judge as mentioned in paragraph (a) (ii) for a combined period of that practice and service of not less than fifteen years.”

As for the High Court, in addition to high moral character and integrity, the requirements to be appointed as Judge include: ten years practice as legal practitioner; or service as a judge on a court of unlimited jurisdiction; or service as a judge and/or legal practitioner for a combined period of ten years.¹⁶⁴

Section 155 relates to tenure of office of superior court judges prohibiting the office of a Justice of a superior court from being abolished and disallows probation periods for such judges.¹⁶⁵

Section 158 sets the regime of removal of judges of superior courts restricting grounds of removal to “serious misbehaviour or inability to perform the functions of office arising from infirmity of body or mind”.¹⁶⁶ Removal is initiated by the King “acting on the advice of an ad hoc committee” in the case of the Chief Justice and “on the advice of the Chief Justice” in the case of other judges,¹⁶⁷ by referring the consideration of such a removal to the Judicial Service Commission (JSC).¹⁶⁸ The King may suspend judges for the duration of JSC inquiries which must be completed within three

¹⁶³ Ibid, section 153 (6).

¹⁶⁴ Ibid, section 154 (1)(b). The sub-provision reads in full:

- “(b) (i) that person is or has been a legal practitioner, barrister or advocate of not less than ten years practice in Swaziland or any part of the Commonwealth or the Republic of Ireland; or
- (ii) that person is, or has served as, a Judge of a superior court of unlimited jurisdiction in civil and criminal matters in any part of the Commonwealth or the Republic of Ireland for a period of not less than five years; or
- (iii) that person is, or has served as, such legal practitioner, barrister or advocate as referred to in paragraph (b) (i) and as such Judge as referred to in paragraph (b) (ii) for a combined period of such practice and service of not less than ten years.”

¹⁶⁵ Ibid, section 155.

¹⁶⁶ Ibid, section 158(2).

¹⁶⁷ Ibid, section 158(3)

¹⁶⁸ Ibid.

months,¹⁶⁹ and the Commission is tasked with conducting an inquiry and make a recommendation to the King.¹⁷⁰

Judicial Service Commission

The constitutional and legislative provisions relating to the appointment, removal and conduct of judges are detailed below in Section B under the heading of "Lack of independence of the judiciary".

Judicial Code of Ethics

A "Judicial Code of Ethics for the Judiciary of Swaziland" was issued by former Chief Justice Banda. However, the Code is not available online or readily accessible and some lawyers interviewed for this report were not even aware of its existence.¹⁷¹ In a 2016 report, the ICJ described the situation as follows: "A judicial code of conduct, while in existence, appears to be out-dated and inconsistent with international standards and principles." The ICJ recommended that the Eswatini judiciary "develop and publish a code of conduct for judges, in line with regional and universal international standards, including the Bangalore Principles on Judicial Conduct, with a view to strengthening the integrity of the Judiciary and improving the accountability of judges".¹⁷²

Despite this, and in summary, the Judicial Code of Ethics accessed by the ICJ appears to have been drafted in attempt to give effect to constitutional provisions and international standards, drawing particularly on the Bangalore Principles of Judicial Conduct.¹⁷³ The Code, which applies to all judicial officers and other court staff such as Masters and Registrars, contains seven parts: Judicial Independence (part 1); Impartiality (part 2); Disqualification (part 3); Integrity (part 4); Propriety (part 5); Competence and diligence (part 6); and Equality of treatment (part 7).

The Code requires judicial officers to "take all reasonable steps to ensure that no person or organ of state interferes with the functions of the court".¹⁷⁴ Judicial officers are required to ensure their conduct "enhances the confidence of the public, the legal profession and litigants in the impartiality of the Judicial officer and of the judiciary."¹⁷⁵ Judges should not manifest bias and should "avoid nepotism and favoritism".¹⁷⁶

In respect of integrity judicial officers "should not become involved in any political controversy or activity" and "should not lend the prestige of a judicial office to advance private interests". Moreover they "should under no circumstances conduct himself in such a way as to arouse any suspicion of corruption".¹⁷⁷

¹⁶⁹ Ibid, section 158(8).

¹⁷⁰ Ibid, section 158(4), 158(6)

¹⁷¹ Manqoba Nxumalo, 'CJ Announces Code of Ethics for Judges,' *Times of Swaziland*, 20 January 2009, available at:

<http://www.times.co.sz/feed/news/3427-cj-announces-code-of-ethics-for-judges.txt>; and Mduzuzi Magagula, 'Code of ethics for judges needed,' 18 September 2011, available at:

<http://www.times.co.sz/news/68625-code-of-ethics-for-judges-needed.html>.

¹⁷² ICJ, 'Justice Locked Out: Swaziland's rule of Law Crisis' (International Fact-finding Mission Report), 2015, available at: <https://www.icj.org/wp-content/uploads/2016/02/Swaziland-Justice-locked-out-RoL-crisis-Publications-Fact-Finding-Mission-Report-2016-ENG.pdf>, p 34-35.

¹⁷³ On file with ICJ, available at <https://www.icj.org/wp-content/uploads/2025/02/JUDICIAL-CODE-OF-ETHICS-FOR-THE-JUDICIARY-OF-SWAZILAND.pdf>.

¹⁷⁴ Ibid, p 10.

¹⁷⁵ Ibid, p 11.

¹⁷⁶ Ibid, p 13.

¹⁷⁷ Ibid, p 17-19.

To ensure “propriety” judicial officers “shall be cautiously selective about the places they go and the persons with whom they associate” and should “conduct himself or herself in a way that is consistent with the dignity of the judicial office”. They should not “allow his/her family, social or other relationships improperly to influence his/her conduct and judgment” and should in interactions with “individual members of the legal profession ... avoid situations which might reasonably give rise to suspicion or appearance of favouritism or partiality”.¹⁷⁸

Judicial officers are prohibited from engaging in “conduct that is prejudicial to the effective and expeditious administration of justice or business of the court, should avoid any personality issues and should seek to foster collegiality” and required to be “faithful to the law” and:

“true and faithful to the Constitution and the law, uphold the course of justice by abiding with the provisions of the Constitution and the law and should acquire and maintain professional competence”.

They should not be influenced by partisan interests, public clamour, or fear of criticism” and “should initiate appropriate action when he/she becomes aware of reliable evidence indicating unprofessional conduct by a colleague or lawyer”.¹⁷⁹

¹⁷⁸ Ibid, p 20-24.

¹⁷⁹ Ibid, p 25-27.

C. Experiences of Lawyers in Eswatini

This section draws widely and primarily on the interviews conducted by the ICJ with the lawyers in Eswatini. For emphasis, some analysis is provided in respect of the accounts of lawyers from the perspective of international law and standards set out in Section B above.

1. Lawyers fear being extrajudicially killed

On 7 December 2022, an attempt was made on Maxwell Nkambule's life. Nkambule, a lawyer,¹⁸⁰ whose clients had been accused of terrorism and murder of police officers, was shot at and pursued by men in car along a public highway. Nkambule has since 8 December 2022 been in exile in neighbouring South Africa and continues to fear for his safety if he were to attempt to return to Eswatini.

Another lawyer¹⁸¹ reports being shot at from a green car in October 2021, nearby a protest relating to the arrest of Bacede Mabuza and Mthandeni Dube. This lawyer suspects that those who shot at them several times were police officers. The lawyer also reports two separate incidences in late 2022 where attempts were made to "swipe" vehicles driven by either them or their children off the road or into oncoming traffic. In both instances vehicles made contact with their cars while overtaking them, and they believed there was an intent to kill them.

Though these are the clearest examples of suspected attempts on lawyer's lives revealed in the interviews, several lawyers also indicated that they suspect those following them in unmarked may have been looking for opportunities to physically harm them in addition to intimidating them.

Maxwell Nkambule indicates that the last time that he spoke with Thulani Maseko, he raised concerns that he would become target for an assassination attempt. Several lawyers interviewed for this research confirmed that there were many other lawyers in their positions fearing for their lives. In the lead up to Thulani's killing – discussed in further detail below – a large number of lawyers began discussing a "hit list" which had allegedly been issued detailing those who were to be killed, including a number of lawyers.

While lawyers do not contend that an official list was ever confirmed or published, they expressed real fear about prospect of the existence of such a list:

"actually what happened was that they released a hit list of people to eliminate, lawyers included. Although that is what you hear through the grape vine. But, you know, in a crisis situation, you don't say its rumours. You take rumours seriously."¹⁸²

However, several lawyers, though confirming discussions of the hitlist, felt that an attempt on Thulani's life was not likely:

¹⁸⁰ International Observatory of Lawyers, 'Eswatini: Liswati lawyer Maxwell Nhambule was the visting of an assassination attempt because of his defence of pro-democracy activists,' 8 March 2023, available at: <https://protect-lawyers.org/en/item/maxwell-nkambule-3/>; Zweli Martin Dlamini, 'Law Society must facilitate safe return of human rights lawyer Maxwell Nkambule to eSwatini, State behind assassination attempt,' 24 August 2023, available at: <https://www.swazilandnews.co.za/fundza.php?nguyiphi=4958>.

¹⁸¹ Interviews conducted by ICJ, Interview #15.

¹⁸² Interviews conducted by ICJ, Interview #9.

"we were told there was a hitlist. We tried to discuss who could possibly be on this hitlist and we all discounted Thulani. Nobody ever... we all discounted Thulani. We said no they would never take that risk. They would never ever do that..."

The belief in the existence of such a list was repeatedly raised as having a chilling effect on the ability of lawyers to do their work. For one lawyer, therefore:

"I received information confirming that I was on that list and so many other things that have made it quite difficult to continue with the work..."¹⁸³

Another lawyer expressed a similar view indicating that the list made lawyers consider carefully which clients to take on:

"We know that there is a list of persons that must be executed – it has been circulating. One of the things that is constantly said is that we don't know who is on the list and in what order the discussion becomes whenever you take up this matter, you might either enrol yourself on the list or you might move yourself up on the list."¹⁸⁴

On 21 January 2023, Thulani Maseko, was shot in his own home, in the presence of his family, and killed. To date, no real progress appears to have been made in the investigations into his killing, at least according to publicly available information.¹⁸⁵ Arnold Pienaar, the head of security company that he confirms has been employed by King Mswati III,¹⁸⁶ though denying involvement in Thulani's killing has confirmed that his company had been given a "list of terrorists".¹⁸⁷ As Tanele Maseko noted in the ICJ's interview with her, the Eswatini government had repeatedly accused Thulani Maseko of and indeed charged him with acts of "terrorism" and related charges.¹⁸⁸

In part, because of the perception that Maseko would enjoy some form of protection because of his international profile, his killing compounded this fear significantly. Bheki Makhubu, veteran journalist and editor of *The Nation*, notes as follows:

"Thulani's death was a huge shock for everyone. And for others, perhaps he sent a message that nobody was now safe. And so, everybody ran for the hills.

¹⁸³ Interviews conducted by ICJ, Interview #15.

¹⁸⁴ Interviews conducted by ICJ, Interview #18.

¹⁸⁵ OHCHR, 'Eswatini: UN experts commemorate human rights defender Thulani Maseko, deplore lack of accountability for his killing,' 22 January 2024, available at:

<https://www.ohchr.org/en/press-releases/2024/01/eswatini-un-experts-commemorate-human-rights-defender-thulani-maseko-deplore>; Amnesty International, '500 Days of Impunity: Demand Justice for Thulani Maseko,' 19 June 2024, available at: <https://amnesty.org.za/action/500-days-of-impunity-demand-justice-for-thulani-maseko/>; Takudzwa Pongweni, 'Thulani Maseko: Honouring a brave defender of human rights murdered in Eswatini,' *Daily Maverick*, 13 June 2024, available at:

<https://www.dailymaverick.co.za/article/2024-06-13-thulani-maseko-honouring-a-brave-defender-of-human-rights-murdered-in-eswatini/>. The government has merely asserted without providing and further detail that the police indicate that "progress has been made". Nearly a year later no further information about the nature such progress is available.

¹⁸⁶ 'Assassination of lawyer puts king's tactics in the spotlight,' *The Times*, 23 January 2023, available at:

<https://www.thetimes.com/world/africa/article/assassination-of-lawyer-puts-kings-tactics-in-the-spotlight-x5b2jjw7h>.

¹⁸⁷ *The Nation* (January 2024), p 22.

¹⁸⁸ Interview with Tanele Maseko.

I would even venture to say, I think it also made us all pause and think and wonder, what the hell are we doing to each other, if people like Thulani are going to become victims of this whole process? Because of all people, if we had had a chat and you said, who could get killed for this thing? I would never have put Thulani's name in that list. Never. But that happened."¹⁸⁹

Similarly, Sipho Gumedze told a South African news publication that this fear of being killed is now more widely held among Swazi lawyers:

"It is true that lawyers are no longer keen in taking matters involving political activists. It is a new development. Previously political activists would be arrested and would not struggle to obtain legal representation. No sane person would want to die and leave behind young children who have no capacity to fend for themselves. Lawyers are human beings first; therefore, they are afraid of getting killed."¹⁹⁰

Gumedze, like a number of those interviewed for this report, indicated that this fear of being killed was a dramatic escalation of the repressive practices. Even lawyers who have previously repeatedly had confrontations with authorities and continued to do their work now live in fear. One interviewee commented:

"So, I think that is the impact it has had on us as attorneys. Of course, we all want to live, we don't want to die and leave our young children. So, if someone comes to you and asks for representation you have to think twice in assessing the situation. Maybe even do a little bit of consulting here and there before you decide to take up a matter of a political nature. We are intimidated; we are not safe, I would say."¹⁹¹

A repeated refrain, too, is the fear not only for their own lives but that of their families:

"I am also fearful, and I am also thinking about it. What will happen? I am thinking about my family. I am thinking about everything."¹⁹²

Tanele Maseko stated that in her view the reason for Thulani's killing was to "instil fear" in those pushing for democratic reform, including lawyers:

"And that day, if you would remember the killing of Thulani, his majesty, the King speaks out, to say, you think you're educated, and I have people to deal with you. If you listen critically and analytically to that speech as myself and Thulani did, and as most people listen to it, it was clear what he was planning. And he knew of what was going to happen to Thulani. But because in Swaziland, you cannot say that because the King is above the law. You know, you cannot take him to court. He cannot be questioned. He cannot, he's immune of any legal process in the country. So, his killing in front of me and my children was sending a warning to say, if you continue to speak against the State and reveal these things, we will deal with you in this manner."¹⁹³

¹⁸⁹ Interview with Bheki Makhubu.

¹⁹⁰ 'Lawyers live in fear as Swazi state intensifies crackdown on activists,' *Daily Maverick*, 13 June 2023, available at: <https://www.dailymaverick.co.za/article/2023-06-13-lawyers-live-in-fear-as-swazi-state-intensifies-activist-crackdown/>.

¹⁹¹ Interviews conducted by ICJ, Interview #16.

¹⁹² Interviews conducted by ICJ, Interview #10.

¹⁹³ Interview with Tanele Maseko.

During the preparation of this report in late September 2024, Mlungisi Makhanya, the President of PUDEMO, an opposition political party in Eswatini often accused by government of being a “terrorist” organization, was found incapacitated at his home in Pretoria South Africa and rushed to a hospital where he was treated in critical condition after a suspected poisoning. The incident has been reported to the South African police and a case has reportedly been opened. Mlungisi Makhanya had been living in exile in South Africa for safety reasons since September 2022, when his home in Eswatini was set alight in an alleged fire-bomb attack which PUDEMO alleges was committed by State agents. PUDEMO has alleged that Eswatini authorities were involved in the poisoning of Makhanya, which the government has denied.¹⁹⁴

While Mlungisi Makhanya is not himself a lawyer, several lawyers interviewed by the ICJ for this report have confirmed that this poisoning would increase the fear of lawyers in representing their clients in opposition to the government, especially because it had occurred in South Africa, outside of Eswatini. As was noted above, Maxwell Nkambule, a lawyer, has also been in exile in South Africa since 2022. In addition, and as described above, lawyers, including Mr Maseko, have commonly been branded as “terrorists” by the government and, as explained below, is likely to be associated with the views of their clients, who may also be accused of sedition and “terrorism” by the government.

2. Lawyers are followed, harassed, threatened and intimidated.

Apart from threats to their lives, there is a more general pattern of harassment, threats and intimidation against lawyers.

A common theme emerging from the interviews is that there has been a substantial upswing in such attacks since the June 2021 protests. Lawyers representing any persons arrested in connection with the events of June 2021 report being followed and harassed constantly:

“everyone in our team who was representing the arrested people started becoming a target. We were targeted. We were followed. Some of us were visited by police at their homesteads. That is when our lives started becoming a nightmare. You would be scrutinized everywhere you go. At night, you would be the first person to be stopped if you happened to leave your office a bit late. I mean, the police were harassing you.”¹⁹⁵

Thulani Maseko had also reported such incidents to the ICJ before his death, which was confirmed by Tanele Maseko in ICJ’s interview with her for this report:

“I think we, me and Thulani, are different from [others], you know, we don't have this fear, fear kind of notion. And that's, of course we know we are being followed. Of course, we know that we are being, you know, our phones are bugged, but I think that deep conviction that we're doing the right thing.”¹⁹⁶

¹⁹⁴ Wycliffe Muia , ‘Eswatini opposition leader poisoned in South Africa – party,’ BBC News, 25 September 2024, available at: <https://www.bbc.com/news/articles/c1wndyqyqgpo>; Timothy Simelane and Thokozani Mamba, ‘Pudemmo Alleges ... Mlungisi Poisoned by ‘Young Boy’ Roommate,’ *Times of Swaziland*, 26 September 2024, available at: <http://www.times.co.sz/news/147276-pudemmo-alleges-...-mlungisi-poisoned-by-‘young-boy’-roommate.html>.

¹⁹⁵ Interviews conducted by ICJ, Interview #10.

¹⁹⁶ Interview with Tanele Maseko.

Tanele Maseko noted that such surveillance efforts had occurred prior to the 2021 unrest, but since June 2021 the surveillance had become much less discreet:

“What is different from then to now, then they would do it discreetly... You know, you would really notice when you're really, really, really vigilant. You know, now, they do it openly. You see the drones; you know you're surveilled. You see the cars; you know you're surveilled. You know, now, they do it to a point of you noticing that, yes, we are watching you.”¹⁹⁷

Harassment in the wake of June 2021 protests followed from accusations that lawyers were involved in planning protest meetings. In this context, lawyers have been arrested and assaulted. Some have had their telephones confiscated, their communications monitored, and their vehicles searched without search warrants by members of the military. Some lawyers have had their homes or offices broken into and searched.

In addition to the above indication of “visits” from police officers, one lawyer indicated that they confronted armed military officers who were present on his remote farm at five am on a weekend. When the lawyer confronted these officers, they could not provide an adequate explanation for why they were there saying only that they “got lost”.¹⁹⁸

When asked to describe who was following them, however, lawyers commonly described the individuals as being dressed in plain civilian clothes. The individuals themselves, who were not normally the same person each time, either followed lawyers while driving or walking or parked outside their homes or offices. When they were in cars, which was common, the individuals typically drove white cars with South African license plates, sometimes placed shoddily over other license plates.¹⁹⁹ Reports of sightings have been continuous and sometimes reported in local media.²⁰⁰

Several lawyers who have been followed have attempted to go to the police for assistance in this regard. One lawyer indicated that police officers confirmed to them, unofficially, that the car was a rental car with a fake license plate:

“On the issue of the car that was following me, I opened the case at the police station. They made some preliminary investigations. They told us, because I brought someone else as lawyer...: ‘listen, what we are going to tell you now, we are not going to put it on the report for obvious reasons’. The car was a rental car, the number plate they were using it was for another car. You would see that the number plate was a cloned one from a garage that no longer exists.”²⁰¹

Another lawyer indicated that they had taken the issue up with the Commissioner of Police in a meeting and the Commissioner’s response was, that “everybody has the right to rent South African cars”, including foreigners.²⁰²

¹⁹⁷ Ibid.

¹⁹⁸ Interviews conducted by ICJ, Interview #4.

¹⁹⁹ See also, in addition to the below examples, Interviews conducted by ICJ, Interview 9, 15, 17.

²⁰⁰ Musa Mdluli, ‘Police by the Day, Alleged Killers by Night: Eswatini Government foreign registered rented cars used to hunt and kill human rights defenders,’ *Swaziland News*, 3 September 2024, available at: <https://www.swazilandnews.co.za/fundza.php?nguyiphi=7266>.

²⁰¹ Interviews conducted by ICJ, Interview #13.

²⁰² Musa Mdluli, ‘Police by the Day, Alleged Killers by Night: Eswatini Government foreign registered rented cars used to hunt and kill human rights defenders,’ *Swaziland News*, 3 September 2024, available at: <https://www.swazilandnews.co.za/fundza.php?nguyiphi=7266>.

Some lawyers also indicated that they had seen drones and helicopters often enough to suspect that these were involved in surveillance efforts in respect of lawyers. When asked how common the helicopters were around their home, one lawyer indicated that “my mom even asked if this helicopter was going to land on our roof”.²⁰³ Tanele Maseko indicates that her children had originally seen the drones monitoring their home.²⁰⁴

Many lawyers interviewed by the ICJ expressed they had suffered anguish and a significant deterioration of their mental health. After the killing of Thulani Maseko, in particular, some lawyers no longer felt safe spending the night in their homes, preferring to sleep at a friend's house or change hotel rooms from one day to the next. Others took measures to reinforce their security at home and in their offices such as: buying a dog; increasing lighting around their houses; building walls and fences; and constantly checking their rear-view mirrors while driving and only driving during the day.²⁰⁵ One lawyer said that he had, for some time after Thulani Maseko's killing, taken to crawling from one room to another or ducking to make sure he was not visible – and prone to being shot at – through his windows. Another lawyer told the ICJ that his offices had been “raided” three times.²⁰⁶

In its response to the ICJ in respect of this report, the Minister of Justice takes the summary position that there is “no repression and harassment of lawyers in Eswatini”, though noting a single example of a report by a lawyer to the police “which nothing came out [of] due to insufficient facts”.²⁰⁷

3. Women lawyers are threatened with sexual violence.

The harassment of lawyers has also taken on a gendered dimension with women lawyers indicating a range of uncomfortable and threatening phone calls received from men. When asked about the nature of these threats, from concealed numbers, one woman lawyer indicated:

“The sexual [threats] were clear. I can't repeat these things, they were said in my native language, in Siswati and Siswati's very vulgar. The gist of it is you need a good man to lay you good and you will stop with this craziness that you are doing.”²⁰⁸

She explained further that these threats were often very explicitly to sexually assault her:

“they told me they know where I live, they know I don't have a husband and they would come one of the days and I would have a good experience.”²⁰⁹

4. Lawyers are associated with the actions of their clients by virtue of being their lawyers.

One common thread throughout the interviews was the view that lawyers are targeted based on the nature of the cases they take up and clients they represent. Almost

²⁰³ Interviews conducted by ICJ, Interview #15.

²⁰⁴ Interview with Tanele Maseko.

²⁰⁵ Interviews conducted by ICJ, Interview #24.

²⁰⁶ Interviews conducted by ICJ, Interview #18.

²⁰⁷ Ibid.

²⁰⁸ Interviews conducted by ICJ, Interview #15.

²⁰⁹ Ibid.

unanimously the lawyers indicated that they are presumed to align themselves with the views and alleged actions of their clients.

According to one lawyer, this has become even more common since June 2021, describing it as a:

“trend that seeks to associate a lawyer to his client, and that the lawyer is pursuing the cause of his client. Because you are allegedly representing someone who is accused of ‘terrorism’, you are also a ‘terrorist’.”

This same lawyer expressed the view that State authorities, including both among the executive and the judiciary, are “largely” to blame for this because:

“because the government should have condemned these sorts of things and I showed the public that anyone who is arrested has the right to a lawyer but there is nothing that the government has said. The judiciary should have also assured the public that they won’t look at the person before the court on what charges have been brought, they won’t even look at his representation they are only concerned about the evidence.”²¹⁰

Another lawyer confirmed the hostility of the judiciary to lawyers representing individuals accused of crimes relating to the June 2021 protests in particular:

“Even if you were going to represent those arrested during that time, the magistrates court was very, very hostile. Especially in Manzini, very, very hostile. Each time you come to court, you were called names, but we felt that we could not abandon our clients and we proceeded”.²¹¹

A third lawyer explained that representing those presumed to be “progressives”, who in Eswatini are often merely those who advocate for constitutional democracy and engage in protest, results in you being assumed to be “progressive”:

“what I have since learned is that if you are representing maybe the political... the progressives, let say progressives, yet people treat you as a progressive even if you are only for justice at that point in time.”²¹²

The result is, according to fourth lawyer, that human rights lawyers, or lawyers taking cases even perceived to be human rights cases are now:

“perceived or labelled as rebels, or they are aligned with the causes that they pursue. So we find that if a lawyer is now representing a pro-democracy party member who has been arrested, then that person will be [assumed to be] aligned with the political beliefs of that client.”²¹³

This common practice of assuming a congruency of the views of lawyer and client frustrates lawyers, who do not understand their role in the same way:

“I am not my client. I don’t know how you can turn that to the government. I am not my client. I am his representative. His ideas are his, not mine. I just go there to assist the court, maybe to do a proper administration of justice. That’s

²¹⁰ Interviews conducted by ICJ, Interview #5.

²¹¹ Interviews conducted by ICJ, Interview #10.

²¹² Interviews conducted by ICJ, Interview #11.

²¹³ Interviews conducted by ICJ, Interview #7.

all. But maybe in Swaziland, once you represent someone, you are taken as an extension of your client. You then must be killed or intimidated, or they say you must leave it, don't take it."²¹⁴

5. Lawyers face adverse economic consequences for taking on cases or clients perceived as political.

As described above, the views of many lawyers are typically associated by State authorities with their clients' views, and if their clients' cases are related to disagreements with the King or royal family and their government or those connected to them there may be adverse consequences for participating in the matter as a lawyer.

Some lawyers in Eswatini who take on cases perceived as hostile to the government or their interests struggle to derive adequate income from the practice of law, a situation which has been exacerbated since June 2021. One lawyer described the current situation, saying "it's just terrible for lawyers in general".²¹⁵

Even clients themselves are weary of engaging with lawyers who take cases that are perceived to render them unpopular with the King and his government. One lawyer put it simply: "I took certain matters and then I suddenly lost corporate clients".²¹⁶ Another indicated that all lawyers are aware now that there is a possibility that if they take cases perceived to be controversial then:

"I will not get instructions from so and so. I also deal with these issues with companies that have connections with the royalty. If I am being sent to represent so and so, instructions or rather the retainer that I have with so and so will be terminated".²¹⁷

Another lawyer indicated that governing lawyers of law firms themselves will tell those who they employ to desist from human rights work:

"Some of the law firms that I've worked for would put out an ultimatum that it's either you desist from this kind of work or we part ways and I've had to part way with particularly two of the law firms to say 'look, this is my passion and this is what I do. And if I can't do it from your law firm then that's fine, we will go out separate ways'.²¹⁸

This lawyer eventually shut down their practice because they were "not getting any of the business that comes from corporate or from government", in their view because of the other cases they had taken which were "seen to be fighting against government". Practicing law just did not make "economic sense" in the situation because they were "losing money rather than making money".²¹⁹

Adverse economic consequences of taking on certain clients and certain cases have been continuous for long period of time. One lawyer indicated that "not only [in] royalty matters, [but] in all other matters", you may lose your case for reasons other

²¹⁴ Interviews conducted by ICJ, Interview #13.

²¹⁵ Interviews conducted by ICJ, Interview #10.

²¹⁶ Interviews conducted by ICJ, Interview #21.

²¹⁷ Interviews conducted by ICJ, Interview #4.

²¹⁸ Interviews conducted by ICJ, Interview #15.

²¹⁹ Ibid.

than the law and “all of those things, I think they [are] affecting the corporate lawyers in Mbabane.”²²⁰

Another interviewee expressed the view that in general, as Swazi lawyers “we don’t live large” and “didn’t make a whole lot of money”. However, the association of lawyers with public interest cases, human rights and political activism had threatened their ability to “make ends meet” at all. While before “we could survive on the little that we could make”, this had now become difficult.²²¹

This situation makes lawyers taking public interest cases more reliant on donor funding from international donors, which has been inconsistent. Clients who need support for human rights cases typically cannot afford to pay any legal fees.

The types of economic pressure that lawyers fear are not only in respect of their own ability to make money through practicing law. One interviewee expressed the view that because of their involvement in human rights cases, they started getting calls about their taxes and being required to fill in unnecessary documentation. The same lawyer indicated that there have been efforts to “access my accounts at the bank” and received calls about “scholarship repayments” from a long time ago which they were not owing.²²²

6. The execution of the Law Society’s mandate

The Legal Practitioner’s Act of Swaziland²²³ establishes the Law Society of Swaziland,²²⁴ and includes among the Society’s statutory mandate:²²⁵

- maintenance of the “prestige, status and dignity of the legal profession”;
- regulation of the legal profession;
- protecting the “interests” of the legal profession;
- upholding the “integrity of legal practitioners”; and
- initiating and promoting “reforms and improvements in any branch of law, the administration of justice, the practice of law...”.

The Act specifically empowers to the Law Society to perform a disciplinary function to deal with misconduct or offenses by legal practitioners.²²⁶ The Act establishes a Disciplinary Tribunal including a member of the judiciary and two members of the Law Society to lead in the performance of this function.²²⁷ It further requires the enactment by the Chief Justice of Regulations detailing the procedure of this tribunal. These regulations have been enacted.²²⁸

²²⁰ Interviews conducted by ICJ, Interview #8.

²²¹ Interviews conducted by ICJ, Interview #18.

²²² Interviews conducted by ICJ, Interview #13.

²²³ The Legal Practitioners Act, 1964, Act 15 of 1964.

²²⁴ Ibid, section 34. Now called the Law Society of Eswatini.

²²⁵ Ibid, section 36.

²²⁶ Ibid, sections, Part VIIA.

²²⁷ Ibid, section 27bis.

²²⁸ The Legal Practitioners (Disciplinary Proceedings) Regulations, 1989, 1 May 1989, available at: <https://www.icj.org/wp-content/uploads/2014/06/Swaziland-Legal-Practitioners-Disciplinary-Proceedings.pdf>. For the current composition of the Tribunal see: Kwanele Dlamini, ‘Law Society Disciplinary Tribunal Reveals: 24 Lawyers Face Serious Misconduct Charges,’ *Times of Swaziland*, 13 November 2024, available at: <http://www.times.co.sz/news/148029-law-society-disciplinary-tribunal-reveals-24-lawyers-face-seriou.html>. See also: ‘Discipline of Lawyers’, *Times of Eswatini*, 21 February 2022, available at: https://www.pressreader.com/eswatini/times-of-eswatini/20220221/281822877235925?srsId=AfmBOorWQb21etI4I9N_FJSDEJ5txoU6QvunEDIDJsi fAqC00-s9WzE.

The Act establishes the Council of the Law Society, consisting of a range of persons elected “annually by the annual general meeting of the Society” (between four to eight persons) and a single individual appointed by the Minister of Justice.²²⁹ This Council is tasked with the “management and control” of the Law Society.²³⁰

In upholding its broad statutory mandate, the Law Society has often come into conflict with authorities in Eswatini including members of the executive and the judiciary. Notable examples include:

- in April 2003, a boycott by members of the Law Society of proceedings involving newly appointed judges to protest the demotion of other judges;²³¹
- a four-month long boycott in 2011 by lawyers of courts in protest of the removal of Justice Thomas Masuku;²³²
- a successful complaint to the African Commission on Human and People’s rights pertaining to the conduct of the sitting Chief Justice Michael Ramodibedi in 2011 in issuing a Practice Directive which banned courts from adjudicating cases brought against the King;²³³
- a complaint filed with the Ministry of Justice in December 2022 about sitting Chief Justice Bheki Maphalala, alleging “impeachable acts and serious misbehaviour” which it argued “warrants his removal”.

Despite these measures, lawyers interviewed for this report repeatedly raised concerns about the relative passivity of the Law Society in the wake of significant challenges faced by lawyers in performing their work in the country. A commonly expressed view was that the Law Society itself was not adequately independent of the government. One interviewee, for example, indicated that:

“Even the Law Society itself, which is supposed to be fighting for this cause [independence of lawyers] is not active enough or because of conflict of interest because it comprises members of government and [the Society] can’t be seen to be challenging the atrocities that are being committed. It is a very tough situation.”²³⁴

Most of the interviewees are presently members of the Law Society. A common theme emerging from the interviews are divisions within the Law Society. One interviewee explained as follows:

²²⁹ The Legal Practitioner’s Act, 1964, Act 15 of 1964, section 37.

²³⁰ Ibid, section 38.

²³¹ OHCHR, ‘UN Rights Experts Express Concerns over Threats to the Independence of Lawyers in Swaziland, 27 June 2003, available at; <https://www.ohchr.org/en/press-releases/2009/10/un-rights-expert-expresses-concern-over-threats-independence-lawyers>.

²³² Southern Africa Litigation Centre, ‘Swaziland shows contempt for rule of law as minister of justice and judge are dismissed,’ 30 September 2011, available at: <https://www.southernafricalitigationcentre.org/salc-joint-statement-swaziland-shows-contempt-for-rule-of-law-as-minister-of-justice-and-judge-are-dismissed/>; Louise Redvers, ‘Swazi lawyers march over judge’s sacking, 7 October 2011, available at: <https://mg.co.za/article/2011-10-07-swazi-lawyers-march-over-judges-sacking/>.

²³³ *The Law Society of Swaziland v Kingdom of Swaziland*, ACHPR, Communication 406/11; A Dube and S Nhlabatsi (2016), *The King can do no wrong: The impact of The Law Society of Swaziland v Simelane NO & Others on constitutionalism*, *African Human Rights Law Journal*, 16, pp.265-282.

²³⁴ Interviews conducted by ICJ, Interview #7.

“Our law society – we are divided among ourselves. I think in our group, some people were planted there to neutralize whatever resolutions are viewed as a threat to the powers that be.”²³⁵

The interviewee is implying that members of the Law Society are placed in its leadership structure by the government specifically for the purpose of influencing its decisions.

Interviewees also criticized the inadequate and ineffective action taken by the Law Society to respond to: 1) lawyers’ general challenges with independence; 2) lawyers’ difficulties in representing clients associated with the June 2021 unrest; and 3) attacks on lawyers and killing of Thulani Maseko.²³⁶

Many of those interviewed were especially critical of the fact that the Law Society had failed in advocating for an effective and impartial the investigation into the killing of Thulani Maseko.²³⁷ Maseko was elected as the Secretary of the Law Society between 2018 and 2020 and continued to be a member of the Law Society until his death. One interviewee expressed the following view:

“Ideally, the Law Society should say something and should do something when attorneys are being attacked like Max and like Thulani. And I think it should be more than just lip service. I think you will find that the majority of the people that are in the society, they don’t have first-hand experience of these things. It is us the attorneys who are down in the rural areas who know what it takes to represent an activist.”²³⁸

Another interviewee described the Law Society as “dormant”, indicating that:

“With serious issues they seem not to have any interest... We raise this issue with the Law Society about our safety and everything, all they did was to make a press statement of some sort. There have been cases such as Mr. Maseko’s case, the incarceration of the two MPs, actually voices which do not even have the true understanding of the complexity of the legal process have made more of an impact than the Law Society. It looks like the Law Society, I would say the Council of the Law Society itself is compromised.”²³⁹

Another interviewee went as far as commenting in respect to the Law Society that:

“It’s lost. We don’t have a Law Society. We are still trying to win it back. We don’t have a law society at the moment; its heavily influenced by the State or senior attorneys who are (1) coming from certain law firms; and (2) who have big contracts from government.”²⁴⁰

²³⁵ Interviews conducted by ICJ, Interview #16.

²³⁶ Sifiso Dlamini, ‘We are not Safe – Lawyers,’ *Eswatini Observer*, 20 August 2023, available at: <http://new.observer.org.sz/details.php?id=20986>.

²³⁷ Law Society of Swaziland, “Statement by the Law Society of Swaziland on the Passing of Human Rights Lawyer, Thulani Maseko”, 22 January 2023, on file with ICJ. The statement calls for a “speedy and thorough” investigation without any reference to how this would be achieved through which independent mechanism. The ICJ has been unable to establish any further statements or efforts by the Law Society to ensure that this investigation is independent and proceeds since this statement made a day after Thulani’s killing.

²³⁸ Interviews conducted by ICJ, Interview #16.

²³⁹ Interviews conducted by ICJ, Interview #4.

²⁴⁰ Interviews conducted by ICJ, Interview #18.

In addition, some interviewees expressed the view that the Law Society is sometimes effectively manipulated by Eswatini authorities and used as an instrument to undermine individual lawyers.²⁴¹ For example, one interviewee expressed the view that they had been threatened with being stricken them off the roll of attorneys based on a “directive that was given by the previous CJ [CJ Ramodibedi] to the Law Society.” This interviewee, a member of the Law Society themselves, indicated a belief that “the Council at that time it was ‘captured’, and they were acting on his instructions to try to remove me from the roll”.²⁴²

In terms of the Legal Practice Act, the Law Society has a range of functions geared towards the protection and advancement of the legal profession. Implicit in and ungirding the role of the Law Society, as it acknowledges its complaint against the Chief Justice, is the mandate to advance the rule of law and uphold the independence of both the judiciary and the legal profession:

“Our statutory mandate as the Law Society is to promote the rule of law. We cannot afford to abdicate on this critical responsibility which is imposed on us by the laws of the country.”²⁴³

On 14 January 2025, the President of the Law Society addressed a letter to the ICJ, responding to a list of questions sent to the Law Society about the execution of its mandate. The findings of the report were also provided to the Law Society. The Law Society’s letter sets out some broad claims, including that lawyers “carry out their functions free from intimidation, harassment, reprisals and other human rights violations” and “operate independently” and that the Law Society itself is independent and “operates free from inappropriate influence or pressure”.²⁴⁴ Having noted this, the Law Society indicates having engaged with various authorities about the killing of Thulani Maseko, and having engaged with Maxwell Nkambule regarding the attempt on his life. Furthermore, the Law Society indicates that it has received two complaints from lawyers regarding the threatening, surveilling and harassment of lawyers. One complaint, it indicates “could not verify upon engagement with the complainant”, the other it indicates was taken up with the police and involved the issuing of a police report which is not provided.²⁴⁵ In respect of the judiciary, the Law Society indicates that it is having “ongoing engagements with various stakeholders” about its complaint against the Chief Justice and has “received assurances that the complaint will be processed”. It also notes it has “engaged with the relevant stakeholders on improving the administration of justice including the functioning of the JSC”.²⁴⁶

Despite certain positive efforts of the Law Society to do just this detailed above, the interviews conducted for this report raise serious concerns about the Law Society’s overall effectiveness in executing its mandate in the face of severe pressure on the independence of lawyers in Eswatini, detailed further in the next section. Of particular concern, in this regard, is interviewees almost unanimous indication of the divisions with the Law Society hampering its responses to State repression of lawyers who do politically disfavoured work.

²⁴¹ Interviews conducted by ICJ, Interviews #15 & 4.

²⁴² Interviews conducted by ICJ, Interviews #15

²⁴³ Law Society of Eswatini Complaint, on file with ICJ, available at <https://www.icj.org/wp-content/uploads/2025/02/LSS-Judicial-Conduct-Complaint.pdf>, para 67.

²⁴⁴ Full letter provided in Annex C to this report. Para 2.1.

²⁴⁵ Ibid, paras 2.2 and 2.4.

²⁴⁶ Ibid, para 2.3.

7. Lack of independence in the legal profession

Given the challenges expressed by the lawyers interviewed, it is perhaps unsurprising that most interviewees were categorical that lawyers engaged in work perceived to be contentious, including work relating to human rights, could simply not operate independently in Eswatini.

One lawyer indicated that the problems with professional independence preceded the June 2021 unrest:

“Even before the [June 2021] crisis, like I told you, this is a system where we create opportunities and then ask who are you playing for? So, we are not independent in that context, in the first place. Even worse now in this crisis situation, like the one we are in. Lawyers are not independent.”²⁴⁷

Another lawyer explained that the difficulties arose from the system of governance in Eswatini:

“Within this system of governance, [the independence of lawyers] is a pipedream. The only time that lawyers can practice independently is with a system that will allow it to operate and practice independently. As long as we have a government that controls all the levels of governance, there is no separation of powers and there even our legal profession will remain polarized as it is, it will never be independent because there is always going to be somebody else pulling the strings elsewhere.”²⁴⁸

Fears about the lack of independence have increased since June 2021. Several lawyers expressed this view:

“We are intimidated. we are not free to do as we would like to do. We are no longer independent. Some lawyers will outright turn you away even if you have a strong case. The mere fact that you are associated with certain activities, or you are associated with a certain political entity, people will just choose not to represent you.”²⁴⁹

Another lawyer reinforced this view, indicating that selection of clients was no longer independent and that you have to “think twice”:

“I wouldn’t say that it is independent because so long as you take a matter, and you think twice, then there is a problem... The fact that we always have second thoughts when we need to represent people, then it means the independence has a problem.”²⁵⁰

A third lawyer gave a similar view, emphasizing that the lack of independence stems from not wanting to anger the authorities:

“Even the lawyers I think they have been doing that, they have really analysed their client list, they’ve been really in that space of not wanting to anger or wanting to be seen as, because of the frustration and the intimidation.”²⁵¹

²⁴⁷ Interviews conducted by ICJ, Interviews #3.

²⁴⁸ Interviews conducted by ICJ, Interview #15.

²⁴⁹ Interviews conducted by ICJ, Interview #16.

²⁵⁰ Interviews conducted by ICJ, Interview #2.

²⁵¹ Interviews conducted by ICJ, Interview #8.

Several lawyers expressed personal reflections that they felt morally or ethically compromised by the lack of independence:

"To practice without fear under the present climate is impossible. You just have to, to find yourself, whether you want to sell the truth or you want to stand for the truth."²⁵²

"You can't practice without fear of reprisals in this country and the profession is very compromised, honestly. We are being more and more sellouts insofar as honestly dealing with certain matters."²⁵³

While agreeing that the legal profession could not be independent, another lawyer remained critical of some of their peers, indicating that some did not realize that they were not independent, and/or were not making adequate efforts to fight for their independence:

"The political climate has made it impossible for lawyers to practice without any fear. It is not going to happen. The profession, it ought to be independent, but it is not. I think in my view, it does not realize that it is not independent. It does not deserve to fight for its independence. To me the profession is complicit to the system. They believe that there is a God somewhere that is going to come down and say, 'Now you are independent from now on.' So, I do not see lawyers taking steps to fight for their independence as a profession... So, for me, they are being complicit, not wanting to assert their independence and then cry victim. We are not victims here."²⁵⁴

However, on the whole, the view expressed by lawyers interviewed is that, try as they may, independence is not feasible in the context:

"In Eswatini, you can pretend that you are strong, but you cannot practice without fear of reprisals because the system has actually imposed itself everywhere even within the justice system there is politics there... it is very difficult and you can't say that the legal practice is independent as well because the lawyers are not protected, they operate under constant threat."²⁵⁵

According to one lawyer, the lack of independence in the legal system has gotten so bad over the last few years and is "so endemic" that this lawyer says:

"I see honest and clean lawyers reconciling themselves that in order for their case to be enrolled you have to do favours for court officials".²⁵⁶

Lawyers are sometimes prevented completely from doing their jobs through what they describe as being "banned" by specific judges from appearing before their courts in certain matters. For example, the Acting Principal Magistrate of one court reportedly told a particular lawyer that "she no longer wants me... in the court", adding that this practice "is not something that is unknown":²⁵⁷

²⁵² Interviews conducted by ICJ, Interview #17.

²⁵³ Interviews conducted by ICJ, Interview #24.

²⁵⁴ Interviews conducted by ICJ, Interview #5.

²⁵⁵ Interviews conducted by ICJ, Interview #7.

²⁵⁶ Interviews conducted by ICJ, Interview #18.

²⁵⁷ Interviews conducted by ICJ, Interview #4.

"When we were to appear before her, she walked out of the court and called us together with the prosecution into her chambers. She told me she does not want to see me in her court for whatever other matter. Not only isolated to this one but all other matters..."²⁵⁸

Particularly in the aftermath of the June uprising, this lawyer added that they were not they were not the only targets:

"The situation was so hostile that not only me and some of the other gentlemen I work with and other ladies, but there are also courts that we have since been banned from appearing before."²⁵⁹

In some instances, where such outright "bans" are not communicated, some judicial officers will make it clear in other indirect ways that "I am not being welcome actually", because "they are listening to me just because procedurally they have to".²⁶⁰ Other lawyers indicate that magistrates will simply indicate that they do not have jurisdiction in matters in which it is clear that they do.²⁶¹

To get around these obstacles, some lawyers tried to devise ways to "swap cases" with each other so that none of them appeared before magistrates who were "more hostile" to them in the wake of June 2021 unrest.²⁶²

In at least one widely publicized incident, the Chief Justice has "banned" a legal practitioner from operating in any of Eswatini's courts. Alleging an indiscretion by Muzi Simelane in paying back certain legal fees to a client, the Chief Justice, in April 2018, wrote to Simelane indicating that he had "acted contemptuously to the Highest Court of the land" and had "brought the administration of justice into disrepute". In the letter the Chief Justice notes that he had written to the Law Society without receiving any response and therefore concluded:

"In the exercise of the powers vested in me by sections 139(5) and 142, of the Constitution, your law firm and yourself are hereby barred from appearing before any Court in Swaziland until you purge your contempt".²⁶³

This letter was further circulated to judges and magistrates in Eswatini, as well as registrars and masters of various courts.

Section 139(5) of the Constitution provides that "the Chief Justice is the head of the Judiciary" and makes the Chief Justice "responsible for the administration and supervision of the Judiciary". Section 142 of the Constitution empowers the Chief Justice, "subject to the provisions of this Constitution or any other law", to enact "rules for regulating the practice and procedure of the superior and subordinate courts, including the specialised and local courts as well as powers of judicial officers". Neither provision includes any reference to measures relating to either holding lawyers in contempt of court or barring them from practicing in courts.²⁶⁴

²⁵⁸ Interviews conducted by ICJ, Interview #4.

²⁵⁹ Ibid.

²⁶⁰ Ibid.

²⁶¹ Interviews conducted by ICJ, Interview #13.

²⁶² Interviews conducted by ICJ, Interview #10.

²⁶³ Letter from Chief Justice to Muzi Simelane, 11 April 2018.

²⁶⁴ See also Centre for Human Rights, Faculty of Law, University of Pretoria, 'Press Statement: Centre for Human Rights condemns disbarring of lawyer Muzi Simelane by Eswatini Chief Justice'

The applicable legal provision in respect of the removal or suspension of legal practitioners in Eswatini is section 27 of the Legal Practitioner’s Act, which reads:

“(1) Upon any application by the Law Society, the Chief Justice, or in his absence, a Judge, may, for any reasonable cause shown order the suspension or removal of a legal practitioner from the roll and, in the case of disciplinary proceedings for professional misconduct, he may order suspension or removal or such other lesser penalty as is provided for in section 27ter.

(2) The provision of this Act relating to discipline shall be without prejudice to the inherent powers of a court or other tribunal to deal with any misconduct or an offence by a legal practitioner in the course of or in relation to proceedings before it.”

The Chief Justice lacks the power to disbar any legal practitioner in terms of the constitutional provisions cited in his letter, rendering such decision *ultra vires*. Muzi Simelane was not provided with an opportunity to make any representations before this notice was issued, in contravention of the principle of the right to a fair hearing. In addition, it is unclear that the Chief Justice is empowered by section 27 of the Legal Practitioner’s Act to take such a measure without an application from the Law Society.

Muzi Simelane has been effectively banned from appearing in, and incapable of filing cases at, any court in Eswatini.²⁶⁵ He approached Eswatini courts to review the decision to debar him on the grounds that he was not heard prior to the Chief Justice taken his decision and that the Chief Justice was not, any event, empowered in terms of the Constitution to debar him. Having lost in the High Court,²⁶⁶ he appealed in the Supreme Court, which on 4 August 2022 upheld the High Court’s decision dismissing the review without considering the substance of the arguments made by him that the directive was *ultra vires* or interrogating either the relevant provision of the Constitution or the Legal Practitioner’s Act.²⁶⁷

Prior to the consideration of the review by the Supreme Court, Simelane had submitted a complaint to the Swaziland’s Commission on Human Rights and Public Administration. The Commission’s report, which the Supreme Court expressly declines to consider in its judgment,²⁶⁸ is titled “Access to Justice Report against the Chief

(27 June 2022), available: https://www.up.ac.za/faculty-of-law/news/post_3084683-press-statement-centre-for-human-rights-condemns-disbarring-of-lawyer-muzi-simelane-by-eswatini-chief-justice.

²⁶⁵ *Muzi P. Simelane v The Chief Justice of Eswatini and 2 Others* (82/2020) [2022] SZSC 34 (4 August 2022), available at: <https://eswatiniilii.org/akn/sz/judgment/szsc/2022/34/eng@2022-08-04/source>

²⁶⁶ *Simelane v. The Chief Justice of ESwatini and Others (1508 of 2020) [2020] SZHC 221* (28 October 2020), available: <https://eswatiniilii.org/akn/sz/judgment/szhc/2020/221/eng@2020-10-28>. In this matter, the court reasons that 1) Simelane has been “found guilty of contempt of court by the Supreme Court”; 2) He has not fully “purged his contempt and he accordingly approaches the court with dirty hands”; 3) therefore he cannot approach the Court with this challenge to the notice until he has purged his contempt; 4) even if there were no notice or directive issued by the Chief Justice “he would still be debarred anyway because no court would hear him unless he first complies with judgment of this court and the Supreme Court”.

²⁶⁷ *Muzi P Simelane v the Chief Justice of Eswatini and 2 Others* (82/20) [2022] SZSC 34 (4 August 2022), available: <https://eswatiniilii.org/akn/sz/judgment/szsc/2022/34/eng@2022-08-04/source>, para 26, in which the Court explicitly refuses to consider Simelane’s challenges to the Chief Justice’s Directives on the basis that “it was not decided upon by the Court a quo”.

²⁶⁸ *Ibid*, paras 15-18.

Justice” and dated May 2020.²⁶⁹ In its report, the Commission notes that despite numerous attempts to invite the Chief Justice to make submissions to it during its investigation, “the office of the Chief Justice did not see the need to make representation or a response on these complaints”.²⁷⁰ It describes the Chief Justice’s failure to respond to it as “unfortunate and a blow to the respect for the rule of law”.²⁷¹ Thereafter, the Commission made the following findings:

- The complaint pertains to an administrative not judicial function performed by the Chief Justice.
- The complainant was not given an opportunity to be heard or show cause as to why he should not be barred from practice before the decision was made.
- This is inconsistent with the principle of *audi alterum partem* and in violation of his constitutional rights to a fair hearing, to access to justice and to carry out his lawful occupation.

It concludes that:²⁷²

“The Commission considers appropriate that the Honourable Chief Justice withdraws the directive and allows complainants to access the courts and to file any court process that would challenge the ban to appear in courts and/or any other challenge in that regard”.²⁷³

The Chief Justice initiated legal proceedings challenging the Commission’s report in September, though he withdrew these on 29 October 2020.

8. Lack of independence of the judiciary

The Constitution of Eswatini entitles all individuals to access to “an independent and impartial court”.²⁷⁴ It also includes as “Directive Principles of State Policy”²⁷⁵ a set of “Objectives on the Independence of Judiciary”,²⁷⁶ which include a wide range of protections for the institutional and individual independence of judges. The judiciary is described by the Constitution as “independent and subject only to this

²⁶⁹ Report on file with the ICJ.

²⁷⁰ Ibid, page 7.

²⁷¹ Ibid, page 8.

²⁷² Ibid, page 9.

²⁷³ Ibid, page 10.

²⁷⁴ The Constitution of the Kingdom of Swaziland Act 2005, Section 21(1).

²⁷⁵ Ibid, Section 62 reads in full:

Objectives on independence of the judiciary

- (1) The independence of the judiciary as enshrined in this Constitution or any other law shall be guaranteed by the State. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
- (2) The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
- (3) The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue is within its competence as defined by law.
- (4) There shall be no inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review in accordance with the law.
- (5) Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments, promotion or transfer for improper motives.
- (6) The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

²⁷⁶ Ibid.

Constitution".²⁷⁷ It is not "subject to the control or direction of any person or authority".²⁷⁸ Interference with judicial officers by executive and legislative officials is explicitly prohibited.²⁷⁹ Safeguards for financial and administrative independence of the judiciary are provided for.²⁸⁰

Despite these and other constitutional protections for the independence of judiciary, which are further detailed above in Section B, the ICJ has over the past two decades detailed significant deficiencies in respect of the independence of the judiciary in Eswatini.

Public Perceptions of Judicial Independence

The ICJ's previous findings are consistent with public perceptions. An Afrobarometer report published in 2023 indicates that only 7.8 percent of respondents had "a lot" of trust in "courts of law" and a further 20.7 percent trusting courts "somewhat". As many as 44.2 percent of respondents in Eswatini indicated that they had "no trust at all" for courts and 21.4 percent expressed "only a little" trust for courts.²⁸¹

A mere 8 percent of respondents indicated a belief that no judicial officers were involved in corruption. As many as 13.4 percent of respondents expressed the view that "all" judicial officers were involved in corruption, with 23.2 percent indicating that "most" judges were involved in corruption and a further 38.3 percent indicating that "some" are so involved.²⁸²

This perception has, according to lawyers, discouraged people from even approaching courts in the first place:

"People are not stupid. They've come to realize that our judiciary is so compromised. Some people are resorting to mediating between themselves. They now practically only go to court when it is impossible to settle. That is what I have observed; the number of civil matters that we would normally deal with has gone down; criminal matters they still remain the same. Only in those cases where people feel there is nothing else they can do [will they go to court]."²⁸³

The generally held perception of a lack of independence of judiciary is also held by the lawyers interviewed by the ICJ for this report. One interviewee, commenting on the building that houses the Supreme Court and the High Court of Swaziland, indicated "there is a serious rot in that building up there",²⁸⁴ with another concluding overall that "there is nothing that you may call judicial independence in Swaziland".²⁸⁵ A third interviewee simply said that "the court belongs to the government".²⁸⁶

²⁷⁷ Ibid, Section 138.

²⁷⁸ Ibid, section 141.

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ 'Afrobarometer Round 9 survey in Eswatini: Summary of results, 2023,' available at:

<https://www.afrobarometer.org/wp-content/uploads/2023/11/Summary-of-results-Eswatini-R9-Afrobarometer-24nov23.pdf>.

²⁸² Ibid, p 44.

²⁸³ Interviews conducted by ICJ, Interview #24.

²⁸⁴ Interviews conducted by ICJ, Interview #3.

²⁸⁵ Interviews conducted by ICJ, Interview #4.

²⁸⁶ Interviews conducted by ICJ, Interview #6.

Judicial Appointments

Section 159 of the Constitution establishes an independent Judicial Services Commission (JSC) and provides for its composition as follows:

- “The Commission shall consist of the following:
- (a) the Chief Justice, who shall be the chairman;
 - (b) two legal practitioners of not less than seven years practice and in good professional standing to be appointed by the King;
 - (c) the Chairman of the Civil Service Commission; and
 - (d) two persons appointed by the King.”

Among other functions provided by section 160, the JSC advises the King on judicial appointments and removal of Director of Public Prosecutions and other public officers. It further plays a role in disciplinary proceedings, including being empowered to exercise disciplinary control over those persons and to remove those persons from office.

The Judicial Service Commission Act 13 of 182 predates the 2005 Constitution by over two decades.²⁸⁷ It is therefore inconsistent with the Constitution in some critical respects. For example, section 3(1) of the JSC Act lists as members of the JSC: the Chief Justice; the Chairman of the Civil Service Board; three persons appointed by the King on such terms and conditions as he may determine and two of whom possess such legal qualifications and experience as the King may determine. The Act also provides the JSC with “severely circumscribed powers to appoint, discipline and remove judicial officers”²⁸⁸ given the primacy afforded to the King in both appointments of members of the JSC and judges. This creates the perception that the “JSC strongly favours Royalty, compromising its independence and, by logical extension, compromising the independence of the judiciary”.²⁸⁹

In addition, in practice, the JSC operates in an “opaque” manner:²⁹⁰

“vacancies are not advertised; there are no public interviews; and the shortlist of candidates that is referred to the King for his consideration is not publicly disclosed.”

Contrary to legal requirements, the inputs of the Law Society are often not solicited during processes of the JSC. The ICJ has concluded in previous reports both that appointments of judges have frequently occurred contrary to constitutional provisions and that “the Commission has not performed its disciplinary functions impartially and has collaborated in abusive proceedings, for instance to arbitrarily dismiss a judge deemed too independent”.²⁹¹

²⁸⁷ Judicial Service Commission Act, 1982, Act 13 of 1982.

²⁸⁸ ICJ, Report of the Centre for the Independence of Judges and Lawyers (Fact-Finding Mission to the Kingdom of Swaziland), June 2003, available at: https://www.icj.org/wp-content/uploads/2012/03/swaziland_fact_finding_10_06_2003.pdf.

²⁸⁹ ICJ, ‘Achieving Justice for Gross Human Rights Violations in Swaziland: Key Challenges, May 2018,’ 2018, available at: <https://www.icj.org/wp-content/uploads/2018/05/Swaziland-GRABaselineStudy-Publications-Reports-Thematic-reports-2018-ENG.pdf>, p 7.

²⁹⁰ ICJ, ‘Justice Locked Out: Swaziland’s rule of Law Crisis’ (International Fact-finding Mission Report), 2015, available at: <https://www.icj.org/wp-content/uploads/2016/02/Swaziland-Justice-locked-out-RoL-crisis-Fact-Finding-Mission-Report-2016-ENG.pdf>, p 22.

²⁹¹ Ibid, p 23-24.

The ICJ's interviews with lawyers reinforce these and other conclusions relating to the JSC persist:

"So obviously the independence that we want and seek, we are far from it. Especially because we have the JSC which is compromised. In the sense that as lawyers for instance, we don't play a single role in the appointment of a single member of the JSC. We've just had an appointment from the JSC, someone was picked from the JSC and ascended to the bench. Where could there be independence in such a setup"²⁹²

Interviewees reported that recruitment processes for judges are commonly conducted without advertising posts or interviewing candidates, and that interviews very seldom took place publicly.

Another interviewee commented in the appointment process, arguing that the process for appointment is not transparent leading to the appointment of unqualified judges:

"The judiciary is not independent. While in the Constitution it makes that undertaking, it is not. I will say it in two ways. It is not independent on the basis that the way judges are recruited. The independence of the judiciary does not start when the person is on the bench. It starts in the process. If you recruit a judge not following an open and transparent process, then in my view, you have already defeated the independence of the judiciary. So, that is the problem. Judges in the country are appointed through the herd. The former EU Ambassador Nicola Bellomo²⁹³ was once quoted saying even his six-year-old boy can be a judge in this country. You are here with me now having lunch but the next morning you will see me carrying a pipe and being sworn in as a judge."

According to another interviewee, the appointment of judges who are underqualified has a very clear impact on their ability to perform their judicial duties, indicating that many judges appear to be "intimidated" when sitting on matters.²⁹⁴ Another interviewee added that in their view it is critical to consider quality of judicial appointments made before even questioning independence of judges.²⁹⁵ Another lawyer describes appearing before what he considers to be underqualified judges as "demoralizing" and diminishing the dignity of even the Supreme Court:

"I'm appearing in the Supreme Court before judges who never practiced in the highest court. I would agree there are some people who have left pockets of brilliance everywhere, we have them here. Don't destroy them by discrediting them. You have to maintain the dignity of the court, which is a measure of the people in the country. When you compromise it then you've got problems."²⁹⁶

Interviewees also stressed the problem caused by the significant power held by both the Chief Justice and King in respect of the JSC. In particular, the King's role in the final decision-making in appointment and removal of judges is effectively total:

²⁹² Interviews conducted by ICJ, Interview #3.

²⁹³ This refers to a comment made by the then EU Ambassador Nicola Bellomo which can be sourced to *The Nation* (August 2017), p 15, which reads as follows:

"Investment is protected by a solid judiciary. If they (investors) see that in this country a judge can be appointed in a way in which even my 6-year-old son can also be a judge, an investor can think twice before putting money in this country which does not offer the adequate conditions".

²⁹⁴ Interviews conducted by ICJ, Interview #18.

²⁹⁵ Interviews conducted by ICJ, Interview #20.

²⁹⁶ Interviews conducted by ICJ, Interview #21.

"[The judiciary] is not independent. One person appoints all the judges; he appoints everyone that sits on the Judicial Service Commission. How can then judges be independent where the process of appointing them is compromised, the process of removing them, is compromised?"²⁹⁷

Another common complaint is the appointment of members of the royal family as judges, which necessarily compromises their independence:

"Our judiciary will never be independent within this system of governance. And particularly, if you look at the appointments that are made within the judiciary - you've got chiefs there, you've got princes there. They are there specifically for the purpose to ensure that the judiciary remains captured at all times."²⁹⁸

The lack of transparency and independence in the appointment process also impacts on the decisions to remove judges, and, indeed whether they are investigated or removed at all. This in turn influences judicial decisions. One interviewee explained:

"If you are a judicial officer, and you hold aspirations of being promoted to a certain position and then there is a protestor in front of you, who has been accused of vandalizing shops or any such acts, or defying the King, what are you going to do? Obviously, you are going to make a judgment that will make you go into the authority's favourable books. That compromises your independence."²⁹⁹

The problems expressed in relation to the appointment process are in respect of the process of appointing both permanent and temporary or acting judges.³⁰⁰ Several interviewees raised significant concerns with the process by which acting judges are appointed, the prevalence of the appointment of acting judges, and the quality of judges appointed in this manner:

"Some of our judges are there on acting basis. They act as judges for a period, our constitution allows one month but they go on for three months. As an acting judge, there is nothing that you bring to the table to say, this is the progress I have made. They have acting judges just because of the backlog. They don't have like progress reports that they bring to say, I have done so many cases for them maybe to be appointed on a permanent basis. So, they act for that period to say, we will renew on such conditions. It is not on appraisal as in what have you done since you are working on an acting basis. It is what have you done in terms of how you have pleased the authorities in the decisions you have made. Have you been able to further so and so's interests. There is no independence."³⁰¹

Several interviewees noted that, in particular, judges appointed on acting bases often have little or no experience in legal practice:

²⁹⁷ Interviews conducted by ICJ, Interview #24.

²⁹⁸ Interviews conducted by ICJ, Interview #15.

²⁹⁹ Interviews conducted by ICJ, Interview #16.

³⁰⁰ Thulani Maseko, *The Nation* (April 2020): "It is deeply concerning that, in this country, most of the men who have ascended to the high office of Justice of the Superior Courts, particularly the Supreme Court, have done so through the back door...There is a growing perception that the recycling of acting judges has developed into judicial cronyism and patronage at all levels, from the Supreme Court, High Court, Industrial Court to the Magistracy".

³⁰¹ Interviews conducted by ICJ, Interview #14.

"Judges of the High Court must have practiced continuously for a minimum of 10 years... We've had people who have never practiced, people who have not practiced for 10 years, people who are admitted attorneys who have never seen the back of a courtroom, we have people who are registrars and magistrates. Right now, we have judges acting in the High Court that have never practiced. Judges of the magistrate court acting in the High Court continuously."³⁰²

Case allocation and judicial independence

While interviewees almost unanimously agreed that there were some independent judges who performed their roles diligently and effectively, the common view expressed was that these were in the minority. One interviewee explained:

"I can count them [independent judges in Eswatini] on my left three fingers, and I'm being honest... There are very few judges who have got in on merit and I'm not afraid to say it because I have been challenging judges... I am not afraid to say it, there are some judges here who are very independent, very independently thinking judges."³⁰³

Interviewees were largely in agreement that these independent judges are seldom if ever allocated to cases that pertain to human rights or public interest, or indeed any matters considered controversial by the government or the King. It is the Chief Justice who is known to make determinations in respect to the allocation of cases to specific judicial office, through an entirely non-transparent process. One interviewee explained:

"Certain cases don't go to certain judges; certain cases always go to certain judges. There is a lot be desired on that front. So, it seems you're doubtful I'm sure when you want justice. The law is just the same, on Monday it is the same, Wednesday it's the same, even on Sunday it is supposed to be the same. So, you need not try to get some judicial officers whom you know; they always want to find judgment pointing to one direction."³⁰⁴

More specifically, another lawyer says:

"We do have judges that are perceived to be liberal or rather pro-democratic, and we can tell that those judges are never given cases that are politically connected. They never receive those cases."³⁰⁵

The converse is also true, with lawyers indicating that it is predictable which judges will be allocated cases deemed as controversial or politically sensitive:

"I can be able to select for you four or five judges and tell you even before we know who the judge is going to be in the matter. I can tell you that this matter will be heard by so and so or so."³⁰⁶

In the aftermath of the June 2021 unrest, this problem persisted not only in the Supreme Court and the High Court but was also manifested in the magistrates' courts

³⁰² Interviews conducted by ICJ, Interview #21.

³⁰³ Ibid.

³⁰⁴ Interviews conducted by ICJ, Interview #17.

³⁰⁵ Interviews conducted by ICJ, Interview #9.

³⁰⁶ Interviews conducted by ICJ, Interview #4.

who overwhelmingly heard criminal cases in which people involved in protests were charged. One lawyer explained:

“The police and the crown will always try to ensure though there are certain judicial officers who have to attend to fresh cases, but you would find there are particular judicial officers that are supposed to be attending fresh cases, then someone who is not on the roster will then be assigned. Unfortunately, we don’t have control over that.”³⁰⁷

Challenges in effectively advising and representing clients

Lawyers also raised various problems in effectively advising and representing their clients before courts. Several expressed the view that it is difficult to give legal advice when they expect that the outcome of the case will not be determined by a proper understanding of the law and its application to the facts. Ultimately, one lawyer explains that lawyers are often well aware of what the result will be of a particular case even before it is argued:

“More than anything, lawyers ... go to court already knowing who is going to win because of that other lawyer in that matter, because of the interest, because of the involvement of the powers that be in that matter, not just because it has to do with a royalty, not just only those matters. If you have a client, the client will go to the powers that be and then that matter will be assigned a specific judge and then the judge will do exactly what the powers that be want. Not only royalty matters, all other matters.”³⁰⁸

Lawyers asserted that they had tried despite the circumstances to defend their clients, putting in long hours of work to no avail:

“[We] put so much hours and research only to find out that the decisions are decided elsewhere. The confidence in the people who are expected to dispense justice, some of them you know no matter how an argument is, they are not prepared to take that opinion.”³⁰⁹

Another lawyer echoed this sentiment, indicating that because “judges themselves get influenced into making certain decisions”:

“No matter how well you draft your papers or substantiate it with case law, and authorities, statutes, if a certain outcome is required, then you won’t get what you want.”³¹⁰

One lawyer also indicated that because of the close relationship between State authorities and certain law firms, the result of a case might even be predictable based on the identity of the lawyer representing a certain party:

“We have law firms that never lose cases; that have clients with no problems because they know they are going to win every case that is enrolled by them.”³¹¹

³⁰⁷ Interviews conducted by ICJ, Interview #24.

³⁰⁸ Interviews conducted by ICJ, Interview #8.

³⁰⁹ Interviews conducted by ICJ, Interview #24.

³¹⁰ Interviews conducted by ICJ, Interview #12.

³¹¹ Interviews conducted by ICJ, Interview #18.

Challenges in accessing court processes and documents

Lawyers also complained that the situation also had bearing on access to court processes, such as those relevant to lodging cases, papers or appeals at courts. Problems of this nature reported in interviewees included the refusal by registrars to accept the filing of legitimate court applications and the failure to produce or publicize judgments and orders of court. Some interviewees indicated that these problems with the registrar were particularly pronounced when an individual was attempting to sue the royal family or those associated with it:

“When you take those matters to the registrar, the role of the registrar is to enrol the matter. It’s as simple as this: enrol all matters. But if you bring this particular matter, he looks at the parties, and then you are going to sit there by the registrar’s office while he consults the Chief Justice. Then you know there is a problem now, they have interest in this matter. One time I was told by the registrar that I have to change the parties if I want the matter enrolled.”³¹²

However, as another interviewee clarified, the problem may also occur in matters not involving the royal family at all:

“Yes, I wouldn’t say it was particularly because the King had interest because there are other cases to date which there is no judgment even if those cases are not involving the King. This time around, the coincidence is why it took so much time. I had got a letter requesting the written judgment to no avail. I have also not taken appeal because after they had dismissed it in the High Court, I wanted to pursue the matter on appeal. I couldn’t.”³¹³

Overall situation: “our jurisprudence is really sliding”

As a consequence of these and other challenges, one interviewee concluded that the jurisprudence of Eswatini Courts had dramatically reduced in quality: “our jurisprudence is sliding... It’s really sliding.”³¹⁴

The prevailing environment, including in respect of intimidation, harassment and reprisals contributes to the failure of members of the judiciary to carry out the core roles and a general lack of independence of the judiciary. As Bheki Makhubu notes, the lack of independence of the judiciary and perceptions thereof, are unlikely to change without democratic governance and legal reform which dilutes the influence over and control by the King and the royal family of the political system and the three branches of government:

“I tell you, this society, everybody wants to be liked by the king, okay? Everybody wants to be liked by the king. Everybody is clamouring for his grace. But that's happening a lot now. But it's always been there. And I think it's going to continue being there.

So, this lack of independence is not caused solely by reprisals that would occur to you if, say, you acquitted a guy charged with murder simply because the King didn't want you to acquit him. I think people get involved in that politics to say they do stupid things because they think it's going to get them a good

³¹² Interviews conducted by ICJ, Interview #13. Interview 18 also raised concerns about the integrity of the operation of the registrar’s offices.

³¹³ Interviews conducted by ICJ, Interview #2.

³¹⁴ Interviews conducted by ICJ, Interview #3.

name with the authorities. And I don't know what else you're going to be once you're a judge. Perhaps they want to be chief justices.

I think, look, the environment is not a walk in the park. I'm not going to, there's no debate in that. But I think a lot of people lack the self-confidence to stand by what they know and believe in, what they know best."³¹⁵

In its response to the ICJ in respect of this report, the Minister of Justice of Eswatini drew attention to a number of considerations, including that constitutional protections provided for judicial independence; judges salaries are not subjected to annual appropriation; and the judiciary administers its own budget. The Minister also asserts that "in the recent past, Eswatini has not received any allegations of judicial interference by the executive or legislative arms of government".³¹⁶

Under international law, States are required to respect and ensure the independence of the judiciary both institutionally and individually.³¹⁷ The ICJ has, in several publications on Eswatini comprehensively analysed legal, institutional and other challenges to judicial independence in Eswatini making detailed recommendations. Though the Constitution of Eswatini requires the protection of judicial independence, and various laws have been enacted to secure such independence, the ICJ has observed that "despite constitutional guarantees and safeguards, the judiciary is not independent".³¹⁸

9. Alleged abuse of power by the Chief Justice

The ICJ has documented in detail complaints against and issues surrounding the former Chief Justice of Eswatini Michael Ramodebedi. A report issued by the ICJ after a fact-finding mission to Eswatini concluded that "Chief Justice Ramodibedi failed to protect and defend the institutional independence of the Judiciary" and this contributed to "create[ing] conditions conducive to abuse of the legal system for personal gain".³¹⁹

The report details a number of incidents, including those concerning abuse of his office for personal gain; improper allocation of cases; issuing of an unlawful practice directive inhibiting access to justice; having inappropriately close relationships with the executive; effectively acting as an agent for executive interests through his office; and presiding over Judicial Service Commission hearings that pertained to complaints against him. Ultimately, impeachment proceedings before the Judicial Service Commission against Chief Justice Ramodebedi were initiated in May 2015 and he was removed from office by the King in June 2015.³²⁰ In 2020, the African Commission on Human and People's Rights found that the practice directive issued by Chief Justice

³¹⁵ Interview with Bheki Makhubu.

³¹⁶ See Annex G.

³¹⁷ See: ICJ Practitioners Guide No. 1 on International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, available at: <https://www.icj.org/wp-content/uploads/2012/04/International-Principles-on-the-Independence-and-Accountability-of-Judges-Lawyers-and-Prosecutors-No.1-Practitioners-Guide-2009-Eng.pdf>.

³¹⁸ ICJ, 'Swaziland: Country Profile Prepared by the ICJ Centre for the Independence of Judges and Lawyers,' 2014, available at: <https://www.icj.org/wp-content/uploads/2014/06/CIJL-Country-Profile-Swaziland-June-2014.pdf>.

³¹⁹ ICJ, 'Justice Locked Out: Swaziland's rule of Law Crisis' (International Fact-finding Mission Report), 2015, available at: <https://www.icj.org/wp-content/uploads/2016/02/Swaziland-Justice-locked-out-RoL-crisis-Publications-Fact-Finding-Mission-Report-2016-ENG.pdf>, p 9.

³²⁰ Ibid, p 7-8.

Ramodebedi was unlawful, though noting that Ramodebedi had already been removed as Chief Justice and the practice directive had been formally withdrawn.³²¹

The current Chief Justice, Bheki Maphalala, was appointed Acting Chief Justice in June 2015,³²² and ultimately appointed to the position permanently in November 2015.³²³ As the ICJ noted, Chief Justice Maphalala's appointment to the Supreme Court, was itself unlawful, given that it was "in contravention of the constitutionally prescribed requirements, as he had served for only two years on the High Court bench".³²⁴

Chief Justice Maphalala's tenure as head of the Eswatini judiciary has been marked with continuous scandal amidst ongoing allegations of abuse of power and corruption.³²⁵ More specific allegations in respect of the Chief Justice's misconduct have been detailed in this report. These include the debarring of Muzi Simelane in the absence of a power to do so; abuse of control of case allocation and management, particularly in political cases; and abuse of the system of appointment of acting judges to appoint what are alleged to be unqualified judges.

A number of the common concerns raised about the Chief Justice were raised by the Law Society of Eswatini in a complaint initiated by it against the Chief Justice in December 2022 seeking his removal from office. The Law Society's complaint includes the following allegations:³²⁶

- **Improper appointment of Acting Judges on a continuously renewed basis:** the Law Society alleges he has been "evading the Constitution" and the requirements for judicial appointment by doing so, noting that Acting Judges

³²¹ *The Law Society of Swaziland v Kingdom of Swaziland*, African Commission on Human and People's Rights, Communication 406/11.

³²² Afrobarometer, 'Swaziland: Much Work to do for the Acting Chief Justice to Restore Confidence in his Office,' 29 October 2015, available at: <https://www.afrobarometer.org/articles/swaziland-much-work-do-acting-chief-justice-restore-confidence-his-office/>.

³²³ Mbonqiseni Ndzimandze, 'Justice Maphalala Confirmed as CJ,' *Times of Swaziland*, 13 November 2015, available at: <http://www.times.co.sz/news/105547-justice-maphalala-confirmed-as-cj.html>.

³²⁴ ICJ, 'Swaziland: Country Profile Prepared by the ICJ Centre for the Independence of Judges and Lawyers,' 2014, available at: <https://www.icj.org/wp-content/uploads/2014/06/CIJL-Country-Profile-Swaziland-June-2014.pdf>.

³²⁵ Bongwiwe Dlamini, 'Chief Justice Bheki Maphalala who is accused of corruption within the Master of High Court appoints his team of Judges to investigate allegations,' *Swaziland News*, 17 January 2024, available at: <https://www.swazilandnews.co.za/fundza.php?nguyiphi=5889>; Carmel Rickard, 'Swaziland: Chief justice in stand-off with senior lawyer,' African LII, 22 February 2019, available at, <https://africanlii.org/articles/2019-02-22/carmel-rickard/swaziland-chief-justice-in-stand-off-with-senior-lawyer>; amaBhungane 'Judicial crackdown on Swazi editor' (19 April 2013), available at:

<https://amabhungane.org/judicial-crackdown-on-swazi-editor/> ; Welcome Dlamini, 'CJ appoints acting judges during recess,' *Times of Eswatini*, 21 February 2021, available at:

<https://www.pressreader.com/eswatini/times-of-eswatini/20210221/281621013076159?srsid=AfmBOoqg9DSZxsPI7C1Pdsc5Bu-Yrb0tImugdai3oBmcZ2SvZLpcqR55>; Nimrod Mabuza, 'eSwatini Judiciary: A fish rots from the head down,' *Centre for Investigative Journalism*, 28 February 2022, available at:

<https://inhlase.com/eswatini-judiciary-a-fish-rots-from-the-head-down/>; Eugene Dube, 'Did CJ Maphalala Have Sex in Office?', *The Swati Newsweek*, 4 July 2020, available at:

<https://sdnewsweek.wordpress.com/2020/07/04/chief-justices-sex-scandal-angers-swazis/>; Zweli Martin Dlamini, 'EXPOSED: How Chief Justice Bheki Maphalala took a bribe in an attempt to release a convicted powerful Motor Vehicle thief 'Kakona' Dlamini, and the plot to kill brave Public Prosecutor Israel Magagula,' *Swaziland News*, 21 November 2023, available at:

<https://www.swazilandnews.co.za/fundza.php?nguyiphi=5580>: Thulani Maseko, *The Nation*, (September 2020).

³²⁶ Full complaint on file with ICJ.

have been shown to “have no ultimate accountability other than to the Chief Justice”. Such renewals are so consistent that the Law Society describes a number of judges as “permanent Acting Judges” in effect.³²⁷ The Law Society also alleges that the Chief Justice is using this power to appoint acting judges for the improper purpose of “establishing patronage in the legal fraternity” and “manipulate judicial decision-making” using a “non-existent backlog” as an “excuse” to do.

- **Establishing a commercial division of the High Court:** While not contesting the Chief Justice’s power to establish such a division, the Law Society observes that the Constitution requires the Chief Justice to consult with the Minister of Justice and the President of the Law Society before establishing such a division.³²⁸ The Law Society alleges that, contrary to the Constitution, no such consultation took place before the Chief Justice established the commercial division of the High Court through the issuing of Practice Directive on 7 October 2021.³²⁹
- **Interference with the administration of justice:** The Law Society cites a number of cases in which the Chief Justice has allegedly improperly interfered with the administration of justice. In matters relating to the Master of the High Court, in which the Chief Justice was a litigant, the Law Society points to the Chief Justice’s improper role in selecting the panel of judges to adjudicate on the matter. This action was taken in contravention of a High Court order in the matter directing that the Principal Judge of the High Court, and not the Chief Justice, determine the panel to hear this matter.³³⁰ The Law Society alleges that this action constituted misconduct by the Chief Justice and “conflict of interest” and “obstruction of justice”. The Law Society also alleges interference in respect of another matter in which the Chief Justice failed to recuse himself despite making comments about the litigants publicly prior to the application being heard.³³¹ The Law Society also alleges that the Chief Justice “called the Deputy Director of Public Prosecutions into his chambers and told him not to prosecute the case” because it “is not a matter of priority or importance”.

³²⁷ See generally: ICJ, ‘Legal Commentary to the ICJ Geneva Declaration: Upholding the rule of Law and the Role of Judges and Lawyers in Times of Crisis,’ Human rights and Rule of Law Series, No.3, 2011, available at: <https://www.icj.org/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf>, pp 100-102 and 109.

³²⁸ The Constitution of the Kingdom of Swaziland Act 2005, section 150(6) reads:
“There shall be such divisions of the High Court consisting of such number of Justices respectively as the Chief Justice may determine after consultation with the Minister responsible for Justice and the President of the Swaziland Law Society.”

³²⁹ Mbongiseni Ndzimandze and Kwanele Dlamini, ‘LSS Questions Commercial Court Constitutionality’, *Times of Swaziland*, 20 June 2022, available at: <http://www.times.co.sz/news/135959-lss-questions-commercial-court-constitutionality.html>.

³³⁰ *Chief Justice of the Kingdom of Eswatini and Another v The Clerk of Parliament and Others* (906 of 2021) [2022] SZHC 45 (8 April 2022), available at:

<https://eswatiniilii.org/akn/sz/judgment/szhc/2022/45/eng@2022-04-08>, para 42: “I therefore come to the conclusion that I must invoke the inherent jurisdiction conferred upon this court and direct that the Principal Judge, by virtue of being the most senior Justice of the High Court (per s.150 (5) of the Constitution), be and is hereby ordered to empanel a full bench that will hear and decide this application.” See also para 44.2: “The Honourable Principal Judge, by virtue of being the most senior Justice of the High Court, is ordered to empanel a full bench to hear and decide this matter.” See, however, *Chief Justice of the Kingdom of ESwatini N.0 and other v Clerk of Parliament and Others* (28/2022) [2023] SZSC 54 (30 November 2023), available at: <https://eswatiniilii.org/akn/sz/judgment/szsc/2023/54/eng@2023-11-30>, in which the Supreme Court, nearly a year after the filing of this complaint, determined that the Supreme Court should hear an appeal of the above decision of the High Court.

³³¹ Cited in the complaint as: Director of Public prosecutions v Mfanukhona Johannes Dlamini & Another Case No. 18/2018.

- **Coercing an employee to withdraw complaints of sexual harassment:** On 16 December 2021, an employee of the High Court lodged a complaint to the Civil Service Commission of Eswatini,³³² alleging she had been sexually harassed by the Chief Justice, including by means of unwanted sexual advances. According to the Law Society’s complaint, “after the employee continuously refused his sexual advances, the Chief Justice removed her from working with him at the Supreme Court and demoted her to a lesser position”. The employee also alleged that the Chief Justice had replaced her with a relative of his. The Law Society notes, however, that the very next day she withdrew this complaint indicating that “she was asked by the Chief Justice to do so and that the Chief Justice undertook to restore her to her position”.
- **Banning of Muzi Simelane:** The Law Society’s complaint also provides details of the Chief Justice’s barring of Muzi Simelane from law practice, indicting that in so doing he acted *ultra vires* and usurped the proper function of the Law Society in terms of the Legal Practitioner’s Act. It describes the “banning” of Simelane as a “naked abuse of power” and that such “banning orders without due process have no place in a constitutional dispensation”.

Overall, the Law Society concludes that:

“We are witnessing the erosion of the rule of law and public confidence in the judicial system. The Chief Justice is at the forefront of the assault on the rule of law. His role as the head of judiciary is that of chief custodian of the law. Instead of fulfilling this important constitutional function, the Chief Justice has consistently breached the Constitution, the law, the Judicial Code of Ethics and his oath of office. He has abused power and interfered with the administration of justice”.

Lawyers interviewed by the ICJ generally reinforced the concerns raised about the Chief Justice both in the public domain, including through local media, and by the Law Society in its complaint. Even the lawyers interviewed for this report who were generally more sympathetic to the judiciary were extremely vocal in their criticism of the Chief Justice.

One lawyer expressed the view that the Chief Justice had introduced a “culture of corruption” in the judiciary and that he operated “in cahoots with” the State and a number of law firms.³³³ Another lawyer indicated simply that “the Chief Justice himself

³³² See: The Kingdom of Eswatini Ministry of Public Service website here: <https://www.gov.sz/index.php/departments-sp-1107500159/civil-service-commission-csc>. In terms of section 187 of the Constitution of the Kingdom of Swaziland Act 2005:

“187. (1) Subject to the provisions of this Constitution or any other law, the power of appointment (including acting appointments, secondments, and confirmation of appointments) promotion, transfer, termination of appointment, dismissal and disciplinary control of public officers shall vest in the Civil Service Commission.”

The Civil Service Order, Act 16 of 1963 defines “public officer” means any holder of any public office and includes any person appointed to act in any such office. See also the Civil Service Board (General Regulations), available at: https://www.gov.sz/images/stories/PublicService/1963_csb_regulations.pdf; See also: *Chief Justice of the Kingdom of ESwatini N.O and other v Clerk of Parliament and Others* (28/2022) [2023] SZSC 54 (30 November 2023), available at: <https://eswatiniilii.org/akn/sz/judgment/szsc/2023/54/eng@2023-11-30>.

³³³ Interviews conducted by ICJ, Interview #18.

is not an independent person”.³³⁴ A third lawyer said, “we don’t trust the Chief Justice”.³³⁵

Several lawyers indicated that in the aftermath of the June 2021 unrest, that the Chief Justice is alleged to have issued a “directive” to judicial officers,³³⁶ and in particular magistrates, to not grant bail arbitrarily to those charged with offenses relating to pro-democracy protests. One lawyer in particular indicated that court staff informed him as much: “They would just tell you that the Chief Justice has directed that this matter [relating to bail] cannot be heard or even brought.”³³⁷

Many of the lawyers interviewed for this report also noted that it is an “open secret” that the Chief Justice, who exercises significant control over judicial appointments, will only appoint those who have curried favour with him:

“Those people who are at the bench now, they don’t come by merit. No, it is what you have done for the CJ or what you are going to do for the CJ and the system.”³³⁸

Others indicate that it is also widely known that the Chief Justice is a “traditionalist” with political sympathies to the royal family and the King.³³⁹

The position held by the Chief Justice is as Indvuna YeMcube (Headman) at Kontjingila Chiefdom,³⁴⁰ a position which the High Court has confirmed he has held since 1995.³⁴¹ Several lawyers expressed the view that the close relationships between traditional authorities and the King and the fact that a Headman may effectively wield some quasi-executive or legislative powers, raises significant concerns in respect of the propriety of the Chief Justice’s occupation such a role.³⁴² At very least the Chief Justice’s position as Headman creates a strong risk of a reasonable perception of a lack of independence.

In terms of Eswatini’s domestic law, including the Constitution,³⁴³ the Chief Justice plays a critical role in the administration of justice, the advancement of the rule of and

³³⁴ Interviews conducted by ICJ, Interview #9.

³³⁵ Interviews conducted by ICJ, Interview #12.

³³⁶ ICJ has not been able to independently verify the existing of such a directive.

³³⁷ Interviews conducted by ICJ, Interview #16.

³³⁸ Interviews conducted by ICJ, Interview #13.

³³⁹ Interviews conducted by ICJ, Interview #14.

³⁴⁰ The Kingdom of Eswatini Ministry of Public Service, ‘Learn About Your Inkhundla,’ available at: <https://www.gov.sz/index.php/learn-about-your-inkhundla?view=article&catid=69:thinkundla-system-of-gov&id=1801:indvuna-yenkhundla-chairman>; Also, about ‘Inkhundla Administration’, available here: <https://www.gov.sz/index.php/ministries-departments/ministry-of-tinkhundla-administration/tinkhundla-administration?view=article&catid=100:tinkhundla&id=539:sandleni-inkhundla>.

³⁴¹ *Prince Velebantfu Dlamini v Inkosatana Gelane Simelane and 10 Others* (1547/2020B) [2023] SZHC 136) 05 June, 2023), available at: <https://eswatiniilii.org/akn/sz/judgment/szhc/2023/503/eng@2023-06-05/source>.

³⁴² See also Thulani Maseko, *The Nation* (September 2020): “Given that the Chief Justice is an active indvuna and other judges are chiefs in their other lives, their impartiality and political neutrality are compromised... eSwatini is a traditional society. In his capacity as indvuna, the CJ plays a leading political role in his community. He is in that capacity a politician dealing with highly contested political issues at the community level, advising the chief of the area. In our view, it compromises his position as the head of the judiciary.”

³⁴³ The Constitution of the Kingdom of Swaziland, section 139(5) makes the Chief Justice the head of the judiciary and renders the Chief Justice “responsible for the administration and supervision of the Judiciary”. Section 142 specifically empowers the Chief Justice to “make rules for regulating the

the protection of judicial independence. The Chief Justice is the “first among equals”,³⁴⁴ and retains important administrative and judicial functions, including in respect of case allocation, acting appointments of judges and chairing of the Judicial Service Commission. Where these powers are abused or misused, they create grave threats to the independence of the judiciary.

10. Issues relating to the June 2021 unrest

Much of the harassment of and many threats against lawyers described above were observed by interviewees to have significantly ramped up and intensified during and after the June 2021 protests.

One interviewee expressed the view that their work as a lawyer was perhaps “80 or 90 percent safer” before June 2021 because there were only a very small number of matters which would be considered controversial enough to elicit scrutiny from the authorities. While State authorities “would most certainly pressure people”, the pressure increased dramatically “immediately after the unrest and during the unrest,” when there became “certain matters you wouldn’t touch”.³⁴⁵ When asked why, the same lawyer emphasized that lawyers representing those involved in protests were seen as “destabilizing the country”:

“[I wouldn’t take those cases] just in fear of victimization. When we talk of victimization it may not be of me personally. I am born from a family which is originating from outside Swaziland. So you can imagine the threats that my father would come under when it is known that his son is part of activities which are viewed as those seeking to destabilize the country.”³⁴⁶

Another lawyer said:

“It was scary. I have never been so scared in my life... It was a scary experience. I think there is no one who would say they were not affected by those events.”³⁴⁷

practice and procedure of the superior and subordinate courts, including the specialised and local courts as well as powers of judicial officers”. In addition a wide range of constitutional provisions allocate specific roles of varying natures to the Chief Justice: section 35 and 105 (making rules in respect of the practice and procedure of courts); section 68(2)(a) (removal of the Prime Minister); section 77(9) (removal of Attorney General); section 150 (6) (designation of divisions of courts); section 153(3) (appointment of Acting Judges); section 158(3) (removal of judges); section 159(2) (Chief Justice is chairperson of the Judicial Service Commission); section 159(6) (removal of Judicial Service Commission members).

³⁴⁴ A description used in South Africa, see: *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* (CCT 53/11, CCT 54/11, CCT 62/11) [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) (29 July 2011), South Africa: Constitutional Court, available at:

<https://www.saflii.org/za/cases/ZACC/2011/23#sdfootnote82anc>. Though the description is equally applicable in Swaziland given the prominent role given to the Chief Justice in the Constitution.

³⁴⁵ Interviews conducted by ICJ, Interview #24.

³⁴⁶ Ibid.

³⁴⁷ Interviews conducted by ICJ, Interview #5.

While some lawyers were discouraged from involvement due to the severity of the response of the authorities to the protests, others who had previously not been involved in human rights lawyering were motivated to become active:

"I didn't really want to do anything politically affiliated. I didn't do anything politically affiliated then, so seeing the pictures of people that were shot and wounded and the reaction of our government towards that really made me say, 'No this cannot happen'. The first time I went there, I was with colleagues. What really touched me then and made me say, 'I really want to do this', was there was a woman there who had a baby. She had just given birth and she was breast feeding... she had been in custody for five days not being brought to court or being charged. She left her baby with her neighbor. The baby had no food, she hadn't left milk ... and she hadn't dressed warmly. So, I just got so emotional. I cried and my colleagues were like, 'You really don't know what goes on here'. So that really touched me."³⁴⁸

Some lawyers commented on the prevalence of criminal charges against their clients, which they allege to have been fabricated. As examples, they allege such charges were laid for doing nothing simply for having too many groceries or household items in their homes:

"They were criminal cases. As a lawyer, these were criminal charges, but criminal charges that were arbitrarily charged. They were fabricated. You can't come to my house and judge me for having six packets of salt, a whole packet of roll-on, a box of tissues."³⁴⁹

Some reported experiences in which the many cases before the criminal courts were dealt with collectively in truncated proceedings. In other words, a group of detainees charged with a criminal charge simply pled guilty as a group and their cases were not considered individually. Their lawyers say there was no possibility of pleading not guilty:

"But what was happening during the June 2021, it was just, once you make an appearance you were sure you were only going to be found guilty, it was either you pay fine, or you pay bail... There was just effectively, it was the courts which became at that period... we call it a revenue authority. So, the court were with the intention of just taking money from people for no reason."³⁵⁰

The types of criminal cases frequently brought included charges for theft, protesting unlawfully and traffic offences. The more serious cases which State prosecutors pursued more vigorously were those in which individuals were charged in terms of the Public Order Act, the Suppression of Terrorism Act and the Sedition and Subversion Acts. According to the lawyers interviewed, two years on from June 2021, many of those charged with these offences had still not had hearings.³⁵¹

³⁴⁸ Interviews conducted by ICJ, Interview #14.

³⁴⁹ Ibid.

³⁵⁰ Interviews conducted by ICJ, Interview #17.

³⁵¹ Overall information about these cases is difficult to find given the authorities failure to take measures to independently investigate the events of June 2021 and the consequences thereof more broadly. The failure to publish independent information compromises the rights of those effected by State responses to the events of June 2021 and diminishes the possibility of accountability more broadly. This report therefore relies substantially on information provided by lawyers of their experiences in this respect.

The lawyers interviewed indicated that it was commonly understood that the Chief Justice had issued a directive to judicial officers to not grant bail in certain cases pertaining to the June 2021 unrest. Bail was commonly denied and fines meted out by courts, sometimes without hearings in public court:

“You know a magistrate would just conclude everything in chambers with the prosecution and the accused and the police and that is all. When the lawyer comes, the client is not given bail or the client has been given the exorbitant amount of a fine. And you would just go around asking yourself and asking people what happened, and you won’t get answers. Magistrates were given specific instructions not to do to those specific political matters, even if it is a traffic matter but a traffic matter where you are found to be putting stones on the road. You are not supposed to do that. Those matters go to a specific magistrate and that, I think, some judge in Mbabane was saying that inside court: oh no we’re not doing that, we’re given specific instructions not to do those ones.”³⁵²

Even where bail was not explicitly denied, lawyers report that sometimes it was just set so high, for minor offences, that it would be in an accused’s best interests to pay a fine and admit guilt. For example, one lawyer indicates that lawyers commonly experienced bail being set at up to 8000 Emalengeni (approximately 450 USD) for traffic offenses carrying a maximum fine of 800 Emalengeni (approximately 45 USD):

“There were so many matters: public order, traffic matters and the sedition and the terrorism. Everything. It was difficult. The looting, you remember that looting. It was difficult for a person to get an attorney even The traffic offense of negligence and whatever, you know causing difficulty in the road whatever, it has an 800 limit of the fine. But then they would specifically [set] bail at 8000... They’ll [set] 8000 bail when at the end of the day it’s just an 800 that fine ... just to frustrate us, to make an example out of it.”³⁵³

Finally, lawyers indicated that court processes were often abused to frustrate them in these matters. For example, hearing dates were set, but on the day of the hearing they were postponed indefinitely, often on spurious grounds. In other instances, cases were simply removed from the docket without the lawyers being informed.

The harassment, surveillance and threats described above were alleged to have been targeted at lawyers who represented individuals in these and other cases, as was the hostility described in courts and the banning of lawyers from appearing in courts:

“Professionally, I found myself being flooded with a lot of cases of people who had been arrested because of the protests... If you represent [them], you are not treated well as a practitioner. You are seen as someone who is assisting or aiding someone who is defying the authorities and challenge the authorities. You will not get co-operation from the police, prosecutors and sometimes magistrates- the judicial officers.”³⁵⁴

In response to the ICJ in respect of this report, the Minister of Justice asserted that:

“the government is committed to ensuring lawful and peaceful protests. Law enforcement is mandated to intervene only in cases of criminal activities, not to

³⁵² Interviews conducted by ICJ, Interview #8.

³⁵³ Ibid.

³⁵⁴ Interviews conducted by ICJ, Interview #16.

target human rights defenders arbitrarily. Arrests occur solely when individuals breach the law, particularly when protests escalate into criminal acts, such as looting or destruction of property. These actions are neither spurious nor meant to suppress human rights defenders' activities but are consistent with legal procedures, as any charges brought forward are processed through the judicial system."³⁵⁵

The independence of judges and lawyers, while always essential, takes on added significance in the context of crises and democratic instability. In these circumstances, it is particularly important that lawyers can effectively represent clients who are, as human rights defenders, particularly at risk of repressive conduct from State authorities.³⁵⁶ The African Commission on Human and Peoples Rights has recently emphasized the importance of human rights defenders having "equal access to justice, including to an effective remedy".³⁵⁷ In its statement on the June 2021 protests in Eswatini, the Commission also called on Eswatini authorities to: "avail those whose rights have been violated by members of law enforcement institutions to have unhindered access to remedies, including reparation and compensation with indigent victims provided legal assistance."³⁵⁸

In its response to the ICJ in respect of this report, the Minister of Justice observed that "regarding investigations on criminal cases and public disorder incidents witnessed during the unrest period, the Royal Eswatini Police Service is committed to diligently, credibly, and transparently investigate all cases arising from the June 2021 civil unrest". The Minister added that "significant progress has been made in some of these cases, with suspects now awaiting trial for acts of violence and criminal offenses". The Minister also commented that "investigations into all these killings and criminal acts were instituted by the Police and there is a breakthrough in some of these cases", but that "some of the cases are complex and are taking longer to resolve due to various factors that have prolonged the completion of investigations".³⁵⁹

11. The extrajudicial killing of Thulani Maseko

The factual scenario relating to the killing of Thulani Maseko has been discussed above. Interviewees were asked about their views on the impact that the killing of Maseko has had on them and their ability to practice law independently in Eswatini.

Perception of State involvement in Thulani's killing

Although lawyers interviewed had differing views about the reasons for Maseko's killing, they almost unanimously suspect that his persistent legal representation of individuals challenging the government and the monarchy likely at least partly motivated his killing. And while some explicitly wanted to refrain from speculation not

³⁵⁵ See Annex G.

³⁵⁶ UN Human Rights Council, Report of the Special Rapporteur on the situation of human rights defenders, UN Doc. A/HRC/31/55, 1 February 2016, available at: <https://documents.un.org/doc/undoc/gen/q16/015/56/pdf/q1601556.pdf>, p 12.

³⁵⁷ Declaration on the Promotion of the Role of Human Rights Defenders and their Protection in Africa, The African Commission on Human and Peoples' Rights, meeting at its XX Ordinary Session held from XX to XX in Banjul, the Gambia, available at: <https://achpr.au.int/sites/default/files/files/2024-01/engdraft-african-declaration-hrd.pdf>.

³⁵⁸ ACHPR, Press statement on human rights situation in the Kingdom of eSwatini, 17 July 2021, available at: <https://achpr.au.int/en/news/press-releases/2021-07-17/press-statement-human-rights-situation-kingdom-eswatini>.

³⁵⁹ See Annex G.

backed by hard evidence, the majority of interviewees believed that State agents were likely involved in Mr Maseko's killing:

"The State wanted to clamp down on any form of opposition and they were feeling like their authority was not being felt, and they needed to set an example, and for me I saw it coming, they just wanted someone to make an example. And unfortunately, it was Thulani – he was the target."³⁶⁰

It is important to note that whether or not this conclusion is accurate, the mere fact that this perception is widely shared among lawyers has a chilling effect on the overall independence of lawyers in Eswatini. Another lawyer expressed the following view on the environment since Mr Maseko's killing:

"You know if you were attacked in your own house, you would call the police, but now it is the police or the state agents that are behind this. So, for most lawyers, and even myself, you would rather hide in your little corner there than to invite the wrath of these guys. It is better to stay safe."³⁶¹

Moreover, interviewees unanimously agreed that the Maseko's assassination has had a devastating effect on the independence of lawyers in Eswatini and their ability to practice without fear of threat or reprisal. Simply put, many lawyers fear for the life to such an extent that this fear impacts their ability to practice.

To understand the impact of Maseko's killing, it is important to understand what he had come to represent in Eswatini society. As Bheki Makhubu notes:³⁶²

"Thulani became the sore thumb, who stood by what he had always believed in. And because most of these guys [in positions of authority] were his peers and friends, they began to see him as an embarrassment and something not to associate with, because I did come to realize, particularly during the time we were in trouble and doing court, that most lawyers and most of the people in the court system, including judges, some of which he had gone to university with, were extremely hostile towards him...he became was a reminder of who they really were, serving the system. And in doing so, I think he gnawed at their consciences, because now they were the defenders of the system. So, they became hostile. They became very unkind to him. And so, yeah, I mean, for me, that kind of hypocrisy is contemptible....

[He was] the most respected among even his fellow comrades, you know, because he was more the thinker and the strategist... So, Thulani's death was a huge shock for everyone. And for others, perhaps he sent a message that nobody was now safe. And so, everybody ran for the hills. I would even venture to say, I think it also made us all pause and think and wonder, what the hell are we doing to each other, if people like Thulani are going to become victims of this whole process? Because of all people, if we had had a chat and you said, who could get killed for this thing? I would never have put Thulani's name in that list. Never. But it happened."

In the domestic environment, as a lawyer, several lawyers indicated that Maseko commonly took on matters that they were "scared" to take and had done so for years:

³⁶⁰ Interviews conducted by ICJ, Interview #24.

³⁶¹ Interviews conducted by ICJ, Interview #22.

³⁶² Interview with Bheki Makhubu.

"Thulani and I took matters that some people did not want to take.... [He] always took on those matters. It is in [his] DNA... it would have been strange for Thulani not to take them. It was expected. When all of us cowards ran away, he didn't."³⁶³

Another interviewee said:

"You see every day, you realized that Maseko was the beacon of litigation in Eswatini. Because he would take any matter, no matter who is being challenged. You go to another lawyer's office and they say, 'No we can't do these matters'. With or without intimidation, they will just tell you, 'No no no. I don't do those matters'. Maseko, there was no matter that he couldn't do. There was also the issue of the office. No matter what you are bringing, Maseko would press forward with it. His office was always open. For people and for lawyers. So now, I think a lot of people are suffering now because there is no lawyer that they can go to. So, I think it was a calculated move to kill Maseko. They knew what Maseko was doing. They knew how Maseko was assisting people. So now everything is dead. We just hear about these things in the newspapers. There is no follow up. Even if certain people didn't come to Maseko's office. If Maseko came across something in the newspaper, he would make an effort to find out, do those people need assistance. It was how Maseko was involved."³⁶⁴

A third interviewee simply said "so, when it comes to responses to human rights issues, it would be bold individuals; no one could match Thulani's boldness because Thulani wouldn't need any group around him to cover".³⁶⁵ A fourth lawyer described Mr Maseko as "encyclopaedia of human rights" noting that his death has "pulled everyone back" because he was "holding us up".³⁶⁶

One lawyer commented that "Thulani wasn't just like any other lawyer" and that "his role in the country, in the space of human rights and as a practitioner" was so critical that "no one can equal it" and "no one would say such as lose cannot be filled".³⁶⁷ Another commented that "[Thulani] has always been [the government's] their enemy number one. It was always coming for him to be more precise".³⁶⁸

Several lawyers pointed towards Maseko's importance in advocating for human rights and democracy in Eswatini internationally:

"You could say that he was the only credible voice internationally within the democratic movement, so he comes with the professional aspect of it and as an activist people are able to listen to him."³⁶⁹

"Thulani was a problem because he is known by so many people, he has friends all over the world with organizations that can exact pressure."³⁷⁰

"You see, civil society needed and coveted the fact that that they actually had somebody who could be able to get into any of the international circles and be

³⁶³ Interviews conducted by ICJ, Interview #21. See also, Interview #11.

³⁶⁴ Interviews conducted by ICJ, Interview #13.

³⁶⁵ Interviews conducted by ICJ, Interview #9.

³⁶⁶ Interviews conducted by ICJ, Interview #20.

³⁶⁷ Interviews conducted by ICJ, Interview #3.

³⁶⁸ Interviews conducted by ICJ, Interview #6.

³⁶⁹ Interviews conducted by ICJ, Interview #5.

³⁷⁰ Interviews conducted by ICJ, Interview #4.

able to present a credible, un rebuttable story about what has actually been going on, and Thulani was that person."³⁷¹

The impact of the killing of Mr Maseko has been immense. One lawyer described the impact as a "death blow" to lawyering for human rights in Eswatini:

"Thulani's killing has dealt us a death blow... we have been depressed by the situation... Thulani was the central pillar of the human rights movement of Eswatini and for all lawyers and it was really a huge loss."³⁷²

Another described Maseko's assassination as having "taken resilience from certain attorneys who are really passionate about the human rights struggle."³⁷³ Several other described it as "frustrating", "sad", "disheartening" or "devastating". Many lawyers indicate that they simply "cannot even take up these matters anymore now".³⁷⁴ This is because of the intimidation and fear resulting from Maseko's killing. One interviewee puts it in the following terms:

"We are intimidated. we are not free to do as we would like to do. We are no longer independent. Some lawyers will outright turn you away even if you have a strong case."³⁷⁵

Another emphasized that Maseko's death had marked a clear turning point for lawyers in Eswatini:

"I will say after the demise of Thulani, the mindset then changed. So, to be candid is that there is no one who wants to walk that walk, in fear of one's life. Which is a damper really to the rights of the people who are getting arrested."³⁷⁶

There has been some apparent fatigue among some lawyers in respect of fighting what are seen as uphill – and often losing – battles in courts:

"The energy is no longer the same. Those people were dedicated pre Thulani's death. You could call them anytime and have them take any case, but not anymore... We used to say that even if we go to court and know that we are not going to get the justice, but let us continue going to court. So, that is how I also felt that let us continue, but now that the lawyers are skeptical and fearful of taking these cases"³⁷⁷

While some lawyers explained that they saw Maseko's killing as a "warning" or an intimidation tactic, one lawyer indicated that even understanding it in this way underestimates its impact:

"You know with the Thulani case, I wouldn't say it was a warning. Killing Thulani was a huge destabilization because of his impact as an individual for the fight for political rights and human rights as well..."³⁷⁸

³⁷¹ Interviews conducted by ICJ, Interview #23.

³⁷² Interviews conducted by ICJ, Interview #7.

³⁷³ Interviews conducted by ICJ, Interview #12.

³⁷⁴ Interviews conducted by ICJ, Interview #13.

³⁷⁵ Interviews conducted by ICJ, Interview #16.

³⁷⁶ Interviews conducted by ICJ, Interview #17.

³⁷⁷ Interviews conducted by ICJ, Interview #10.

³⁷⁸ Interviews conducted by ICJ, Interview #3.

One lawyer observed that even those lawyers who may have taken issue with Maseko's work "were speaking up about it" because of the fact and manner of his killing:

"I think personally even if you did not like him, even if you did not support what he was doing, support his representing people, the voiceless, supporting human rights, but he was a family man and he was killed in the most brutal way. It was shocking, those pictures were everywhere. Even if you did not like him, that was sad. Everybody talked about that as well."³⁷⁹

While there seems to have been a large impact on many lawyers, the effect was particularly severe for those who had worked closely and publicly with Maseko over the years: "Really after Thulani's death, especially those who were so close and working with him on those cases, we were so scared".³⁸⁰

One lawyer said that "just after his death it was even difficult to walk out of your house and go to work. Each one of us was scared... the environment may have looked quiet but it [was] deadlier than before".³⁸¹ Another lawyer acknowledged that the effect of Thulani's killing was so "chilling" that the authorities had "won for now", explaining that "it [was] a victory on the part of the State because Thulani could not stand any injustice".³⁸² Yet another expressed concern that after the loss of Mr Maseko, and others before him "we will find ourselves having no one to fight for this place".³⁸³

Finally, one lawyer indicated that it had now become harder, once again, to encourage young lawyers and colleagues from the "mainstream profession", who were not typically human rights lawyers, "to come and lend a hand". This the lawyer noted, was an about face from the situation in the aftermath of June 2021, where some lawyers had offered such assistance.³⁸⁴

Compounding this impact has been the ongoing failure on the part of the Eswatini authorities to effectively investigate into Maseko's killing. As one lawyer noted in addition to being "scared off" and threatened, lawyers faced a reality in which they "don't know who shot [their] colleague".³⁸⁵ Another lawyer points out that the worry is compounded by the fact that while the government had made progress in prosecuting its critics who were involved in June 2021 protests, it has still not moved forward in respect of Thulani's killing:

"I am saying we would appreciate if we could have progress on what is being done with the investigation because we have seen other investigations where there are suspected paraded to say these are people who are suspected to have shot police, suspected to have burned structures, these are suspected to have done this, but our dear colleagues Thulani and [name omitted for security] we haven't yet gotten any progress on the investigations on what happened and who the suspects for their cases is."³⁸⁶

Under international and Eswatini law, responsible authorities must conduct independent, impartial, prompt, thorough, effective, credible and transparent

³⁷⁹ Interviews conducted by ICJ, Interview #8.

³⁸⁰ Interviews conducted by ICJ, Interview #9.

³⁸¹ Interviews conducted by ICJ, Interview #4.

³⁸² Interviews conducted by ICJ, Interview #5.

³⁸³ Interviews conducted by ICJ, Interview #6.

³⁸⁴ Interviews conducted by ICJ, Interview #15.

³⁸⁵ Interviews conducted by ICJ, Interview #21.

³⁸⁶ Interviews conducted by ICJ, Interview #14.

investigations into cases of suspected unlawful killings. As the African Commission on Human and People's Rights has affirmed:

"Whenever there is reasonable ground to believe that a human rights defender has been killed, disappeared, tortured, ill-treated, arbitrarily detained, threatened or subject to a violation of any of their rights, whether by a public authority or private actor within the territory or subject to its jurisdiction, the competent authority must ensure that a prompt, thorough, effective, independent and impartial investigation is conducted with due diligence and is prosecuted as appropriate."³⁸⁷

An identical call for an independent, impartial and effective investigation has been made by the UN High Commissioner for Human Rights.³⁸⁸

The failure to expeditiously and independently investigate Thulani Maseko's killing have been the subject of widespread condemnation, including by three independent experts of the UN Human Rights Council (Special Procedures) who in January 2024 noted that:³⁸⁹

"Investigations conducted into Thulani's death have made no substantive progress over the course of an entire year. This is outrageous and creates a climate of impunity and a chilling effect on the human rights movement in Eswatini....

"The lack of progress in the investigation into the tragic apparent targeted killing of such a prominent human rights defender and lawyer sends the message that the safety and protection of human rights defenders, civil society actors and lawyers is not guaranteed and not a priority for the State."

Despite consistent and continuing calls from several African and UN bodies and mechanisms, the Eswatini authorities have provided no information on what progress, if any, has been made in such investigations. Concerns exist about the possibility of the independence of efforts through the Eswatini police in the political and legal environment in Eswatini.³⁹⁰

³⁸⁷ Declaration on the Promotion of the Role of Human Rights Defenders and their Protection in Africa, The African Commission on Human and Peoples' Rights, meeting at its XX Ordinary Session held from XX to XX in Banjul, the Gambia, available at:

<https://achpr.au.int/sites/default/files/files/2024-01/engdraft-african-declaration-hrd.pdf>.

³⁸⁸ OHCHR, 'Türk condemns killing of Eswatini human rights lawyer, urges accountability', 23 January 2023, available at:

<https://www.ohchr.org/en/press-releases/2023/01/turk-condemns-killing-eswatini-human-rights-lawyer-urges-accountability>.

³⁸⁹ Ms. Mary Lawlor, Special Rapporteur on the situation of human rights defenders; Mr. Morris Tidball-Binz, Special Rapporteur on extrajudicial, summary or arbitrary executions; Ms. Margaret Satterthwaite, Special Rapporteur on the independence of judges and lawyers; and Mr. Clément Nyaletsossi Voule, Special Rapporteur on freedom of peaceful assembly and of association: OHCHR, 'Eswatini: Un experts commemorate human rights defender Thulani Maseko, deplore lack of accountability for his killing,' 22 January 2024, available at: <https://www.ohchr.org/en/press-releases/2024/01/eswatini-un-experts-commemorate-human-rights-defender-thulani-maseko-deplore>.

³⁹⁰ UN Human Rights Committee, General Comment 36 – Article 6: the right to life, CCPR/C/GC/36, 3 September 2019; OHCHR, The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, 2017, available at:

<https://www.ohchr.org/sites/default/files/Documents/Publications/MinnesotaProtocol.pdf>; ICJ, The

In its response to the ICJ in connection with this report the Minister of Justice of Eswatini explicitly recognized that “Mr Maseko was assassinated”, commenting that “the unfortunate incidence that led to the death of Mr. Thulani Maseko is still under investigation” and contested ICJ’s categorization of Thulani’s killing as an “extra-judicial killing”.³⁹¹

12. The shrinking of civic space more broadly

Many lawyers interviewed by the ICJ asserted that their experiences in Eswatini were part of a wider shrinking of civic space in the country.³⁹² One particular point of concern they raised is in respect of Non-Profit Organisations Bill, 2024³⁹³ developed by Swaziland’s Ministry of Home Affairs.

Senior government officials have, in debates about the Bill, asserted that the “core mandate” of many NGOs operating in the country “is to advance or drive social change”.³⁹⁴ Lindiwe Dlamini, Eswatini’s Senate President, for example, also expressed concern that “certain nations” funded such NGOs as part of their foreign policy objectives to “driv[e] social change according to their own perceptions” and “impose their own democratic systems” on Eswatini.³⁹⁵ Other senior public officials have associated June 2021 to “some of the NGOs” who were alleged to be “being used to finance violence and terrorism in the country”.³⁹⁶

A full analysis of the Bill is beyond the scope of this report. While the Bill does appear to focus significantly on “terrorism financing”, it is unclear what added function it plays given Eswatini’s already existing “robust legislative framework to combat money laundering, terrorism financing, and proliferation, which includes specific provisions for the non-profit sector”.³⁹⁷

The Bill creates new and additional offenses carrying hefty prison sentences for individuals and is therefore likely to have a chilling effect on NGO operations in the country to the detriment of the exercise of the rights to freedoms of association, expression, assembly, and public participation. The Coordinating Assembly of NGOs in Eswatini (CANGO) have expressed a range of concerns with the Bill,³⁹⁸ including that the Bill is a threat to the autonomy of NGOs in general and “especially those that

investigation and prosecution of potentially unlawful death: ICJ Practitioners’ Guide no. 14, 2019, available at: <https://www.icj.org/resource/the-investigation-and-prosecution-of-potentially-unlawful-death-icj-practitioners-guide-no-14/>.

³⁹¹ See Annex G.

³⁹² See also: The Foundation for Socio-Economic Justice in Swaziland, ‘Eswatini Shadow Report to the African Commission on Human and People’s Rights,’ available here: <https://www.icj.org/wp-content/uploads/2021/11/FSEJ-Eswatini-Shadow-Report-November-2021.pdf>, para 14.

³⁹³ The Bill is not readily available online, but is on file with the ICJ.

³⁹⁴ Sifiso Dlamini, ‘NGOS, Churches Pushing Political Agenda to be De-Registered,’ *Times of Swaziland*, 8 June 2024, available at: <http://www.times.co.sz/feed/news/145510-ngos-churches-pushing-political-agenda-to-be-de-registered.txt>.

³⁹⁵ Ibid.

³⁹⁶ Ibid.

³⁹⁷ CANGO Analysis of the NGO Bill, on file with the ICJ, available at <https://www.icj.org/wp-content/uploads/2025/02/ANALYSIS-OF-THE-NGO-BILL-Prepared-for-CANGO.pdf>. See also The Money Laundering and Financing of Terrorism (Prevention) Act, 2011, Act 6 of 2011.

³⁹⁸ ‘2023 NGO Bill will affect autonomy’, *Times of Eswatini*, 17 June 2024, available at: <https://www.pressreader.com/eswatini/times-of-eswatini/20240617/281930253147554?srsItd=AfmBOoq5YW1yqPub7bwEbP23c99QkWWMRc2MRaZl6khcOiqy9pb- uPI> .

promote human rights”.³⁹⁹ They have argued that the Bill’s provisions are “vague and unjustly imply that NGOs are involved in unlawful activities” and impose “excessively harsh regulatory measures,” thereby “grant[ing] the government unwarranted control over NGO operations, including the authority to suspend or terminate organizations”.⁴⁰⁰

Eswatini has an obligation as a party to the ICCPR to respect and ensure the rights to freedom of expression and information (Article 19), freedom of peaceful assembly (Article 21) freedom of association (Article 22) and public participation (article 25). It has similar obligations as a party to the African Charter on Human Peoples Rights (Articles 9,10,11 and 13). Restrictions and restrictive measures on these rights must be established by law in conformity with the principle of legality. They may only be taken for one of the enumerated legitimate purposes (national security, public order, public health or morals, protection of the rights of others), must be strictly necessary for those purpose and a proportionate and least restrictive means of meeting such the objectives. They must also be non-discriminatory.⁴⁰¹

The UN Special Rapporteur on the rights to peaceful assembly and association, has called attention to the “trend of overregulation of the civil society sector under the guise of counter-terrorism measures”,⁴⁰² and recommended that “measures targeting harmful activities, such as terrorist financing” must not “unduly or inadvertently restrict associations’ right to access resources, including financial resources, to carry out their legitimate activities”.⁴⁰³ The Special Rapporteur has also identified the increasing practice of practice of organizations “being stigmatized and unfairly treated as a result of the information revealed in registration forms and procedures”.⁴⁰⁴ Often laws are “designed to control the civil society sector, giving extensive powers to the executive authorities to regulate civil society”.⁴⁰⁵

³⁹⁹ Ibid.

⁴⁰⁰ CANGO Analysis of the NGO Bill, on file with the ICJ, available at <https://www.icj.org/wp-content/uploads/2025/02/ANALYSIS-OF-THE-NGO-BILL-Prepared-for-CANGO.pdf>.

⁴⁰¹ See: UN General Assembly, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association,’ UN Doc. A/74/349, 11 September 2019, available at: <https://documents.un.org/doc/undoc/gen/n19/276/22/pdf/n1927622.pdf>, para 50.

⁴⁰² Ibid, para 2.

⁴⁰³ Ibid, para 52.

⁴⁰⁴ Ibid, para 50; UN General Assembly, Rights to freedom of peaceful assembly and of association’ [the report of the Special Rapporteur on the right to freedom of peaceful assembly and of association, Clément Nyaletsossi Voule], UN Doc. A/77/171, 15 July 2022, available at: <https://documents.un.org/doc/undoc/gen/n22/427/29/pdf/n2242729.pdf> para 38. The UN Special Rapporteur on the rights to peaceful assembly and association, has called attention to the “trend of overregulation of the civil society sector under the guise of counter-terrorism measures”, and recommended that “measures targeting harmful activities, such as terrorist financing” must not “unduly or inadvertently restrict associations’ right to access resources, including financial resources, to carry out their legitimate activities”. The Special Rapportuer has also identified the increasing practice of practice of organizations “being stigmatized and unfairly treated as a result of the information revealed in registration forms and procedures”. Often laws are “designed to control the civil society sector, giving extensive powers to the executive authorities to regulate civil society”.

⁴⁰⁵Ibid, UN Doc. A/77/171, para 38 which notes examples:

“Troubling developments in that context include decree No 4-2020 in Guatemala, by which the Government was granted extensive powers over civil society space and which survived a constitutional challenge in 2021; the adoption of the General Law for the Regulation and Control of Non-Profit Organizations in Nicaragua, which entered into force on 6 May 2022 and imposes tight controls on civic space; a draft law on the operations of non-governmental organizations and a draft law on the promotion and development of civil society organizations in Thailand, by which the authorities are to be granted extensive

In 2023, the ACHPR recognized the prevalence of “threats and violence against human rights defenders and activists in the Kingdom of Eswatini”⁴⁰⁶ and called upon authorities to “refrain from any form of victimization, harassment, intimidation and targeting of human rights defenders”. States are more broadly required to ensure that associations are not “subject to stigmatization, harassment, threats, and attacks ... on the basis of the sources of their funding”.⁴⁰⁷

The comments cited above by senior public officials in the wake of the June 2021 unrest raise serious concerns about the purpose of the Bill, which some civil society actors have suggested is specifically related to the mere receipt of foreign funding. Instead of taking measures to prevent and redress attacks on human rights defenders, the Bill signals an intent to clamp down on civil society actors and civic space – including lawyers and their clients – by the Eswatini authorities.

Read alongside ICJ’s interviews for this report, CANGO’s concerns that NGOs will “fear reprisals for opposing government positions” appear to be well-founded. As lawyers taking cases on behalf of human rights defenders often work with NGOs, the impact the Bill has on NGOs will directly affect the ability of lawyers to operate independently.

oversight powers; a new draft law on international cooperation in the Bolivarian Republic of Venezuela, which would grant the Government broad powers over civil society organizations’ access to funding; amendments to the Law on Non-Commercial Organizations in Kyrgyzstan, which impinge on the right to freedom of association; and draft amendments to the Decree Law on the Organization of Associations in Tunisia. In Libya, in July 2021, the Government of National Unity proposed a draft regulation on the work of civil society organizations under which the executive would be granted extensive and excessive powers to restrict, suspend and dissolve associations. In addition, by circular No. 10 of 2021, the President of the Government of National Unity in Libya imposed several restrictions on civil society, including by limiting their collaboration with the United Nations.”

See also: UN Human Rights Council, General principles and guidelines on ensuring the right of civil society organizations to have access to resource (Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsossi Voule), UN Doc. A/HRC/53/38/Add.4, 23 June 2023, available at: <https://www.ohchr.org/en/documents/thematic-reports/ahrc5338add4-general-principles-and-guidelines-ensuring-right-civil>.

⁴⁰⁶ ACHR, Resolution on the Situation of Human Rights in the Kingdom of Eswatini - ACHPR/Res.554 (LXXV) 2023, 11 June 2023, available at: <https://achpr.au.int/en/adopted-resolutions/554-resolution-situation-human-rights-kingdom-eswatini>.

⁴⁰⁷ UN Human Rights Council, General principles and guidelines on ensuring the right of civil society organizations to have access to resource, op. cit., Principle 7, paras 39-42.

D. Recommendations

In its engagement with the situation of the rule of law, human rights and the administration of justice in Eswatini over the course of two decades, the ICJ has offered a variety of institutional and specific recommendations, including particularly to the Eswatini authorities aimed at securing the independence of judges and lawyers and the fair and equal administration of justice. Some of these recommendations are restated below. Other recommendations focus more specifically on aspects relating to issues raised directly by interviews in compiling this report. Nevertheless, the recommendations that follow complement the recommendations made in previous reports, most of which remain pertinent.

To safeguard the rule of law and the separation of powers, and in compliance with international law and standards, the ICJ provides the following recommendations to the responsible Eswatini authorities:

Responsible executive authorities, including the Prime Minister and the Minister of Justice

1. Pursue avenues for constructive dialogue, inclusive of all stakeholders, towards constitutional reform to ensure the creation of a democratic society based on human rights and the rule of law in Eswatini.
2. Implement recommendations made by the African Commission on Human and Peoples' Rights in respect of the independence of judges and lawyers in communications decisions pertaining to Eswatini.⁴⁰⁸
3. Implement recommendations of the United Nations independent human rights experts, including the Human Rights Committee,⁴⁰⁹ the UN Special Rapporteur on the independence of judges and lawyers⁴¹⁰ and other Special Procedures of

⁴⁰⁸ *Lawyers for Human rights v. Swaziland*, African Commission on Human and Peoples' Rights, Comm. No. 251/2002 (2005), available at: <http://www.icj.org/wp-content/uploads/2014/06/lawyers-for-human-rights-v-swaziland.pdf>; *Justice Thomas S. Masuku v. The Kingdom of Swaziland*, ACHR, Comm. No. 444/13 2021, ACHPR 518 (2021) available at: <https://africanlii.org/akn/aa-au/judgment/achpr/2021/518/eng@2021-07-19>; ACHR, Resolution on the Situation of Human Rights in the Kingdom of Eswatini – ACHPR/Res.554 (LXXV) 2023, 11 June 2023, available at: <https://achpr.au.int/en/adopted-resolutions/554-resolution-situation-human-rights-kingdom-eswatini>; Press Statement on the brutal murder of prominent Swati human rights activist, Adv. Thulani Maseko, 23 January 2023, available at: <https://achpr.au.int/en/news/press-releases/2023-01-23/press-statement-brutal-murder-prominent-swati-human-rights-activist>; Press Statement at the Conclusion of the Promotion Mission of the African Commission on Human and Peoples' Rights to the Kingdom of Swaziland, 14 March 2016, available at: <https://achpr.au.int/index.php/fr/node/1900>; Press statement on human rights situation in the Kingdom of eSwatini, 17 June 2021, available at: <https://achpr.au.int/en/news/press-releases/2021-07-17/press-statement-human-rights-situation-kingdom-eswatini>.

⁴⁰⁹ UN Human Rights Committee, List of issues in the absence of the initial report of Swaziland, CCPR/C/SWZ/Q/I, 13 April 2017, available: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=CCPR/C/SWZ/Q/1&Lang=en; Human Rights Committee discusses the implementation of Civil and Political Rights in Swaziland, 10 July 2017, available at: <https://www.ohchr.org/en/press-releases/2017/07/human-rights-committee-discusses-implementation-civil-and-political-rights>.

⁴¹⁰ 'UN human rights expert concerned over deteriorating rule of law in Swaziland,' 4 December 2002, available at : <https://news.un.org/en/story/2002/12/53262>; 'UN rights expert expresses concern over threats to the independence of lawyers in Swaziland,' 27 June 2003, available at: <https://www.ohchr.org/en/press-releases/2009/10/un-rights-expert-expresses-concern-over-threats-independence-lawyers>.

the UN Human Rights Council,⁴¹¹ and the High Commissioner for Human Rights.⁴¹²

4. Implement the recommendations that the government has already accepted from States at the UN Human Rights Council in terms of the UPR process in respect of the independence of judges and lawyers.⁴¹³ Accept other recommendations that it has yet to support.
5. Immediately desist from interference of any kind with the functions and powers of judges and judicial officers and the functions of lawyers to ensure the independent operation of the judiciary and legal profession consistently with international law and standards.
6. Immediately desist from any acts of persecution, intimidation and harassment of lawyers. This should include measures to:
 - a. end completely unlawful surveillance of lawyers in connection with their carrying out their professional functions;
 - b. provide protection to lawyers who report intimidation, harassment and reprisal;
 - c. actively and publicly condemn any assertions of connection or association between the views and actions of lawyers and their clients and promote a public understanding of the critical role of lawyers in advancing the rule of law and human rights.
7. Immediately declare a moratorium on the application of the Sedition and Subversive Activities Act, the Suppression of Terrorism Act and the Public Order Act to target human rights defenders, lawyers, and those conducting protests for democratic and constitutional reform.
8. Reevaluate and review the charging, sentencing and conviction of individuals in terms of public order laws relating to the June 2021 unrest, with a view to:
 - a. assessing their conforming with domestic and international human rights law; and
 - b. redressing any improper charges or unfair trials, including, where warranted, by quashing convictions.
9. Take steps to quash the convictions of Mduduzi Bacede Mabuza and Mthandeni Dube.
10. Establish a fully independent mechanism—consisting of a mix of independent Eswatini lawyers and independent international legal experts, including from the African region, with a view to expediting effective, thorough and impartial investigations of:
 - a. the deaths and injuries of protests in connection with June 2021 unrest;
 - b. the extrajudicial killing of Thulani Maseko;

⁴¹¹ OHCHR, 'Eswatini: Un experts commemorate human rights defender Thulani Maseko, deplore lack of accountability for his killing,' 22 January 2024, available at: <https://www.ohchr.org/en/press-releases/2024/01/eswatini-un-experts-commemorate-human-rights-defender-thulani-maseko-deplore#:~:text=Margaret%20Satterthwaite%2C%20Special%20Rapporteur%20on,peaceful%20assembly%20and%20of%20association.>

⁴¹² OHCHR, 'Türk condemns killing of Eswatini human rights lawyer, urges accountability,' 23 January 2023, available at: [https://www.ohchr.org/en/press-releases/2023/01/turk-condemns-killing-eswatini-human-rights-lawyer-urges-accountability.](https://www.ohchr.org/en/press-releases/2023/01/turk-condemns-killing-eswatini-human-rights-lawyer-urges-accountability)

⁴¹³ UN Human Rights Council, Decision adopted by the Human Rights Council on 23 March 2022, (49/109 – Outcome of the universal periodic review: Eswatini), UN Doc. A/HRC/DEC/49/109, 29 March 2022, available at: <https://documents.un.org/doc/undoc/gen/q22/296/14/pdf/q2229614.pdf>. Report of the Working Group on the Universal Periodic Review: Eswatini, UN Doc. A/HRC/49/14, 7 January 2022, available at: <https://documents.un.org/doc/undoc/gen/q22/002/92/pdf/q2200292.pdf>; Report of the Working Group on the Universal Periodic Review: Eswatini (Addendum), UN Doc. A/HRC/49/14/Add.1, 3 March 2022, available at: <https://documents.un.org/doc/undoc/gen/q22/275/41/pdf/q2227541.pdf>.

- c. the harassment, intimidation and targeting of lawyers and human rights defenders, for alleged conduct relating to legitimate exercise of freedom of expression and political participation, including that involving criticism of the government and government policy and conduct, calling for constitutional reform and advocating for democracy and human rights.
11. So as to facilitate efforts by lawyers to advance human rights and the rule of law, coordinate with the Legislature to take the necessary steps, in keeping with appropriate procedures in terms of domestic law, to ensure that Eswatini ratifies or accedes to, and implements into national law, international human rights and criminal law treaties to which Swaziland is not yet a party. Such treaties include:
 - a. the International Covenant for the Protection of all Persons from Enforced Disappearances;
 - b. the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR);
 - c. the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty;
 - d. the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights;
 - e. the Optional Protocol to the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment;
 - f. the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women;
 - g. The Optional Protocol to the Convention on the Rights of the Child on a communication procedure;
 - h. the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; and
 - i. the Rome Statute of the International Criminal Court.
 12. Comply with its reporting obligations to all treaty bodies, including by submitting any overdue reports to treaty body mechanisms expeditiously.
 13. Take all appropriate measures, taking care to respect the separation of powers, to ensure that the appointment of temporary, casual or short-term judges ceases. Such appointments, which are not desirable even in situations of crisis, where they occur, must not only be justified by an absolute need for enhanced judicial capacity, but should also only be made where judges so appointed are afforded the same institutional and individual guarantees of judicial independence afforded to permanent judges.⁴¹⁴
 14. Ensure the expeditious resolution, through the appropriate constitutional channels and processes,⁴¹⁵ of the complaint initiated by Law Society against the Chief Justice in December 2022.

Legislative authorities

1. Undertake a comprehensive legislative review process, particularly in respect of the Judicial Services Commission Act, the Legal Practitioner's Act and other legislation pertaining to the judiciary and the legal profession, to ensure that the State's legislative framework concerning the administration of justice is in

⁴¹⁴ ICJ, 'Legal Commentary to the ICJ Geneva Declaration: Upholding the rule of Law and the Role of Judges and Lawyers in Times of Crisis,' Human rights and Rule of Law Series, No.3, 2011, available at: <https://www.icj.org/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf>, principle 6.

⁴¹⁵ The Constitution of the Kingdom of Swaziland Act 2005, section 158.

compliance with the Constitution and international law and standards. This should include clear provisions relating to:

- a. The removal of any control or undue influence by the Crown in respect of the composition of the Judicial Services Commission and the judiciary;
 - b. Clear, transparent and appropriate processes with detailed and objective criteria for the appointment, promotion, suspension, transfer and promotion of judicial officers;
 - c. Legislation relating to the appointment of acting or temporary judges should be enacted, setting out the following:
 - i. A threshold by which to determine in which situations an “emergency” or “crisis” involves such a severe shortage of judges that it risks institutional collapse in the fair administration of justice in the absence of temporary appointments.
 - ii. That temporary appointments must be subject to clear, transparent and appropriate processes with detailed and objective criteria for the appointment of acting or temporary judges.
 - iii. That temporary judges so appointed are afforded the same institutional and individual guarantees of judicial independence afforded to permanent judges.
 - d. Measures to ensure the full and effective participation of the legal profession, civil society and the general public in the appointment process of judicial officers.
2. Review and repeal or amend the Sedition and Subversive Activities Act, the Suppression of Terrorism Act and the Public Order Act to ensure compliance with the Constitution and international law and standards.

Judicial authorities

1. Conduct a thorough review of the “Judicial Code of Ethics for the Judiciary of Swaziland” and following a consultative process with members of the legal profession, revise the Code to ensure its consistency and compliance with the Constitution and international law and standards.
2. Publish online and in other accessible platforms any judicial directives that have been or are issued pertaining to the operation of the judiciary.
3. Set up an independent review committee staffed with former and current judges, with a demonstrated record of independence and high competence, from jurisdictions outside of Eswatini to review all standing judicial directives to ensure their consistency with the Constitution and international law and standards.
4. Withdraw all banning orders – whether formal or informal – against individual lawyers from attending to matters in specific courts or in front of specific judicial officers.
5. Develop, publish and transparently implement a process for case allocation which is impartial, fair and consistent with the Constitution and international law and standards. Remove direct control by the Chief Justice or any other single judicial officer to influence the allocation and management of cases.
6. Cease the appointment of temporary, casual or short-term judges, unless – and in compliance with regional and universal international and national law and standards – there is an absolute need due to potential conflicts of interest or the need to clear case backlogs.
7. Hold regular consultations between the Judiciary and the Law Society and all sectors of the Bar with a view to ensuring a fairer and more effective administration of justice and ensuring an appropriate professional relationship between the Judiciary and the legal profession.

Law Society

1. Review the effectiveness of efforts made by the Law Society to secure the independence of lawyers, taking into account, in particular:
 - a. the personal security of lawyers undertaking cases that perceived to be controversial, including human rights cases;
 - b. attempts to harass, intimidate, threaten and conduct surveillance on lawyers undertaking cases that perceived to be controversial including human rights cases; and
 - c. the practice by some judicial officers of banning lawyers from appearing in particular courts and/or in front of particular judicial officers.
2. Review the effectiveness of efforts made by the Law Society to secure the independence of judges and to protect them and their judicial functions, taking into account, in particular:
 - a. The effectiveness of the Law Society's role within the Judicial Service Commission;
 - b. The slow progress in the assessment of the Law Society's complaint against the Chief Justice filed in December 2022; and
 - c. Its responses to attempts by executive authorities, members of the judiciary and any other individuals or entities to place pressure on inappropriate influence individual judges in specific cases.
3. Take all necessary and appropriate measures to ensure the institutional independence of the Law Society, insulating the Law Society, the Council of the Law Society and members of the Law Society from inappropriate influence and pressure by executive and other authorities.
4. Take appropriate measures within its powers to advocate for:
 - a. An expeditious, effective and independent investigation into the killing of Thulani Maseko;
 - b. An expeditious, effective and independent investigation into the State's response to the June 2021 unrest, including the harassment, intimidation and threatening of lawyers whose clients are charged with public order offenses relating to the unrest.

States providing economic, develop and other assistance and cooperation with Eswatini

1. Donor countries should call on Eswatini to enact reforms such as those recommended in this report and take steps to ensure that its economic assistance does not facilitate threats or harms to the rule of law and human rights, including:
 - a. undermining of the independent legal profession;
 - b. impeding the independence of judiciary; and
 - c. repressing the exercise of the rights of freedom of expression, association, assembly and public participation of human rights defenders.
2. The European Union should take measure to promote and advance the implementation of the Partnership Agreement between the European Union and its Member States, of the one part, and the Members of the Organisation of

African, Caribbean and Pacific States, (Samoa agreement) ⁴¹⁶ including the African Regional protocol, in particular:

- a. title one concerning human rights, democracy, and governance in people-centred and rights-based societies; and
- b. title 5 in the African regional agreement on human rights, democracy and governance.

⁴¹⁶ EU, 'Partnership Agreement between the European Union and its Member States, of the one part, and the Members of the Organisation of African, Caribbean and Pacific States, of the other part,' Document 22023A02862, 28 December 2023, available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=OJ:L_202302862 .

E. ANNEX A – SUMMARY OF ICJ PUBLICATIONS ON ESWATINI

ICJ Bulletin (1987)

In 1987, an article in an ICJ bulletin recorded that between 1968 and 1986 “actions taken by the executive and legislation passed by Parliament tended to interfere with the jurisdiction of the courts” and that “there were actions taken by members of the executive which had the effect of impinging upon the independence of the legal profession”.⁴¹⁷

Fact Finding Mission (2003)

In a report at the conclusion of a fact-finding mission in 2003, the ICJ noted that challenges documented in the report were “rooted in a past whereby the Executive routinely threatened judicial independence where it conflicted with entrenched interests” and that “periodic attacks on judicial independence in Swaziland have given way to Executive attitudes holding the judiciary, rule of law and the separation of powers in virtual contempt”.⁴¹⁸

The fact-finding mission followed on a crisis in the judiciary caused by a Government statement refusing to comply several court decisions which it claimed would “strip the king of some of his powers” and “emasculat[e] the legitimate authority of the king, an authority which has been accorded to Swazi kings since time immemorial.”⁴¹⁹ This public statement led the resignation, in protest, of six judges of the Supreme Court.

The report raised various concerns relating to judicial independence including: lack of independent court budget; lack of trained support staff and problematic case management techniques. It also condemned “incessant” and ongoing attacks on the judiciary and threats made directly by government Ministers to judges before particular matters, including threats of demotion and requests for judges to resign. It also records judges being “summoned” by the King and “ordered... to not rule against the Government” in particular matters.⁴²⁰

The report also drew attention to some concerns relating to the ability of lawyers to operating freely and independently. While describing civil society organizations as “relatively weak and inactive” it notes that the rule of law crisis has “served to galvanise many organisations against State efforts to strengthen its power by emasculating the judicial arm of Government”. Lawyers had been vocal in this respect. The report also notes that the Government had threatened certain lawyers with deportation, and that members of banned opposition political parties had been unsuccessfully prosecuted for sedition.

⁴¹⁷ ICJ, Centre for the Independence of Judges and Lawyers Bulletin Nos.19 and 20, April-October 1987, available at: <https://icj2.wpenginepowered.com/wp-content/uploads/2013/10/CIJL-Bulletin-1920-1987-eng.pdf>, p 27-8.

⁴¹⁸ ICJ, Report of the Centre for the Independence of Judges and Lawyers (Fact-Finding Mission to the Kingdom of Swaziland), June 2003, available at: https://icj2.wpenginepowered.com/wp-content/uploads/2012/03/swaziland_fact_finding_10_06_2003.pdf, p 4.

⁴¹⁹ Ibid, p 24.

⁴²⁰ Ibid, p 2.

Attacks on Justice (2005)

This report, published in 2008, notes at the outset that “political activities continue to be prohibited and political activists, as well as journalists” were routinely “harassed by the police”.⁴²¹ Similarly, it recorded that “demonstrations and meetings of pro-democracy activists, political groups and workers’ unions have been forcibly dispersed by the police” and “security forces and government officials have reportedly continued to use torture, ill-treatment and excessive force with impunity”.⁴²²

This situation was worsened by the 2002 enactment of the Internal Security Act which “provides for harsh penalties for anyone participating in, or organizing, political demonstrations and outlaws ‘support’ for any political parties already banned since the King’s Proclamation of 12 April 1973”.⁴²³

Moreover, the report finds that Government had failed to “investigate, prosecute and discipline police officers responsible for human rights abuses, including torture, excessive use of force and death in custody” and that “no independent and impartial body has the authority to investigate police abuses”.⁴²⁴

While noting the importance of the enactment of the 2005 Constitution, the ICJ expressed disappointment that in terms of the new Constitution, “the King remains above the law and continues to be empowered to approve bills or withhold his consent”.⁴²⁵

The report notes the King’s demotion of a High Court judge, Justice Thomas Masuku, to lower court because of the judge’s refusal to process legal applications from the Government until the Government retracted its statement refusing to obey court orders.⁴²⁶

Swaziland – Country Profile (2014)

In 2014 the ICJ’s Centre for the Independence of Judges and Lawyers published a “Country Profile” for Swaziland,⁴²⁷ which provides a detail overview of the independence of judges and lawyers in the country. In respect of judicial independence it concludes:

“In Swaziland, despite constitutional guarantees and safeguards, the judiciary is not independent. The executive does not consistently respect the principle of judicial independence. Further, among other things, the King controls judicial appointments and there have been concerns about the independence of procedures related to judicial accountability, as well as about judges upholding the integrity of their office.”⁴²⁸

⁴²¹ ICJ, ‘Attacks on Justice 2005: Swaziland’, 2008, available at: <https://www.icj.org/resource/attacks-on-justice-2005-swaziland/>, p 2.

⁴²² Ibid.

⁴²³ Ibid.

⁴²⁴ Ibid.

⁴²⁵ Ibid, p 3.

⁴²⁶ Ibid, p 7.

⁴²⁷ ICJ, ‘Swaziland: Country Profile Prepared by the ICJ Centre for the Independence of Judges and Lawyers,’ 2014, available at: <https://www.icj.org/wp-content/uploads/2014/06/CIJL-Country-Profile-Swaziland-June-2014.pdf>.

⁴²⁸ Ibid, p 1.

In respect of the independence of the legal profession it finds:

“The right to legal representation is not always guaranteed, and the ICJ has received reports of intimidation, harassment and interference with the work of lawyers in Swaziland. Among other things, lawyers’ freedom of expression is not always respected either, and concerns have been raised regarding the implementation of disciplinary proceedings.”⁴²⁹

Justice Locked Out (2015)

In 2015, the ICJ once again undertook a fact finding mission to Eswatini following the attempted arrest and impeachment of Chief Justice Ramodibedi and the arrest of the Minister of Justice, two High Court judges and a High Court Registrar. The arrests were ostensibly made on various charges related to corruption and the obstruction of justice.

The report concludes that “this latest crisis is part of a worrying trend of repeated interference by the Executive and of the Judiciary’s inability to defend its independence”.⁴³⁰ It observes that, in Swaziland, “the rule of law is weak” and there is a “long history of disregard for the independence of the Judiciary and violations of human rights”.⁴³¹

Decrying the Eswatini Constitution’s failure to provide for the “necessary safeguards” to “guarantee” judicial independence concluding that the legislative and regulatory framework is also inadequate and does “not respect the separation of powers”.⁴³² This results in a “de facto lack of independence of the Judiciary’s governing bodies”.⁴³³ The report describes the Swazi judiciary as in a “fragile and degraded state”.⁴³⁴

Moreover, the report calls the conduct of the Chief Justice into question, concluding that attacks on the judiciary by the Executive coupled with the Chief Justice’s failure to “defend the institutional independence of the Judiciary” had “created conditions conducive to abuse of the legal system for personal gain”.⁴³⁵

The Chief Justice’s failures stemmed, in part, from the “warm relationship” between himself and the executive resulting in collusion to “obtain favourable court judgements against human rights defenders critical of Swaziland’s monarchical rule and its governance and policies”.⁴³⁶ Indeed the Chief Justice’s involvement in “factional politics” and “power struggles within the Executive and the Monarchy” which, lead, in part, the judicial crisis.⁴³⁷

Chief Justice Ramodibedi’s tenure also produced “factional divisions” with the Judiciary which “bred an atmosphere of mistrust, suspicion and fear amongst individual judges”,⁴³⁸ a situation which the ICJ described as:

⁴²⁹ Ibid.

⁴³⁰ ICJ, ‘Justice Locked Out: Swaziland’s rule of Law Crisis’ (International Fact-finding Mission Report), 2015, available at: <https://www.icj.org/wp-content/uploads/2016/02/Swaziland-Justice-locked-out-ROL-crisis-Publications-Fact-Finding-Mission-Report-2016-ENG.pdf>, p 5.

⁴³¹ Ibid, p 10.

⁴³² Ibid, p 8.

⁴³³ Ibid.

⁴³⁴ Ibid, p7.

⁴³⁵ Ibid, p 9.

⁴³⁶ Ibid, p 13.

⁴³⁷ Ibid, p 14 and p 16.

⁴³⁸ Ibid, p 17.

“not conducive to the judges’ proper discharge of their mandate and makes the Judiciary susceptible to interference with its independence by the Executive and private forces wielding influence. It also affects the confidence of the public in the Judiciary and the administration of justice”.⁴³⁹

The report also decries the Crown’s “comprehensive[] control[] [of] judicial appointments”, which is realized through its “full control over appointments to the Judicial Services Commission, creating a great risk of undermining the independent character of individual members of the [Commission].”⁴⁴⁰ In practice, in any event, the Commission’s advisory function has been interpreted and applied in such a manner that the “King may freely reject” its advice.

Control over the appointment process more generally was found to be an “important contributing factor to the lack of judicial independence.” Notably, report highlighted the abuse of the appointment of acting judges for specific, some of whom did not meet the minimum requirements for appointment, and the inappropriate control exercised by the Chief Justice of over case allocation, with a “high possibility of collusion between the Chief Justice and the Crown and members of the Executive”.⁴⁴¹

The report also condemned the practice, exercised on a number of occasions of issuing arrest warrant against members of the judiciary as recrimination for decisions made by them. While noting that these warrants were typically withdrawn, the issuing of such warrants in contravention of an explicit constitutional provision, appears to have been used “merely as a measure of harassment”.⁴⁴²

In respect of the independence of lawyers, describing the relationship between the Law Society and the judiciary as “tense and frosty”, the report notes that judges have, on occasion, “advised parties to proceedings that they would not get a judgement in their favour due to their representation by lawyers who are viewed as ‘agents of regime change’.”⁴⁴³ The Law Society, had, in 2011, initiated a “collective boycott” of the courts for over four months in response to the issuing of a directive by the Chief Justice “preventing all Swazi courts from receiving or entertaining any case that challenges the King directly or indirectly”.⁴⁴⁴ The Law Society also laid an official complaint to the Judicial Service Commission in this regard, and, after the Commission failed to take action, filed a communication against Swaziland at the ACHPR.⁴⁴⁵

Finally, the report noted that in this overall environment, there was “very little public confidence in the Judiciary” and uncertainty in Swaziland in respect of “whether or to what extent most members of the general population considered the Judiciary an accessible and effective means of delivering justice”. Instead, the judiciary was perceived by many as “primarily a tool to protect the interests of the Crown and (certain members of) the Executive”.⁴⁴⁶

⁴³⁹ Ibid.

⁴⁴⁰ Ibid, p22.

⁴⁴¹ Ibid, p 23, 28.

⁴⁴² Ibid, p 27.

⁴⁴³ Ibid, p 30.

⁴⁴⁴ Ibid, p 30.

⁴⁴⁵ Sibongile Sukati, ‘Former CJ Directive on King Violated Africa Charter,’ *Times of Swaziland*, 4 May 2021, available at: <http://www.times.co.sz/news/132532-former-cj-directive-on-king-violated-africa-charter.html>.

⁴⁴⁶ ICJ, ‘Justice Locked Out: Swaziland’s rule of Law Crisis’ (International Fact-finding Mission Report),’ 2015, op. cit., p33.

Achieving Justice for Gross Human Rights Violations in Swaziland (2018)

This report highlights a range of key issues in respect of the protection of human rights in Eswatini, including: the treatment of persons deprived of their liberty; the weaponization of the law to suppress human rights defenders; and issues relating to institutional deficiencies in justice sector institutions.⁴⁴⁷

In respect of the independence of the judiciary, the report raises concerns in respect of the process for judicial appointments.⁴⁴⁸ It also draws attention to the absence of an independent body to investigate police abuses of power. It highlights issues relating to the efficacy and independence of the Commission on Human Rights and Public Administration.

In respect of human rights defenders, it concludes that:

“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.”⁴⁴⁹

⁴⁴⁷ ICJ, 'Achieving Justice for Gross Human Rights Violations in Swaziland: Key Challenges, May 2018,' 2018, available at: <https://www.icj.org/wp-content/uploads/2018/05/Swaziland-GRABaselineStudy-Publications-Reports-Thematic-reports-2018-ENG.pdf>.

⁴⁴⁸ Ibid, p 28-9.

⁴⁴⁹ Ibid, p 19.

F. ANNEX B – COMMUNICATIONS DECISIONS OF THE ACHPR

Communication 251/02: Lawyers of Human Rights v The Kingdom of Swaziland

This communication relates to a complaint by Lawyers for Human Rights, a Swazi NGO challenging provisions of the proclamation made King Sobhuza I in 1973. In particular it was argued that the provisions of the Proclamation outlawing political parties violate the rights to freedom of association, expression and assembly, protected by the African Charter on Human and People's Rights. It was also argued that the King's power, in terms of the Proclamation, to overturn court decisions, violates the right to effective judicial remedies and that the King's power to hire and fire judges impinges judicial independence and the separation of powers. In its letter to ICJ in respect of this report the Minister of Justice of Eswatini indicated that "the Proclamation and Decree referred to are no longer in force, as [they] were repealed by [the] coming into force of the 2005 Constitution".

Relevant paragraphs of the ACHPR's decision (2005):

[27] "The African Commission has considered this matter and realises that for the past 31 years the Kingdom of Swaziland has had no Constitution. Furthermore, the complainant has presented the African Commission with information demonstrating that the King is prepared to utilise the judicial power vested in him to overturn court decisions. As such, the African Commission believes that taking into consideration the general context within which the judiciary in Swaziland is operating and the challenges that they have been faced with especially in the recent past, any remedies that could have been utilised with respect to the present communication would have likely been temporary. In other words, the African Commission is of the view that the likelihood of the complainant succeeding in obtaining a remedy that would redress the situation complained of in this matter is so minimal as to render it unavailable and therefore ineffective. For the reasons stated herein above, the African Commission declares this communication admissible."

[41] "In making this decision on the merits, the African Commission would like to point out that it is disappointed with the lack of cooperation from the Respondent State. The decision on the merits was taken without any response from the State".

[51] "In the opinion of the [African] Commission, by ratifying the [African] Charter without at the same time taking appropriate measures to bring domestic laws in conformity with it, the Respondent State's action defeated the very object and spirit of the [African] Charter and thus violating Article 1 thereof."

[53] "In the present communication, the King's Proclamation clearly outlaws the formation of political parties or any similar structure. Political parties are one means through which citizens can participate in governance either directly or through elected representatives of their choice. By prohibiting the formation of political parties, the King's Proclamation seriously undermined the ability of the Swaziland [sic] people to participate in the government of their country and thus violated Article 13 of the [African] Charter."

[54] "In the present communication the Proclamation of 1973 and the Decree of 2001 vested judicial power in the King and ousted the jurisdiction of the court on certain matters. The acts of vesting judicial power in the King or ousting the jurisdiction of the courts on certain matters in themselves do not only constitute a violation of the right

to fair trial as guaranteed in Article 7 of the Charter, but also tend to undermine the independence of the judiciary.”

[56] “By entrusting all judicial powers to the Head of State with powers to remove judges, the Proclamation of 1973 seriously undermines the independence of the judiciary in Swaziland. The main *raison d’être* of the principle of separation of powers is to ensure that no organ of government becomes too powerful and abuses its power. The separation of power amongst the three organs of government - executive, legislature and judiciary - ensure checks and balances against excesses from any of them. By concentrating the powers of all three government structures into one person, the doctrine of separation of power undermines [sic] and is subject to abuse.”

[58] “Clearly, retaining a law which vests all judicial powers in the Head of State with possibility of hiring and firing judges directly threatens the independence and security of judges and the judiciary as a whole. The Proclamation of 1973, to the extent that it allows the Head of State to dismiss judges and exercise judicial power is in violation of Article 26 of the African Charter”

[61] “the prohibition on the establishment of political parties under the Proclamation remained effective and consequently restricted the enjoyment of the right to freedom of association and assembly of its citizens. The [African] Commission therefore finds the State to have violated these two articles by virtue of the 1973 Proclamation.”

[63] “From the above reasoning, the African Commission is of the view that the Kingdom of Swaziland by its Proclamation of 1973 and the subsequent Decree No. 3 of 2001 violated Articles 1, 7, 10, 11, 13 and 26 of the African Charter. The [African] Commission hereby recommends as follows:

- that the Proclamation and the Decree be brought in conformity with the provisions of the African Charter;
- that the State engages with other stakeholders, including members of civil society in the conception and drafting of the New Constitution; and
- that the Kingdom of Swaziland should inform the African Commission in writing within six months on the measures it has taken to implement the above recommendations”

Communication 406/11: Law Society v The Kingdom of Swaziland

Challenge by Law Society of Swaziland against the issuing by the Chief Justice of Practice Directive 4/2011 which banned all courts in the country from receiving or entertaining any summons against the King. It was argued that this violates equal protection and recognition before the law and compromises the independence of the judiciary. This Practice Directive was revoked.⁴⁵⁰

Relevant paragraphs of the ACHPR’s decision (2021):

[143] “This clearly shows that the Practice Directive was selectively applied against the owner of MVN Marketing Supply (Pty) Ltd, to deny Access to Courts”

[157] “The Practice Directive was used to deny a litigant in the Respondent State access to courts, thereby indicating a violation of Article 7(1)(a)”

⁴⁵⁰ Chief Justice of Eswatini, ‘Notice’, available here: <https://eswatilii.org/akn/sz/doc/documents-and-guidelines/2013-07-03/practice-directive-no12017/eng@2013-07-03>

[164] "From the language of the Practice Directive, it can plainly be viewed that it sought to interfere with the judicial process, by directing judicial officials to reject summons and other applications against the King, which constitutes a violation of Article 26 of the African Charter."

[167] "stresses that the provisions of section 11 of the Constitution should not be used to preclude the rights enshrined in the African Charter with respect to the Office of the King."

Communication 444/13: Justice Thomas S Masuku v The Kingdom of Swaziland

Thomas Masuku was appointed as a Judge of the High Court in 1999. In 2003 he was demoted to being a Judge of the Industrial Court. He was later reinstated. In 2011 charges were laid against him at the Judicial Services Commission by the Chief Justice. Among the complaints laid against Judge Masuku was a complaint that he had insulted the King in one of his judgments. The Commission recommended his removal and he was removed from office by the King. Judge Masuku complained both about the process adopted in his removal and the decision to remove him in substance. In its response to the ICJ's letter in respect of this report, the Minister of Justice of Eswatini indicated that "the government is considering to institute review proceedings in the appropriate forum".⁴⁵¹

2021: Decision in Masuku re removal of Masuku

[157] "In light of the fact that these charges against the victim emanated from the Chief Justice, given that the Chief Justice would have had to report them to the JSC in order for the disciplinary proceedings to be instituted against the victim, the Commission is of the view that the Chief Justice ought not to have chaired the JSC proceedings against the victim, given the likely perception that the Chief Justice could not be impartial in the disciplinary proceedings".

[161-2] "... does raise doubts on the impartiality of the Chief Justice in relation to the JSC proceedings... the Chief Justice's participation in the JSC disciplinary proceedings violated the victims right to appear before an impartial tribunal".

[171] "the Commission takes note of the fact that the legal framework for the JSC, that is the Constitution of the Respondent State and the Judicial Service Commission Act (1982), do not have a provision for the JSC to hold its proceedings in public, there is equality no expression provision mandating that its' proceedings should be held in private. Furthermore, the Commission notes that both the Constitution and the JSC Act prescribe that the JSC may regulate its own procedure".

[174] "the JSC should have granted the victim's request for a public hearing, and concurs that he should have been given the opportunity to refute the charges against him in public... the reasons given for rejecting the victim's request do not meet the standard stipulated in the Principles on the Rights to a Fair Trial".

[175] "... the failure to accord the victim a public hearing of the JSC disciplinary hearing violated his right to a fair trial".

⁴⁵¹ See Annex G.

[187] "... the Commission is of the view that instituting disciplinary proceedings against a Judge based on language which was used in a judgment does not constitute 'serious misbehaviour', rather this charge amounts to interference with the victim's judicial independence".

[191] "... amounts to exerting influence or pressure on the victim. Likewise this amounts to exerting influence or pressure on the Respondent State's judiciary given that this action may cause other members of the judiciary to fear disciplinary or other consequences if they use language which is similarly questioned, while in the exercise of their judicial functions".

[192] "... an action which directly threatened both the victim and the judiciary's judicial independence".

[196] Commission's recommends that Judge Masuku is compensated and the charges against him reviewed. In addition, it recommends that Eswatini:

- "Review the Judicial Service Commission's legal framework to include provision which allows judicial officers to seek judicial review of the disciplinary proceedings"
- "Review the Judicial Service Commission's Legal Framework to include a provision which entitled judicial officers facing disciplinary proceedings to object to the participation of a member of the Commission in the proceedings and decisions of the Commission on the ground of bias".

G. ANNEX C – ICJ CORRESPONDENCE WITH ESWATINI AUTHORITIES

The following are letters sent to Eswatini authorities by the ICJ. Signatures, letterheads, footers and footnotes have been omitted but otherwise the text has been reproduced verbatim.

13 December 2024

His Royal Highness Prince Simelane
The Honourable Minister of Justice and Constitutional Affairs Mbabane

Dear Honourable Mr Prince Simelane,

Re: Request for comment in relation to a forthcoming ICJ report on the Independence of Judges and Lawyers in Eswatini

We write to you in your capacity as Minister of Justice and Constitutional Affairs of Eswatini. The International Commission of Jurists 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 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.

The ICJ has had a programme of engagement on the rule of law and human rights over the past two decades, including analytical reports following research and consultation with national stakeholders. Some provide a variety of institutional and specific recommendations to Eswatini to secure the independence of judges and lawyers. In all of these reports, the ICJ has expressed concerns in respect of problems regarding respect for the separation of powers and protection of the rule of law generally, as well as regarding the independence of judges and lawyers in particular. Expert mechanisms from the United Nations and African human rights systems have similarly conducted similar analyses and handed down communications decisions pertaining directly to concerns relating to the independence of judges and lawyers.

Our forthcoming report, to be published in late January 2025, documents issues faced by lawyers in respect of these ongoing challenges relating to the independence of judges and lawyers. In summary, the overwhelming consensus among lawyers interviewed is that:

- Lawyers fear for their safety and well-being, including being extrajudicially killed.
- Lawyers are followed, harassed, threatened and intimidated.
- Women lawyers are threatened with sexual violence.
- Lawyers are associated with the actions of their clients simply by virtue of being their lawyers.
- Lawyers face adverse economic consequences for taking on cases or clients perceived as “political” or politically sensitive.
- Lawyers perceive shortcomings in the execution of the mandate of the

Law Society.

- Lawyers indicate that the legal profession operates in an environment that inhibits and/or preclude their capacity to act independently.
- Lawyers indicate that the judiciary is not independent.
- Lawyers consider that the Chief Justice abuses his power.
- Lawyers experience significant pressure and obstacles relating to cases emanating from the June 2021 uprising.
- Lawyers are significantly and adversely impacted by the extrajudicial killing of Thulani Maseko.

Following from the report, the ICJ would like to address the following specific questions to the Minister of Justice and Constitutional Affairs of Eswatini:

1. **Banning of Petitions:** By what legal authority did the Acting Prime Minister issue an order “to stop with immediate effect the delivery of petitions to Tinkhundla Centres” on 24 June 2021?
2. **Recommendations of Africa Commission:** What measures has Eswatini taken to implement recommendations made by the African Commission on Human and People’s Rights in respect of independence of judges and lawyers?
3. **Recommendations of UN bodies:** What measures has Eswatini taken to implement recommendations made by the United Nations Human Rights Council under the auspices of Universal Periodic Review and recommendations made by experts of the United Nations Special Procedures and UN Treaty Bodies?
4. **Interference with the judiciary:** What measures do Eswatini authorities take to ensure, consistent with its Constitution, that there is no interference with the judiciary by executive and legislative officials and if and where such interference does occur it is properly investigated and sanctioned?
5. **Repression and Harassment of Lawyers:** Lawyers interviewed for the report allege that executive officials have enlisted individuals to repress, harass and otherwise intimidate human rights defenders, including lawyers. This includes various reported instance of surveillance, threats and attempts made on their lives. What measures have Eswatini to prevent such acts of repression, harassment and intimidation? In particular, how do Eswatini authorities respond to allegations that lawyers have:
 - a. Been followed and surveilled by cars, drones and people including in their own homes;
 - b. Had their offices raided;
 - c. Been threatened with violence, including sexual violence; and
 - d. Had attempts made on their lives as a direct result of their work representing clients in matters pertaining to human rights and the public interest. In this regard several lawyers informed ICJ of the wide circulation of a “hit list” in early 2023 which they understood to include individuals, including lawyers, who were to be killed.
6. **The Suppression of Terrorism and Public Order Acts:** The report recommends, consistently with previous recommendations of UN and African human rights mechanisms, the declaration of a moratorium on the application of repressive laws including the Sedition and Subversive Activities Act, the Suppression of Terrorism Act and the Public Order Act to target human rights defenders, lawyers, and those conducting protests for democratic and constitutional reform. What steps does Eswatini plan on taking in this regard?
7. **Situation of the two former Members of Parliament Mduduzi Bacede**

Mabuza and Mthandeni Dube: The African Commission on Human and People’s Rights has described the arrest, charging and prosecution of Mduduzi Bacede Mabuza and Mthandeni Dube as “politically motivated”. Since their conviction, what steps does Eswatini plan on taking to quash this conviction or to secure their pardon and release?

8. **The Extrajudicial killing of Thulani Maseko:** The report reveals that little or no progress has been made in respect of an independent, impartial and thorough investigation into the killing of Thulani Maseko to bring those responsible to justice in a fair trial. What steps does Eswatini plan on taking in this regard? How will the authorities ensure that these investigations are independent, effective and expeditious?
9. **June 2021 protests:** The report reveals that little or no progress has been made into the investigation of deaths and killings relating to the June 2021 unrest. A 2022 report of the Swaziland Commission on Human Rights and Public Administration recommended an “independent, thorough, credible, transparent and impartial investigation”. What steps does Eswatini plan on taking in this regard? How will the authorities ensure that such investigations are independent, effective and expeditious?
10. **Independence of the Judiciary:** The report reveals a range of issues in respect of the independence of the judiciary including:
 - a. The common practice of appointing large numbers of temporary, casual or short-term judges;
 - b. The lack of transparency in the judicial appointments process resulting in the appointment of judges whose competence and qualifications are widely questioned;
 - c. The need to ensure the review and amendment of the Judicial Service Commission Act to ensure compliance with the Constitution and international law and standards in particular to dilute the oversized influence of the state on judicial appointments;
 - d. The lack of clear, transparent and appropriate processes with detailed and objective criteria for the appointment of acting or temporary judges;
 - e. The failure to ensure the full and meaningful participation of the legal profession, including the Law Society, in the appointment of judicial officers;
 - f. An unresolved complaint initiated by the Law Society against the Chief Justice which has not been resolved and raises serious questions about his fitness for office.

What steps does the government of Eswatini plan on taking in this regard?

I would be grateful if you could provide your responses to these questions and any other inputs that you would like to be considered in the finalization of ICJ’s report by 13 January 2025 via email to Timothy Fish Hodgson via email at timothy.hodgson@icj.org.

Sincerely,

Kaajal Ramjathan-Keogh
Africa Director

13 December 2024

His Excellency, Prime Minister Russell Mmiso Dlamini Government of Eswatini
Mbabane

Dear Prime Minister Dlamini,

Re: Request for comment in relation to a forthcoming ICJ report on the Independence of Judges and Lawyers in Eswatini

Your excellency, we write to you in your capacity as Prime Minister of Eswatini. The International Commission of Jurists 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 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.

The ICJ has had a programme of engagement on the rule of law and human rights over the past two decades, including analytical reports following research and consultation with national stakeholders. Some provide a variety of institutional and specific recommendations to Eswatini to secure the independence of judges and lawyers. In all of these reports, the ICJ has expressed concerns in respect of problems regarding respect for the separation of powers and protection of the rule of law generally, as well as regarding the independence of judges and lawyers in particular. Expert mechanisms from the United Nations and African human rights systems have similarly conducted similar analyses and handed down communications decisions pertaining directly to concerns relating to the independence of judges and lawyers.

Our forthcoming report, to be published in late January 2025, documents issues faced by lawyers in respect of these ongoing challenges relating to the independence of judges and lawyers. In summary, the overwhelming consensus among lawyers interviewed is that:

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- Lawyers face adverse economic consequences for taking on cases or clients perceived as “political” or politically sensitive.
- Lawyers perceive shortcomings in the execution of the mandate of the Law Society.
- Lawyers indicate that the legal profession operates in an environment that inhibits and/or preclude their capacity to act independently.
- Lawyers indicate that the judiciary is not independent.
- Lawyers consider that the Chief Justice abuses his power.
- Lawyers experience significant pressure and obstacles relating to cases emanating from the June 2021 uprising.
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killing of Thulani Maseko.

Following from the report, the ICJ would like to address the following specific questions to the Minister of Justice and Constitutional Affairs of Eswatini:

1. **Banning of Petitions:** By what legal authority did the Acting Prime Minister issue an order “to stop with immediate effect the delivery of petitions to Tinkhundla Centres” on 24 June 2021?
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4. **Interference with the judiciary:** What measures do Eswatini authorities take to ensure, consistent with its Constitution, that there is no interference with the judiciary by executive and legislative officials and if and where such interference does occur it is properly investigated and sanctioned?
5. **Repression and Harassment of Lawyers:** Lawyers interviewed for the report allege that executive officials have enlisted individuals to repress, harass and otherwise intimidate human rights defenders, including lawyers. This includes various reported instance of surveillance, threats and attempts made on their lives. What measures have Eswatini to prevent such acts of repression, harassment and intimidation? In particular, how do Eswatini authorities respond to allegations that lawyers have:
 - a. Been followed and surveilled by cars, drones and people including in their own homes;
 - b. Had their offices raided;
 - c. Been threatened with violence, including sexual violence; and
 - d. Had attempts made on their lives as a direct result of their work representing clients in matters pertaining to human rights and the public interest. In this regard several lawyers informed ICJ of the wide circulation of a “hit list” in early 2023 which they understood to include individuals, including lawyers, who were to be killed.
6. **The Suppression of Terrorism and Public Order Acts:** The report recommends, consistently with previous recommendations of UN and African human rights mechanisms, the declaration of a moratorium on the application of repressive laws including the Sedition and Subversive Activities Act, the Suppression of Terrorism Act and the Public Order Act to target human rights defenders, lawyers, and those conducting protests for democratic and constitutional reform. What steps does Eswatini plan on taking in this regard?
7. **Situation of the two former Members of Parliament Mduduzi Bacede Mabuza and Mthandeni Dube:** The African Commission on Human and People’s Rights has described the arrest, charging and prosecution of Mduduzi Bacede Mabuza and Mthandeni Dube as “politically motivated”. Since their conviction, what steps does Eswatini plan on taking to quash this conviction or to secure their pardon and release?
8. **The Extrajudicial killing of Thulani Maseko:** The report reveals that little or no progress has been made in respect of an independent, impartial and thorough investigation into the killing of Thulani Maseko to bring those

responsible to justice in a fair trial. What steps does Eswatini plan on taking in this regard? How will the authorities ensure that these investigations are independent, effective and expeditious?

9. **June 2021 protests:** The report reveals that little or no progress has been made into the investigation of deaths and killings relating to the June 2021 unrest. A 2022 report of the Swaziland Commission on Human Rights and Public Administration recommended an “independent, thorough, credible, transparent and impartial investigation”. What steps does Eswatini plan on taking in this regard? How will the authorities ensure that such investigations are independent, effective and expeditious?
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 - a. The common practice of appointing large numbers of temporary, casual or short-term judges;
 - b. The lack of transparency in the judicial appointments process resulting in the appointment of judges whose competence and qualifications are widely questioned;
 - c. The need to ensure the review and amendment of the Judicial Service Commission Act to ensure compliance with the Constitution and international law and standards in particular to dilute the oversized influence of the state on judicial appointments;
 - d. The lack of clear, transparent and appropriate processes with detailed and objective criteria for the appointment of acting or temporary judges;
 - e. The failure to ensure the full and meaningful participation of the legal profession, including the Law Society, in the appointment of judicial officers;
 - f. An unresolved complaint initiated by the Law Society against the Chief Justice which has not been resolved and raises serious questions about his fitness for office.

What steps does the government of Eswatini plan on taking in this regard?

I would be grateful if you could provide your responses to these questions and any other inputs that you would like to be considered in the finalization of ICJ’s report by 13 January 2025 via email to Timothy Fish Hodgson via email at timothy.hodgson@icj.org.

Sincerely,

Kaajal Ramjathan-Keogh
Africa Director

13 December 2024

Honourable Chief Justice Bheki Maphalala Supreme
Court of Eswatini
Mbabane

Dear Chief Justice Maphalala,

Re: Request for comment concerning a forthcoming ICJ report on The Independence of Judges and Lawyers in Eswatini

We write to you in your capacity as Chief Justice of Eswatini, the head of Eswatini's judiciary. The International Commission of Jurists 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 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.

The ICJ has had a programme of engagement on the rule of law and human rights over the past two decades, which includes, following research and consultation with national stakeholders, analytical reports. Some provide a variety of institutional and specific recommendations to Eswatini to secure the independence of judges and lawyers. In all of these reports, the ICJ has expressed concerns in respect of problems in regarding the respect for the separation of powers and protection of the rule of law generally, as well as regarding the independence of judges and lawyers in particular.

Expert mechanisms from the United Nations and African human rights systems³ have similarly conducted similar analyses and handed down communications decisions pertaining directly to concerns relating to the independence of judges and lawyers.

Our forthcoming report, to be published in late January 2025, documents issues faced by lawyers regarding these ongoing challenges relating to the independence of judges and lawyers. In summary, the overwhelming consensus among lawyers interviewed is that:

- Lawyers fear for their safety and well-being, including being extrajudicially killed.
- Lawyers are followed, harassed, threatened and intimidated.
- Women lawyers are threatened with sexual violence.
- Lawyers are associated with the actions of their clients simply by virtue of being their lawyers.
- Lawyers face adverse economic consequences for taking on cases or clients perceived as "political" or politically sensitive.
- Lawyers perceive shortcomings in the execution of the mandate of the Law Society.
- Lawyers indicate that the legal profession operates in an environment that inhibits and/or precludes their capacity to act independently.
- Lawyers indicate that the judiciary is not independent.
- Lawyers consider that the Chief Justice abuses his power.

- Lawyers experience significant pressure and obstacles relating to cases emanating from the June 2021 uprising.
- Lawyers are significantly and adversely impacted by the extrajudicial killing of Thulani Maseko.

Following from the report, the ICJ would like to address the following specific questions to the Chief Justice:

1. **Code of Ethics:** Some lawyers interviewed have drawn ICJ's attention to a "Judicial Code of Ethics for the Judiciary of Swaziland" established by former Chief Justice Banda:
 - a. What measures has the judiciary taken to implement this Code?
 - b. Why is the Code not available online or otherwise unavailable to the general public?
 - c. Why do so few lawyers appear to know about this Code? What measures have been taken to disseminate the Code amongst judges and members of the legal profession?
2. **Acting Judges:** Lawyers interviewed raised concerns about what they describe as a ubiquitous practice of the appointment of Acting Judges to Eswatini's courts. They raise concerns about the impact of the repeated appointment and renewal of Acting Judges on the independence of the judiciary. Under international standards, the appointment of temporary judges must be avoided, save in exceptional circumstances. In this light:
 - a. How many Acting Judges are currently sitting on Eswatini's courts?
 - b. What is the process for the appointment of Acting Judges?
 - c. What is the ultimate time length, on average, that Acting Judges end up sitting considering the repeated renewals of their appointments?
 - d. What measures are in place to ensure the independence of Acting Judges?
 - e. What produces the need for the appointment of so many Acting Judges?
3. **Disbarring of Muzi Simelane:** The ICJ's attention has been drawn to several documents in connection with Mr Muzi Simelane including:
 - 1) A letter from your offices to Mr Simelane dated 11 April 2018 indicating that he is "barred from appearing before any Court in Swaziland";
 - 2) Court judgments in respect of Mr Simelane's situation;
 - 3) A report of the Swaziland's Commission on Human Rights and Public Administration in respect of your interactions with Mr Simelane.
 Considering these documents:
 - a. Why did your offices not respond to the Swaziland's Commission on Human Rights and Public Administration's request for responses in relation to its investigation?
 - b. How do you intend to act on the Commission's recommendations?
 - c. How can your letter dated 11 April 2018 be squared with the powers of the Chief Justice in terms of the Constitution and the powers of the Law Society in terms of the Legal Practice Act?
4. **June 2021 protests:** Several lawyers interviewed indicated that in the aftermath of the June 2021 unrest the Chief Justice issued a "directive" to judicial officers and in particular magistrates, to not grant bail to those

charged with offenses relating to June 2021 protests. Such a summary order, if in fact issued, have the effect arbitrarily denying a class of individuals bail without an individual assessment applying ordinary criteria :

- a. Was such a directive or instruction ever issued? If so, what are the specifics of such a directive?
 - b. If such a directive was issued, in terms of what legal authority was it issued?
5. **Banning of lawyers from courts:** The ICJ's attention has been drawn to a practice implemented by several judicial officers by which they have informed certain lawyers that they are "banned" from appearing before their courts in certain matters, often relating to June 2021 protests:
- a. Is this practice endorsed within the judiciary?
 - b. By what legal authority are lawyers banned from appearing before certain judicial officers in particular cases?
6. **Law Society Complaint:** The Law Society has brought the ICJ's attention to a complaint filed by it in December 2022 regarding various aspects of your conduct in your capacity as Chief Justice. Given the centrality of your role as Chief Justice to the independence – and public perception of independence – of the judiciary in Eswatini, what steps have been taken to speed up evaluating and resolving the complaint?

Kindly provide your responses to these questions and any other inputs that you would like to be considered in the finalization of ICJ's report by 13 January 2025 via email to Timothy Fish Hodgson at timothy.hodgson@icj.org.

Sincerely,

Kaajal Ramjathan-Keogh Africa
Director

13 December 2024

Mr Mangaliso Magagula

President of the Law Society of Swaziland Mbabane

Dear Mr Mangaliso Magagula,

Re: Request for comment regarding a forthcoming ICJ report on the Independence of Judges and Lawyers in Eswatini

We write to you in your capacity as President of the Law Society of Swaziland. The International Commission of Jurists 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 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.

The ICJ has had a programme of engagement on the rule of law and human rights over the past two decades, including analytical reports following research and consultation with national stakeholders. Some provide a variety of institutional and specific recommendations to Eswatini to secure the independence of judges and lawyers. In all of these reports, the ICJ has expressed concerns in respect of problems regarding respect for the separation of powers and protection of the rule of law generally, as well as regarding independence of judges and lawyers in particular. Expert mechanisms from the United Nations and African human rights systems have similarly conducted similar analyses and handed down communications decisions pertaining directly to concerns relating to the independence of judges and lawyers.

Our forthcoming report, to be published in late January 2025, documents issues faced by lawyers regarding these ongoing challenges relating to the independence of judges and lawyers. In summary, the overwhelming consensus among lawyers interviewed is that:

- Lawyers fear for their safety and well-being, including being extrajudicially killed.
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- Women lawyers are threatened with sexual violence.
- Lawyers are associated with the actions of their clients simply by virtue of being their lawyers.
- Lawyers face adverse economic consequences for taking on cases or clients perceived as "political" or politically sensitive.
- Lawyers perceive shortcomings in the execution of the mandate of the Law Society.
- Lawyers indicate that the legal profession operates in an environment that inhibits and/or preclude their capacity to act independently.
- Lawyers indicate that the judiciary is not independent.
- Lawyers consider that the Chief Justice abuses his power.
- Lawyers experience significant pressure and obstacles relating to cases emanating from the June 2021 uprising.
- Lawyers are significantly and adversely impacted by the extrajudicial

killing of Thulani Maseko.

Following from the report, the ICJ would like to address the following specific questions to the Law Society:

1. **Independence of Lawyers:** In the execution of its mandate, what steps has the Law Society taken to ensure the independence of lawyers and their ability to carry out their functions free from intimidation, harassment, reprisals and other human rights violations? This question is asked considering reports from lawyers cannot independently operate and determine which cases to take and which clients to represent. Lawyers note that human rights, cases against the Crown and cases arising from June 2021 protests are particularly risky.
2. **Safety and Security of Lawyers:** In the execution of its mandate, what steps has the Law Society taken to ensure the independence of the legal profession in light of:
 - a. The extra-judicial killing of Thulani Maseko in January 2023 and attempts made on other lawyer's lives, including but not limited to the attempt on Maxwell Nkambule's life in December 2022.
 - b. The surveilling, threatening and harassing of lawyers involved in human rights and public interest matters and in particular those lawyers involved in representing clients in matters associated with the June 2021 protests.
 - c. Banning lawyers from appearing in front of particular judges/courts, including but not limited to the apparent banning of Muzi Simelane from appearing in all courts by the Chief Justice.
3. **Independence of the Judiciary:** The report documents a range of challenges in respect of the independence of the judiciary, including concerns about the judicial appointments process, interference with the judiciary by members of the executive and the quality of judges in Eswatini courts. Challenges faced by lawyers operating in courts in which they allege the independence of the judiciary is highly compromised. In the execution of its mandate, what steps has the Law Society taken to secure the independence of the judiciary, including in particular in respect of:
 - a. The Chief Justice and the Law Society's complaint against him. Has there been any progress since the complaint was laid and what has the Law Society done to ensure this process moves forward?
 - b. The processes and functions of the Judicial Service Commission. What steps has the Law Society taken to ensure the JSC's proper functioning?
4. **Independence of the Law Society:** Is the Law Society capable of operating independently, free from inappropriate influence or pressure by executive and other authorities? What steps has the Law Society taken to secure its independence?

Kindly provide your responses to these questions and any other inputs that you would like to be considered in the finalization of ICJ's report by 13 January 2025 via email to Timothy Fish Hodgson via email at timothy.hodgson@icj.org.

Sincerely,
Kaajal Ramjathan-Keogh Africa
Director

13 January 2025

International Commission of Jurists
Postnet Suite 384
Private Bag X29
Gallor Manor 2052
Johannesburg
South Africa

Dear Mr Hodgson,

Re: Request for Comment regarding a forthcoming ICJ report on the Independence of Judges in Eswatini

1. We refer to your letter dated 13 December 2024, wherein you requested the Law Society comment regarding a report on the independence Judges and Lawyers in Eswatini.
2. The Law Society's comment to your specific questions is set out below:

2.1 Independence of Lawyers

Lawyers in the country carry out their functions free from intimidation, harassment, reprisals and other human rights violations. Lawyers operate independently and are able to determine which cases to take and which clients to represent.

2.2 Safety and Security of Lawyers

The Law Society has taken steps to secure the independence of the legal profession. It engaged with relevant stakeholders and the police regarding the death of Thulani Maseko. We were informed that the matter is still under investigation.

The Law Society also engaged with Mr Nkambule regarding his matter. There were also engagements with other stakeholders. The stakeholders included the then Minister of Justice, the Attorney General, the Director of Public Prosecutions, the National Commission of Police. At the time of the engagements, the police were investigating the matter and were to prepare a police report upon the conclusion of their investigations.

The two reports of the surveilling, threatening and harassment of Lawyers involved in Human Rights and the public interest matters related to the unrest were investigated by the Law Society. We engaged with the attorney and the police in respect of the one complaint. The police investigated the matter and furnished a police report to the attorney concerned and he shared the report with the Law Society. With regards to the second complaint, the Law Society could not verify the complaint upon engagement with the complainant and as a result, we could not pursue it.

Other than the two complaints, there were no other complaints relating to the surveilling, threatening and harassment of Lawyers involved in Human Rights and public interest matters associated with the unrest.

With regards to the issue of Muzi Simelane, we have been having ongoing engagements with Mr. Simelane. His matter is part of the complaints against the Chief Justice.

2.3 Independence of the Judiciary

We have been having ongoing engagements with the relevant stakeholders regarding processing the complaint. We have received assurances that the complaint will be processed.

The Law Society also engaged with the relevant stakeholders on improving the administration of justice including the functioning of the JSC.

2.4 Independence of the Law Society

The Law Society is independent and operates independently, free from inappropriate influence or pressure by the executive or other authorities.

3. We trust that this answers your questions. Should you have any further queries, we are available to answer them.

Yours Faithfully,

Mangaliso Magagula
President

4 February 2025

The Africa Director

International Commission of Jurists
Postnet Suite 384
Private Bag x29
Gallor Manor 2052
JHB

**RE: RE: REQUEST FOR COMMENT IN RELATION TO A FORTHCOMING ICJ
REPORT ON THE INDEPENDENCE OF JUDGES AND LAWYERS IN ESWATINI**

1. Reference is made to the above subject.
2. Your correspondence dated 13 December, 2024 is acknowledged with thanks. Kindly find herein annexed the report which is submitted electronically in terms of the subject above.
3. However, we apologize for the delay in submitting the report.
4. Your cooperation is highly appreciated.

Kind regards

HRH PRINCE SIMELANE

MINISTER FOR JUSTICE AND CONSTITUTIONAL AFFAIRS.

RESPONSE TO THE INTERNATIONAL COMMISSION OF JURISTS

JANUARY 2025

INTRODUCTION

1. The Government of the Kingdom of Eswatini is committed to upholding the principles of democracy, rule of law, human rights and recognizes its national and international obligations to ensure the independence of the Judges and Lawyers. The country is party to regional and international human rights treaties⁴⁵² that advocate for the promotion and protection of human rights including the independence of the Judiciary.
2. The country has implemented measures to safeguard judicial autonomy to fulfil these obligations. The Constitution of Eswatini enshrines the principle of judicial independence in Section 141, providing a legal framework that insulates the Judiciary from undue influence. The Judiciary exercises its powers in both its judicial and administrative functions. The Government endeavours to ensure adequate resources for the Judiciary, reinforcing its ability to function independently. By aligning its domestic laws and practices with international standards, Eswatini demonstrates its commitment to maintaining a Judiciary

⁴⁵² International Covenant on Civil and Political Rights, African Charter on Human and People's Rights

that is free from external pressures, ensuring justice and fairness for all its citizens.

The Government of Eswatini wishes to respond to the issues raised in the communication as follows: -

A) Banning of petitions

3. The delivery of petitions occurred during the era of COVID 19 at different Tinkhundla Centres. There was excitement growing rapidly and crowds swelling which posed a threat to the already endemic situation of COVID 19. These deliveries were held in contravention of not only COVID-19 Regulations issued under the Disaster Management Act 2006 but also the public Order Act of 2017, as well as other criminal laws. After petitions were delivered in 51 Tinkhundla Centres, the Government then suspended the physical delivery of petitions due to the violations of the COVID 19 Regulations. However, an alternative platform to submit petitions electronically was provided, i.e. electronic mail address and later the Ministry of Tinkhundla offices.
4. With the third wave of COVID 19 looming, the then Acting Prime Minister exercising executive and administrative powers, suspended the physical delivery of petitions due to complete disregard of public safety, the rule of law, and COVID 19 Regulations⁴⁵³ by the petitioners. The executive and administrative powers were vested in him as provided by the Constitution of Eswatini⁴⁵⁴.

B) Recommendations of the African Commission on Human and People's Rights

Communication 251/02

5. The African Commission on Human and People's Rights (ACHPR) in determining the matter between Lawyers for Human Rights v The Kingdom of Eswatini⁴⁵⁵ held that Eswatini violated certain Articles⁴⁵⁶ of the African Charter through its 1973 Proclamation and the subsequent Decree No. 3 of 2001. The Proclamation and Decree referred to are no longer in force, as were repealed by coming into force of the 2005 Constitution. Hence the recommendations were rendered moot.

Communication 406/11

6. The Practice Directive 4/2011 issued by the then Chief Justice which provided that civil claims directly or indirectly against His Majesty the King and Ingwenyama were not to be accepted in the High court or any court. This Directive was revoked by the current Chief Justice, after due consideration and consultation through Practice Directive No. 1/2017. The ACHPR acknowledged this development on its decision for Communication 406/11.

⁴⁵³ Regulation 25 as varied which stipulates that gatherings attracting more than 100 people are super spreader events of the virulent disease.

⁴⁵⁴ Section 71

⁴⁵⁵ ACHPR Communication 251/02

⁴⁵⁶ Articles 1, 7, 10, 11, 13 and 26

Communication 444/13

7. Pursuant to the decision of the ACHPR in the case of Justice Thomas Masuku v The Kingdom of Eswatini, the government is considering to institute review proceedings in the appropriate forum.

C) Recommendations of the UN bodies

8. Eswatini accepted 70.3% of the recommendations from the Universal Periodic Review (UPR) relating to amongst others, legal and general frameworks, civil and political rights, economic, social, and cultural rights, women's rights, children's rights, and other specific vulnerable groups. The country is making progressive efforts to implement these recommendations from the Universal Periodic Review (UPR) mechanism and treaty bodies. Since the adoption of the Report of the UPR Working Group in 2022, the country has enacted several pieces of legislation and adopted policies⁴⁵⁷ that ensure the promotion, protection, and enjoyment of human rights thus improving the livelihoods of the citizens of Eswatini.
9. There are ongoing programs to strengthen the national human rights framework. The Government adopted a Legal Aid Policy in 2022 which has culminated to a Legal Aid Bill currently before Parliament. A Human Rights Bill is in its final stage of drafting which will fully operationalize the Commission on Human Rights and Public Administration / Integrity.
10. Through collaboration with Development Partners, Civil society organizations as well as the private sector, Government is putting in place programmes to address challenges that hinder the full enjoyment of socio-economic, civil and political rights by the people of Eswatini.
11. Further, to systematically follow up on the implementation of all recommendations from the human rights mechanisms, the country adopted a first UPR Recommendations Implementation Plan 2023-2026 which will facilitate the tracking of the implementation progress of these recommendations by the National Mechanism for Reporting and Follow-up

D) Measures to ensure non-interference with the Judiciary

12. The Constitution provides for a clear separation of powers between branches of government, that is the Executive, Legislative, and Judiciary. Each branch operates independently and without undue influence from the others in the exercise of its function.
13. In order to ensure non-interference; the Judiciary administers its own budget separate from the Ministry responsible for the administration of justice. In accordance with the Constitution, the judges' remuneration is not subject to annual appropriation but charged on the consolidated fund.

⁴⁵⁷ The National Development Plan 2023/24-27/28, Legal Aid Policy 2022, the Gender Policy (2023 – 2033), National Strategy on Ending Violence (2023 – 2027) amongst others.

14. In the recent past, Eswatini has not received allegations of judicial interference by the Executive or legislative arms of government.

E) Repression and harassment of Lawyers

15. Eswatini endeavours to provide a safe and respectful environment for everyone to exercise their human rights in ambit of the law. However, there was once a report to the police by a lawyer that he was allegedly followed by an unknown foreign registered motor vehicle and felt his life was under threat. Subsequent to that, investigations were instituted but unfortunately nothing came out due to insufficient facts. To be precisely, no repression and harassment of lawyers in the Kingdom of Eswatini.

16. In respect of the alleged repression, harassment, intimidation and or threat of violence including sexual violence of lawyers, the Government has not had any report of these allegations and would have appreciated full details of the incidents mentioned in the report.

F) Moratorium of The Suppression of Terrorism and Public Order Acts

17. The **Public Order Act (2017)** and its accompanying **Code of Practice on Gatherings** formalize procedures for peaceful assembly, aiming to balance the rights of protestors with public order and safety. This statute is product of extensive consultation and consensus between all social partners and government with technical support from the International Labour Organization (ILO).

18. The Government is committed to ensuring lawful and peaceful protests. Law enforcement is mandated to intervene only in cases of criminal activities, not to target human rights defenders arbitrarily. Arrests occur solely when individuals breach the law, particularly when protests escalate into criminal acts, such as looting or destruction of property. These actions are neither spurious nor meant to suppress human rights defenders' activities but are consistent with legal procedures, as any charges brought forward are processed through the judicial system.

19. The Suppression of Terrorism Act is compliant with the ICCPR and other human rights treaties as well as it was amended in 2017, to narrow down the definition of terrorist activities as well as providing for a judicial review of declaration made by the Minister when proscribing certain entities. Suspending its operation would breach Eswatini's treaty obligations to International Convention for the Suppression of Terrorist Bombings, International Convention for the Suppression of the Financing of Terrorism and other similar treaties.

20. The constitutionality of Sedition and Subversive Activities Act was put to test in the courts of Eswatini. Ultimately the Supreme Court held that this legislation is compliant with international human rights law and the country's constitution.

G) Situation of the two former members of Parliament Mduuzi Bacede Mabuza and Mthandeni Dube

21. The Government of Eswatini adheres to the principle of separation of powers for the three arms of Government in exercise of its function and further respects the principle of the rule of law. This means that the Executive arm of Government respects and does not interfere with the Judicial decisions.
22. The Government will not interfere with the Director of Public Prosecutions' decision to prosecute the two former MPs as doing so would undermine the rule of law and erode public confidence in the criminal justice system. In this case, the Government will allow the due process of the criminal justice system as the two MPs have appealed against their conviction and sentencing.

H) The extrajudicial killing of Mr. Thulani Maseko

23. In the aftermath of the 2021 civil unrest, Eswatini has faced a challenging rise in murder cases. These tragic incidents have included the loss of prominent members of society, law enforcement officers, traditional leaders and others. Investigations into all these killings and criminal acts were instituted by the Police and there is a breakthrough in some of these cases.
24. It is acknowledged that some of the cases are complex and are taking longer to resolve due to various factors that have prolonged the completion of investigations. Despite these challenges, the Government remains steadfast in its commitment to conducting a thorough, credible, and transparent investigations for every case. The objective is to ensure that all individuals responsible for any wrongdoing are held accountable and face justice in a fair and equitable trial.
25. Eswatini firmly clarifies that the unfortunate incidence that led to the death of Mr. Thulani Maseko is still under investigation. Hence, it cannot be categorized as an extra-judicial killing. It should be explicitly noted that Mr. Maseko was assassinated.

I) June 2021 protests

26. Since the June 2021 unrest was unprecedented, the Government opted to intensify capacity building initiatives for law enforcement officers to strengthen crowd management of riots and violent protestors. Regarding investigations on criminal cases and public disorder incidents witnessed during the unrest period, the Royal Eswatini Police Service is committed to diligently, credibly, and transparently investigate all cases arising from the June 2021 civil unrest. Significant progress has been made in some of these cases, with suspects now awaiting trial for acts of violence and criminal offenses.

CONCLUSION

27. The Government of Eswatini remains committed to adhering to the principles and standards to ensure the independence of the Judges and lawyers in carrying out their profession.

Commission Members

January 2025 (for an updated list, please visit www.icj.org/commission)

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Prof. Carlos Ayala, Venezuela

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