



UNITED NATIONS HUMAN RIGHTS COUNCIL

**25th Session of the Working Group on the Universal Periodic Review
April/May 2016**

**INTERNATIONAL COMMISSION OF JURISTS' SUBMISSION TO THE
UNIVERSAL PERIODIC REVIEW OF SWAZILAND**

Submitted on 21 September 2015

Composed of 60 eminent judges and lawyers from all regions of the world, 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, in consultative status with the Economic and Social Council since 1957, and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

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THE ICJ'S SUBMISSION TO THE UNIVERSAL PERIODIC REVIEW OF SWAZILAND

1. The International Commission of Jurists (ICJ) welcomes the opportunity to contribute to the Human Rights Council's Universal Periodic Review (UPR) of Swaziland. In this submission, the ICJ brings to the attention of the Human Rights Council's Working Group on the UPR and to the Human Rights Council issues concerning: (1) independence and impartiality of the judiciary and fair trial rights; and (2) international human rights instruments and mechanisms.

Independence and impartiality of the judiciary and fair trial rights

2. Ever since 1973, when Sobhuza II, the previous King, proclaimed to be the 'supreme power in the Kingdom of Swaziland' and to hold all legislative, executive and judicial power, Swaziland has become one of Africa's few remaining absolute monarchies. King Sobhuza II proceeded to repeal the 1968 Constitution that had provided for a constitutional monarchy and clear separation of powers. Although a new Constitution containing a bill of rights was adopted in 2005 as supreme law, constitutional rights are often not respected in practice, or are not interpreted and implemented consistently with regional and international human rights law and standards. For example, while sections 138 and 141 of the Constitution proclaim the independence of the judiciary, in practice, as detailed below, there is no real judicial independence in the country.
3. Furthermore, since Swaziland's first UPR in October 2011, the rule of law and the right to a fair trial have been severely weakened by the authorities, including by the judiciary itself, thereby undermining public confidence in the ability of the latter, in particular, to ensure the protection of human rights in the country.
4. The judges' appointment process continues to pose a threat to judicial independence and impartiality. The Constitution of Swaziland provides that the judges are appointed by the King after consultation with the Judicial Service Commission (JSC). The King has the ultimate and final say in respect of the appointments to the bench. Moreover, the composition of the JSC and the appointment of its members undermine confidence in the independent discharge of its mandate, including the consultative role in the appointment of judges. The JSC is chaired by the Chief Justice, and in addition comprises two legal practitioners, the Chairman of the Civil Service Commission and two other persons. All of these individuals are appointed by the King.
5. Besides the issues concerning the composition and role of the JSC, there remains concern about the continued appointment of foreign judges to the Superior Courts after July 2012, in contravention of the Constitution.
6. In addition, some recent judicial appointments have given rise to concern about the lack of qualification of those appointed. Certain appointments have been publicly questioned by Swaziland's legal practitioners and by the Law Society. The appointment of contract judges, by the King upon request of the Chief Justice, also serves to undermine the security of tenure of judges, and it places the contract judges at risk of manipulation by the Crown and the judicial hierarchy.
7. The ICJ has observed that Swaziland has a long history of disregard for the independence of the judiciary. In 2011, the JSC removed High Court Judge Thomas Masuku from office for allegedly criticizing the King. The proceedings leading to Judge Thomas Masuku's dismissal from the bench were not transparent, impartial or fair, and due process safeguards were not respected. The then Chief Justice, Chief Justice Ramodibedi, was the complainant, prosecutor and judge in the matter. Indeed, Chief Justice Ramodibedi refused to recuse himself from the proceedings that led to Justice Masuku's dismissal, notwithstanding the fact that he acted both as accuser

and as judge. Furthermore, he denied the application for a public hearing of the matter that Judge Masuku's counsel had made. The opportunity to cross-examine deponents to the affidavits attesting to Judge Masuku's alleged misconduct was also refused by then Chief Justice Ramodibedi. In addition, international observers wishing to observe Judge Masuku's dismissal proceedings were denied access.

8. Also in 2011, the then Chief Justice Ramodibedi issued a Practice Directive ordering the non-registration of lawsuits that challenge the King "directly or indirectly", effectively barring access to justice in any case against corporations, companies, trust or any entities in which the King owns shares or has an interest. Chief Justice Ramodibedi also issued another Practice Directive that undermined the fair allocation of cases by allowing the Chief Justice to intervene directly in the allocation of sensitive and political cases, which were assigned only to specific judges within the Superior Courts. Prior to this Practice Directive, the Registrar was responsible for case allocation. Through the implementation of the new Practice Directive junior judges have been allowed to preside over complex matters, which would have ordinarily been dealt with by more senior judges. This, in turn, has led to the legitimate perception that junior judges are being used to pursue cases on extraneous, political grounds, rather than on the basis that evidence so warrants. The fallout has been the establishment of a practice inconsistent with the independence and impartiality of the judiciary and, as a result, a further erosion of public confidence in the judiciary and the rule of law.
9. In August 2011, the Law Society of Swaziland launched a four-month boycott of the courts to protest against the lack of judicial independence, in response to these acts from the judiciary that openly undermined its independence, which seriously impeded the delivery of justice in the country as the functioning of the courts was disturbed. The Law Society of Swaziland also filed a complaint with the African Commission on Human and Peoples' Rights accusing the then Chief Justice Ramodibedi of systematically undermining judicial independence. This matter is still pending before the African Commission on Human and Peoples' Rights.
10. In July 2014, human rights lawyer Thulani Maseko and journalist Bheki Makhubu were convicted of contempt of court for "violating and undermining the dignity, repute and authority of the High Court of Swaziland" by writing and publishing an article critical of a judge's handling of a criminal case. They were given prolonged prison sentences following an unfair trial solely for having exercised their rights to freedom of opinion and expression by writing articles critical of the judiciary.
11. The United Nations Working Group on Arbitrary Detention (WGAD), in its opinion adopted in April 2015, concluded that "the detention and trial of Mr. Maseko for his exercise of the right to express his opinion on a court case 'runs contrary to Swaziland's international human rights obligations in particular under article 19 of the International Covenant on Civil and Political Rights. The non-observance of the international norms relating to the right to fair trial, established in Article 10 of the UDHR and Article 14 of the ICCPR in this case is of such gravity as to give the deprivation of liberty of Mr. Maseko an arbitrary character. The deprivation of liberty of Mr. Maseko has been arbitrary, being in contravention of Articles 10 and 19 of the UDHR, and Articles 14 and 19 of the ICCPR." The WGAD also found violations of a number of other fair trial rights, including the denial of Thulani Maseko's right to legal assistance.
12. The WGAD concluded that the then Chief Justice Ramodibedi and High Court Judge Mpendulo Simelane had not conducted themselves impartially in the proceedings against Maseko and Makhubu. Judge Simelane in his former capacity as Registrar of the High Court specifically had been identified in the articles that formed the basis of the contempt of court charges against

Thulani Maseko. However, Judge Simelane refused to recuse himself in the criminal trial on contempt of court charges against Thulani Maseko despite applications for recusal from defence lawyers.

13. The WGAD further observed that the initial arrest warrant for Thulani Maseko for criticising the conduct of the Chief Justice Ramodibedi was issued by the Chief Justice himself on his own motion. Furthermore, Chief Justice Ramodibedi remanded Thulani Maseko in custody even though the prosecution had not requested custodial remand. The conduct of Chief Justice Ramodibedi and Justice Simelane denied Thulani Maseko his right to a fair trial before an independent and impartial court as required under international law and standards.
14. In May 2015, the ICJ set up a fact finding mission of judges in collaboration with the African Judges and Jurists Forum, the Commonwealth Magistrates and Judges Association, and Judges for Judges in response to a judicial crisis involving the arrest of High Court judges Annandale and Simelane, Registrar of the High Court Nhlabatsi and Minister of Justice Shongwe, and an attempt to arrest the then Chief Justice Michael Ramodibedi on warrants sought by the Anti-Corruption Commission for various charges related to abuse of their judicial functions in a manner amounting to abuse of authority and violation of their legal duties, in order to obtain a favourable result in legal matters. Then Chief Justice Ramodibedi and Judge Simelane were also charged with defeating or obstructing the course of justice. To avoid being arrested the then Chief Justice locked himself up in his home, leading to a 37-day stand-off. High Court judge Annandale was held in jail for four days; shortly afterwards the charges against him and Registrar Nhlabatsi were withdrawn and the prosecution dropped. High Court judge Simelane remains suspended, and at the time of writing there is no indication as to whether criminal or disciplinary proceedings will be pursued against him. Also at the time of writing, the case against the Minister of Justice Shongwe is still pending.
15. The then Chief Justice, Chief Justice Ramodibedi, was charged in disciplinary proceedings with misconduct and notified of the decision to impeach him by the JSC. He unsuccessfully challenged the composition and impartiality of the JSC. After completion of the impeachment process and through a proclamation from the King, he was relieved of his duties with effect from 17 June 2015, on grounds of serious misbehaviour. The composition of the JSC, its conduct during Chief Justice Ramodibedi's tenure and during his impeachment continues to raise concern about the absence of safeguards for the independence and impartiality of the judiciary. At the time of writing, there is no indication as to whether the criminal charges will be further pursued against the former Chief Justice, who has meanwhile left Swaziland (he is a citizen of Lesotho).

International human rights instruments and mechanisms

16. Swaziland is a party to a number of regional and international human rights treaties,¹ although it has yet to ratify or accede to some key international treaties and it does not recognize the jurisdictional competence of the African Court of Human and Peoples' Rights. Swaziland is not a party to the following international human rights treaties:

- Optional Protocol to the ICESCR;
- International Convention for the Protection of all Persons from Enforced Disappearances;
- Optional Protocol to the ICCPR;
- Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty;
- Optional Protocol to the CAT;
- Optional Protocol to the CEDAW;
- Optional Protocol III to the CRC on a communications procedure;

- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; and,
- Rome Statute of the International Criminal Court.

There has been no progress in this regard since Swaziland's UPR of 2011, although the country then accepted the recommendations to ratify the International Convention for the Protection of all Persons from Enforced Disappearances (it is a signatory only); the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; the Optional Protocol to the Convention Against Torture; and the Rome Statute of the International Criminal Court.²

17. During the previous cycle of the UPR, Swaziland also accepted recommendations to put in place human rights training programmes for members of the judiciary and law enforcement officials, and to take concrete and immediate measures to guarantee the independence and impartiality of the judiciary. Despite its stated acceptance of the above-mentioned recommendations, none of them has been implemented by Swaziland.

Recommendations

The ICJ therefore calls upon the Working Group and the Human Rights Council to recommend to the authorities of Swaziland, the following:

Concerning the independence of the judiciary

18. The authorities of Swaziland must respect and ensure judicial independence and take the necessary steps to cease interference with judicial functions, including through bringing the Constitution and subordinate legislation in line with regional and international law and standards, in particular on the separation of powers and respect for judicial independence.
19. The authorities of Swaziland must immediately review the laws and regulations pertaining to the JSC with a view to bringing them in line with regional and international law and standards, including by removing the Crown's control over the JSC's composition; allowing for public, transparent and fair appointment and removal processes that respect the separation of powers, including public announcement of any vacancies in the judiciary, and ensuring the full participation of all concerned stakeholders.
20. The authorities Swaziland must urgently develop a code of conduct for judges, in line with regional and 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.
21. Consistent with previous recommendations, the authorities of Swaziland "must put in place human rights training programmes for members of the judiciary and law enforcement officials, including the police, security forces and correctional officers and take concrete and immediate measures to guarantee the independence and impartiality of the judiciary" with a view to improving the independence of judges and lawyers and raising awareness of human rights, including the right to a fair trial.

Concerning the right to a fair trial

22. The authorities of Swaziland should ensure that accused persons are at all times afforded the right to legal representation, and that persons awaiting trial are not detained in custody but are instead released subject to appropriate guarantees to appear for trial, unless the interests of

justice call for remand in custody in accordance with relevant national laws which are consistent with international standards and norms.

23. The authorities of Swaziland should introduce and implement a case allocation and management system that is impartial and fair, removing direct control by the Chief justice or the ability of any single judicial officer to influence the allocation and management of cases. The case management must further ensure that judicial officers do not preside over matters in which there is a potential conflict of interests or the potential for a perception of partiality in the proceedings.

Concerning international treaties and decisions

24. The Government of Swaziland must become a party to, and implement into domestic law, regional and international human rights treaties to which Swaziland is not a party, including among others, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the Optional Protocol to the Convention Against Torture, and the Rome Statute of the International Criminal Court
25. The Government of Swaziland must ratify and implement into domestic law the International Convention for the Protection of all Persons from Enforced Disappearances.
26. Furthermore, the Government of Swaziland must implement decisions and recommendations of regional and international human rights mechanisms in respect of Swaziland's obligations under international law, in particular, it should implement in full the decision of the WGAD, Opinion 6/2015 pertaining to the detention of Thulani Maseko, including by granting him compensation.

ENDNOTES

¹ Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (26 March 2004); International Covenant on Civil and Political Rights (26 March 2004); Convention on the Elimination of All Forms of Discrimination against Women (26 March 2004); International Convention on the Elimination of All Forms of Racial Discrimination (7 April 1969); International Covenant on Economic, Social and Cultural Rights (26 March 2004); Convention on the Rights of the Child (7 September 1995); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict and Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (24 September 2012); Convention on the Rights of Persons with Disabilities (24 September 2012).

² Human Rights Council, Report of the Working Group on the Universal Period Review: Swaziland, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, UN Doc. A/HRC/19/6/Add.1 (6 March 2012), paras. 1, 2, 3 and 21.