

Working Group on Arbitrary Detention

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Re: Request for Opinion on the Arbitrary Detention of Thulani Rudolf Maseko in Swaziland

Members of the Working Group on Arbitrary Detention,

Further to your urgent action letter (jointly with other special procedures) to the Government of Swaziland of 2 April 2014, reported as Case No. Case No SWZ 1/2014 in the Communications Report UN Doc A/HRC/27/72 (20 August 2014), we hereby submit full information regarding the arbitrary deprivation of liberty of one of Swaziland's preeminent human rights lawyers, Thulani Rudolf Maseko, on his behalf. We hope that with this information, the Working Group will be in a position to adopt an Opinion on the case in the coming months.

Thulani Maseko has been deprived of his liberty on the basis of his exercise of his right to freedom of opinion and expression as protected, among other sources, by article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights (the "Covenant").¹ Further, non-observance in the proceedings against him of the international norms relating to the right to a fair trial, as recognised in the Universal Declaration of Human Rights and in article 14 of the Covenant, has been of such gravity as to give the deprivation of liberty an arbitrary character.

A Swaziland court convicted Mr. Maseko on 17 July 2014 (*see* Judgment on Conviction attached herein as **Exhibit 1**), and on 25 July 2014 sentenced him to two (2) years of imprisonment (*see* Judgment on Sentencing attached herein as **Exhibit 2**). The conviction and sentence were based on a charge of contempt of court for "violat[ing] and undermin[ing] 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.²

¹ Swaziland acceded to the Covenant on 26 March 2004, but does not yet appear to have submitted its initial report under the Covenant, which was due 26 June 2005.

² *See* Indictment in *The King v. Nation Magazine et al.* (Case No. 120/14) (17 March 2014) [hereinafter Indictment], at pps. 2-3; Judgment in *Rex v. the Nation Magazine et al.* (120/14) [2014] SZHC 152 (17 July

² *See* Indictment in *The King v. Nation Magazine et al.* (Case No. 120/14) (17 March 2014) [hereinafter Indictment], at pps. 2-3; Judgment in *Rex v. the Nation Magazine et al.* (120/14) [2014] SZHC 152 (17 July 2014) (M.S. Simelane J.) [hereinafter Judgment on Conviction], at pps. 4-5; Judgment in *Rex v. the Nation Magazine et al.* (120/14) [2014] SZHC 170 (25 July 2014) (M.S. Simelane J.) [hereinafter Judgment on Sentencing], at p. 9.

Mr. Maseko is currently being held in a special correctional facility known as Big Bend Correctional Facility (“Big Bend”), located in a remote rural area approximately 300 kilometers from his family’s residence in the capital city of Mbabane. The distance and inaccessibility of Big Bend (approximately 3 hours by vehicle) make it extremely difficult for Mr. Maseko to maintain contact with his family and attorneys, including those representing him in his appeals of the criminal judgment and sentence. Mr. Maseko was transferred from the Sidwashini Remand Centre in Mbabane to Big Bend immediately after, and it may be inferred in retaliation for, his publication of an open letter (published in leading newspapers around the world, such as the U.K.’s The Guardian), in which he criticized the Kingdom of Swaziland’s government and requested that the United States press the Kingdom to accept constitutional talks aimed at political reform.³

Mr. Maseko has been denied any possibility of a reduced sentence, supervised release or payment of fine in lieu of prison. In fact, as described further below, Mr. Maseko will face a renewed criminal trial for a 2009 incident, in which the government arbitrarily indicted him on sedition charges for statements made at a Workers Day celebration.⁴

Finally, since he has been in the government’s custody from March 2014, Mr. Maseko has been unable to support his young family and has been forced to close his law practice, leaving him without income and his family in dire financial conditions. The welfare of the Maseko family therefore depends on Mr. Maseko being released as soon as possible.

It may also be noted in relation to Mr Maseko’s case that:

- Several Special Rapporteurs of the African Commission on Human and Peoples’ Rights stated that they “urge the Government of the Kingdom of Swaziland, to order the immediate and unconditional release of Mr. Maseko and Mr. Makhubu . . . and to respect and guarantee their right to freedom of opinion and expression.”⁵
- Amnesty International has affirmed that Bhekithemba Makhubu and Thulani Maseko are “prisoners of conscience, arrested and detained merely for exercising their right to freedom of expression”.⁶

³ See Thulani Maseko, *Letter to Barack Obama from a Swaziland jail cell*, THE GUARDIAN, 3 August 2014, <http://www.theguardian.com/world/2014/aug/03/-sp-barack-obama-swaziland-thulani-maseko>.

⁴ See *Case Testing Terrorism Act Starts December 1*, SWAZI OBSERVER, 10 September 2014, <http://www.observer.org.sz/news/65804-case-testing-terrorism-act-starts-december-1.html>; *Thulani Not a Prisoner of Conscience – Ex-Minister*, SWAZI OBSERVER, 22 October 2014, <http://www.observer.org.sz/news/67052-thulani-not-a-prisoner-of-conscience-ex-minister.html>.

⁵ *Press Release by the Special Rapporteur on Freedom of Expression and Access to Information in Africa and the Special Rapporteur on Human Rights Defenders in Africa on the Arrest of Mr. Thulani Rudolf Maseko and Mr. Bheki Makhubu*, AFRICAN COMM’N ON HUMAN AND PEOPLES’ RIGHTS, 28 March 2014, <http://www.achpr.org/press/2014/03/d197/>.

⁶ *Swaziland: Deplorable Sentences Against Journalist and Lawyer Stifle Free Speech*, AMNESTY INTERNATIONAL, 25 July 2014, <http://www.amnesty.org/en/news/swaziland-deplorable-sentences-against-journalist-and-lawyer-stifle-free-speech-2014-07-25>.

- The World Organisation Against Torture (OMCT) / Fédération Internationale des Ligues des Droits de l'Homme (FIDH) Observatory for the Protection of Human Rights Defenders has called upon the Swazi authorities “to release Messrs. Maseko and Makhubu immediately and unconditionally, and to put an end to the continued judicial harassment against them.”⁷

In addition, the American Bar Association,⁸ American University Washington College of Law,⁹ Robert F. Kennedy Center for Justice and Human Rights,¹⁰ Freedom House,¹¹ and the Committee to Protect Journalists,¹² among others, have all issued statements condemning the Kingdom of Swaziland for its suppression of expression and association, and requesting the acquittal and release of Thulani Maseko and Bheki Makhubu.

Accordingly, Mr. Maseko hereby requests that the Working Group adopt a formal Opinion on his case, pursuant to Resolution 1997/50 of the Commission on Human Rights, as reconfirmed by Resolution 2000/36, 2003/31, and Human Rights Council Resolutions 6/4 and 15/18. Detailed information and analysis of his case is set out below, following the format of the Working Group Questionnaire.

⁷ *Swaziland: Sentencing of Messrs. Thulani Rudolf Maseko and Bheki Makhubu to Two Years of Prison*, WORLD ORG. AGAINST TORTURE, 25 July 2014, <http://www.omct.org/human-rights-defenders/urgent-interventions/swaziland/2014/07/d22774/>.

⁸ *Statement of James R. Silkenat, President, American Bar Association Re: Pending Prosecution of Thulani Maseko and Bheki Makhubu*, AMERICAN BAR ASSOCIATION, 10 April 2014, available at http://www.americanbar.org/news/abanews/aba-news-archives/2014/04/statement_of_jamesr.html.

⁹ *American University Washington College of Law Center for Human Rights & Humanitarian Law and Humphrey Fellowship Program Call for Immediate Acquittal and Release of WCL Alum Thulani Maseko and Journalist Bheki Makhubu in Swaziland*, AMERICAN UNIV. WASH. COLLEGE OF LAW – CTR. FOR HUMAN RIGHTS & HUMANITARIAN LAW, 9 June 2014, <http://www.wcl.american.edu/humright/center/wclstatementmasekomakhubu.cfm>.

¹⁰ *Conviction of Human Rights Defenders in Swaziland Makes a Mockery of the Rule of Law*, R.F.K. CENTER FOR JUSTICE AND HUMAN RIGHTS, 25 July 2014, <http://www.rekcenter.org/conviction-of-human-rights-defenders-makes-a-mockery-of-the-rule-of-law>.

¹¹ *Swazi Authorities Should Drop Political Charges*, FREEDOM HOUSE, 18 March 2014, <http://www.freedomhouse.org/article/swazi-authorities-should-drop-political-charges#.VCq2SvldW51>.

¹² *CPJ Condemns Swaziland Editor's Prison Sentence*, COMM. TO PROTECT JOURNALISTS, 25 July 2014, <https://cpj.org/2014/07/cpj-condemns-swaziland-editors-prison-sentence.php>.

**QUESTIONNAIRE TO BE COMPLETED BY PERSONS
ALLEGING ARBITRARY ARREST OR DETENTION**

I. IDENTITY OF THE PERSON ARRESTED OR DETAINED

1. **Family name:** Maseko
2. **First name:** Thulani Rudolf
3. **Sex:** Male
4. **Birth date or age (at the time of detention):** Born 1 March 1970 and 44 years of age at the time of detention.
5. **Nationality/Nationalities:** Swaziland
6. **Identity document (if any):** Swaziland National Identity Card, Personal ID Number 7003016100015
7. **Profession and/or activity (if believed to be relevant to the arrest/detention):** Mr. Maseko is a Swazi lawyer, dedicated to defending human rights and advocating for political reform. More detail on his profession and activity, which are highly relevant to Mr. Maseko's arrest and detention, is provided in Section IV(B)(1) below.
8. **Address of usual residence:** Ka-Luhleko Area, Bhunya Township, Mazini Region, Swaziland.

II. ARREST

1. **Date of arrest:** Mr. Maseko was initially arrested on 17 March 2014. He was then released on 6 April 2014 when Judge Mumcy Dlamini of the High Court of Swaziland determined that the arrest warrant which purported to provide a legal basis for Mr. Maseko's arrest was contrary to Swaziland's Criminal Procedure and Evidence Act and had to be set aside. Mr. Maseko was re-arrested on 9 April 2014. He has been detained continuously since 9 April 2014 through and including the date of this Petition.
2. **Place of arrest (as detailed as possible):** Mr. Maseko was arrested on 17 March 2014 at his office situated at the Swazi Plaza in Mbabane, Swaziland.
3. **Forces who carried out the arrest or are believed to have carried it out:** Officers of the Royal Swaziland police.
4. **Did they show a warrant or other decision by a public authority?:** An arrest warrant was shown at the time of the initial arrest on 17 March 2014. That arrest warrant for Mr. Maseko was issued by Chief Justice Michael Ramodibedi of the High Court, but was later declared invalid, as explained in the following paragraph. A

further verbal order for Mr. Maseko's arrest was issued in open court by Judge Mpendulo Simelane on 9 April 2014.

5. **Authority who issued the warrant or decision:** The original arrest warrant was issued by Chief Justice Ramodibedi of the High Court for "contempt of court." This warrant was declared invalid under Article 31(1) of the Criminal Procedure and Evidence Act of Swaziland on 6 April 2014 by Judge Dlamini of the High Court of Swaziland on the grounds that the Chief Justice lacked the authority to issue a warrant in these circumstances.¹³ The prosecutor appealed this decision. A new order for Mr. Maseko's arrest was issued on 9 April 2014 by Judge Mpendulo Simelane by verbal order in open court on the grounds that because an appeal was pending, Judge Dlamini's decision invalidating the original warrant was stayed.¹⁴ On 3 December 2014, the Swaziland Supreme Court overruled Judge Dlamini's judgment declaring the original arrest warrant invalid.¹⁵
6. **Relevant legislation applied (if known):** The High Court of Swaziland has not applied any substantive legislation to Mr. Maseko's conduct (i.e., the publication of an article critical of a judge of that court) but instead relied on the common law doctrine of contempt of court.

III. DETENTION

1. **Dates of detention:** 17 March 2014 through 6 April 2014, then 9 April 2014 through the date of this Petition, inclusive.
2. **Duration of detention (if not known, probable duration):** Mr. Maseko has been detained for some eleven months to date. On 25 July 2014, Mr. Maseko was sentenced for two years counting from 17 March 2014, the date he was taken into custody.¹⁶
3. **Forces holding the detainee under custody:** His Majesty's Correctional Services, Ministry of Justice and Constitutional Development.
4. **Places of detention (indicate any transfer and present place of detention):** Mr. Maseko was preliminarily held at the Mbabane Police Station, and was then transferred to Sidwashini Remand Centre. He is now being held at the Big Bend Correctional Facility.

¹³ See Judgment in *Thulani Rudolph Maseko et al. v. Honourable Chief Justice et al.* (161/2014) [2014] SZHC 77 (6 April 2014) (M. Dlamini J.) [hereinafter Judgment on Release], at pps. 17-18.

¹⁴ See *Thulani Maseko and Bheki Makhubu Contempt of Court Case: Timeline of Proceedings*, SOUTHERN AFRICA LITIGATION CENTER BLOG, 14 April 2014, <http://www.southernafricalitigationcentre.org/2014/04/14/thulani-maseko-and-bheki-makhubu-contempt-of-court-case-timeline-of-proceedings/>.

¹⁵ See *Bheki, Thulani Bite Dust Again*, SWAZI OBSERVER, 4 December 2014, <http://www.observer.org.sz/news/68340-bheki-thulani-bite-dust-again.html>.

¹⁶ See Judgment on Sentencing, *supra* note 2, at p. 9.

5. **Authorities that ordered the detention:** Upon his initial arrest for contempt of court, Mr. Maseko was detained for seven days pursuant to an order by Chief Justice Ramodibedi. After seven days, Mr. Maseko appeared before Judge Simelane who extended the detention. Mr. Maseko remained in custody until 6 April 2014 when Judge Dlamini released him after declaring the original arrest warrant invalid. On 9 April 2014, Mr. Maseko was detained again pursuant to a new arrest warrant issued by Judge Simelane and he has remained in detention ever since. On 25 July 2014, Judge Simelane of the High Court issued a Judgment sentencing Mr. Maseko to two years' imprisonment counting from 17 March 2014, the date he was taken into custody.¹⁷
6. **Reasons for the detention imputed by the authorities:** On 17 March 2014, Mr. Maseko was charged with "contempt of court" and arrested pursuant to a warrant issued by Chief Justice Ramodibedi of the High Court.¹⁸ These charges were based on statements made in an article written by Mr. Maseko, titled *Where the Law Has No Place*, published in The Nation, an independent magazine in Swaziland.¹⁹ In the article, Mr. Maseko criticized the conduct of Chief Justice Ramodibedi in relation to the prosecution of a government vehicle inspector for actions the inspector took against members of the judiciary arising from the misuse of government vehicles.

Mr. Maseko was convicted and imprisoned for expressing in the article his opinions that the prosecution of the inspector was "corrupt," "a demonstration of moral bankruptcy," "a travesty of justice," "a kangaroo process," and "used to settle personal scores at the expense of justice and fairness."²⁰ According to the High Court's Judgment, these statements of opinion written by Mr. Maseko on a matter of public importance "did unlawfully and intentionally violate and undermine the dignity, repute and authority" of the High Court of the Kingdom of Swaziland, and thereby constituted the crime of contempt of court.²¹ As a result, Mr. Maseko was sentenced to two (2) years of imprisonment without bail or supervised release, which

¹⁷ See *id.*

¹⁸ See Indictment, *supra* note 2, at pps. 2-3.

¹⁹ Also charged in the same case were The Nation, Bheki Makhubu and Swaziland Independent Publishers (Pty) Ltd. Mr. Makhubu is the editor and publisher of The Nation, an independent magazine covering news and socio-political commentary in Swaziland. He was arrested on 18 March 2014 and charged and tried together with Mr. Maseko. The Indictment against all four defendants listed two counts of contempt of court involving two different articles published in The Nation, one written by Mr. Makhubu and published in February 2014, titled *Speaking My Mind* and the other written by Mr. Maseko and published in March 2014, titled *Where The Law Has No Place*. Mr. Makhubu, was charged in both counts. Mr. Maseko was charged only in the second count. Mr. Makhubu, like Mr. Maseko, was sentenced to two years' imprisonment without the option of a fine. With respect to The Nation and Swaziland Independent Publishers (Pty) Ltd., the High Court imposed a fine of fifty thousand Emalangeni (SZL 50,000) on each count for a total of one-hundred thousand Emalangeni (SZL 100,000), to be paid within one (1) month from the date of the judgment, and held that failure to make timely payment would result in the court authorizing the Attorney General to institute proceedings for recovery of the fine as a civil debt owing to the government of Swaziland. See Judgment on Sentencing, *supra* note 2, at p. 9.

²⁰ See Judgment on Conviction, *supra* note 2, at pps. 4-5.

²¹ See *id.* at p. 5.

Judge Simelane declared was “commensurate with the offences committed and will serve as a deterrent to others, in particular like minded journalists in this country.”²²

7. **Relevant legislation applied (if known):** None. “Contempt of court” is a common law crime in Swaziland.

IV. DESCRIBE THE CIRCUMSTANCES OF THE ARREST AND/OR THE DETENTION AND INDICATE PRECISE REASONS WHY YOU CONSIDER THE ARREST OR DETENTION TO BE ARBITRARY

Part A of this section provides certain general information about Swaziland as a background to Mr. Maseko’s arrest and trial in Swaziland. Part B proceeds through the facts regarding Mr. Maseko’s arrest, detention, and trial. The analysis in Part C of this section sets forth the specific basis upon which Mr. Maseko asserts that his detention is an arbitrary deprivation of liberty.

A. Background

Swaziland is Africa’s last absolute monarchy²³ situated between Mozambique and South Africa.

King Mswati III and Queen Mother Ntfombi, the king’s mother who rules as his co-monarch, possess ultimate authority over all branches of the Swazi government. Although a parliament of appointed and elected members exists, as well as a prime minister, the king and his traditional advisors retain virtually all political power.²⁴

Chapter III of the 2005 Constitution recognizes a number of fundamental rights and freedoms, which according to Article 14(2) are to be respected and upheld by the judiciary and enforceable by the courts. Entitlement to the rights and freedoms is however generally “subject to respect for the rights and freedoms of others and for the public interest” (Article 14(3)). Further, in Swaziland constitutional rights are often not respected in practice, or are not interpreted and implemented consistent with international human rights standards.²⁵

Article 16 of the Swazi Constitution, which recognizes the right to liberty, provides, in pertinent part, as follows:

²² See Judgment on Sentencing, *supra* note 2, at p. 9.

²³ *Swaziland—Law, Custom, and Politics: Constitutional Crises and the Breakdown in the Rule of Law*, INTERNATIONAL BAR ASSOCIATION, March 2003, at 11.

²⁴ Human Rights Watch, *Swaziland: Country Summary* (January 2012).

²⁵ Amnesty International, *Swaziland: Submission to the UN Universal Periodic Review, 12th session of the UPR Working Group* (14 March 2011); Human Rights Watch, *Swaziland: Country Summary* (January 2012).

16. (1) A person shall not be deprived of personal liberty save as may be authorised by law in any of the following cases –

(a) in execution of the sentence or order of a court, whether established for Swaziland or another country, or of an international court or tribunal in respect of a conviction of a criminal offence;

(b) in execution of the order of a court punishing that person for contempt of that court or of another court or tribunal;

(c) in execution of the order of a court made to secure the fulfilment of any obligation imposed on that person by law;

(d) for the purpose of bringing that person before a court in execution of the order of a court;

(e) upon reasonable suspicion of that person having committed, or being about to commit, a criminal offence under the laws of Swaziland;

...

(2) A person who is arrested or detained shall be informed as soon as reasonably practicable, in a language which that person understands, of the reasons for the arrest or detention and of the right of that person to a legal representative chosen by that person.

(3) A person who is arrested or detained –

(a) for the purpose of bringing that person before a court in execution of the order of a court; or

(b) upon reasonable suspicion of that person having committed, or being about to commit, a criminal offence,

shall, unless sooner released, be brought without undue delay before a court.

(4) Where a person arrested or detained pursuant to the provisions of subsection 20(3), is not brought before a court within forty-eight hours of the arrest or detention, the burden of proving that the provisions of subsection (3) have been complied with shall rest upon any person alleging that compliance.

(5) Where a person is brought before a court in execution of the order of a court in any proceedings or upon any suspicion of that person having committed or being about to commit an offence, that person shall not be further held in custody in connection with those proceedings or that offence save upon the order of a court.

(6) Where a person is arrested or detained –

(a) the next-of-kin of that person shall, at the request of that person, be informed as soon as practicable of the arrest or detention and place of the arrest or detention;

(b) the next-of-kin, legal representative and personal doctor of that person shall be allowed reasonable access and confidentiality to that person; and

(c) that person shall be allowed reasonable access to medical treatment including, at the request and at the cost of that person, access to private medical treatment.

(7) If a person is arrested or detained as mentioned in subsection (3) (b) then, without prejudice to any further proceedings that may be brought against that person, that person shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that that person appears at a later date for trial or for proceedings preliminary to trial.

(8) A person who is unlawfully arrested or detained by any other person shall be entitled to compensation from that other person or from any other person or authority on whose behalf that other person was acting.

(9) Where a person is convicted and sentenced to a term of imprisonment for an offence, any period that person has spent in lawful custody in respect of that offence before the completion of the trial of that person shall be taken into account in imposing the term of imprisonment.

Section 24 of the Swazi Constitution, which recognizes the right to freedom of expression and opinion, provides, in pertinent part, as follows:

24. (1) A person has a right of freedom of expression and opinion.

(2) A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of expression, which includes the freedom of the press and other media, that is to say –

(a) freedom to hold opinions without interference;

(b) freedom to receive ideas and information without interference;

(c) freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons); and

(d) freedom from interference with the correspondence of that person.

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;

(b) that is reasonably required for the purpose of -

(i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;

(ii) preventing the disclosure of information received in confidence;

(iii) maintaining the authority and independence of the courts; or

(iv) regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television or any other medium of communication; or

(c) that imposes reasonable restrictions upon public officers,

except so far as that provision or, as the case may be, the thing done under the authority of that law is shown not to be reasonably justifiable in a democratic society.

Even without examining the interpretation or application in practice of these provisions, the protection for freedom of expression under the Swaziland Constitution does not appear to comply with international standards and Swaziland's international legal obligations. For instance, Section 24(3) appears to reverse the burden of proof as to justification. Under international standards, the burden is on the State to demonstrate that any restriction on freedom of expression is justified; Section 24(3) of the Constitution appears to place the burden on the individual to prove that the restriction is not capable of justification.

In practice, international non-governmental organisations have reported a range of human rights violations in Swaziland, including violations of freedom of association and assembly, particularly against political opposition grounds; as well as harassment and other violations in relation to human rights defenders; unjustified restrictions on freedom of expression and the media; and a lack of judicial independence.²⁶

On April 17, 2013, a Swazi court found Bheki Makhubu, editor of The Nation, guilty of the criminal offense of contempt of court for writing articles that criticized the judiciary and

²⁶ See, for example, Human Rights Watch, *Swaziland: Country Summary* (January 2012); Amnesty International, *Swaziland: Submission to the UN Universal Periodic Review, 12th session of the UPR Working Group* (14 March 2011); Open Society Foundations, *Swaziland Justice Sector and the Rule of Law* (March 2013); *Swaziland—Law, Custom, and Politics: Constitutional Crises and the Breakdown in the Rule of Law*, INTERNATIONAL BAR ASSOCIATION, March 2003, at 11; *Swaziland: A Failed Feudal State*, FREEDOM HOUSE (September 2013), <http://www.freedomhouse.org/report/special-reports/swaziland-failed-feudal-state>; International Commission of Jurists, *Swaziland: Country Profile* (9 June 2014), <http://www.icj.org/cijlcountryprofiles/swaziland/>.

particularly Chief Justice Ramodibedi.²⁷ This was a precursor to the instant case. The Supreme Court of Swaziland ultimately accepted Mr. Makhubu's pleas in mitigation of sentence and reduced the High Court's sentence for contempt of court from two years to three months' imprisonment.²⁸

After Thulani Maseko and Bheki Makhubu were, in the present case, sentenced to prison for criticizing Chief Justice Ramodibedi, the Chief Justice issued a press release that "warn[ed] the media from commenting adversely on cases pending in court."²⁹

B. Statement of Facts

1. Thulani Rudolf Maseko

Thulani Rudolf Maseko is a Swazi lawyer who advocates for human and political rights in Swaziland, including constitutional reforms in favor of freedom and democracy in Swaziland.

Born in the Manzini District of Swaziland on 1 March 1970, Mr. Maseko graduated from the University of Swaziland with an LL.B. He went on to obtain a Master's degree (LL.M.) in Human Rights and Democratization in Africa from the Centre for Human Rights of the University of Pretoria in South Africa in 2005.³⁰ From 2010-2011, Mr. Maseko was a Fellow in the prestigious Hubert H. Humphrey Fellowship Program at American University's Washington College of Law in the United States.³¹ In 2011, Mr. Maseko received the Vera Chirwa Human Rights Award bestowed by the University of Pretoria, in recognition of his unwavering support of human rights and democratization efforts in Swaziland.³²

²⁷ That judgment was affirmed by the Supreme Court of Swaziland. See Judgment in *Swaziland Independent Publishers (PTY) Limited & The Editor of the Nation and the King* (74/13) [2014] SZSC 25 (30 May 2014).

²⁸ *Id.* at p. 72 ("It is the order of this Court that: . . . v. The sentences imposed by the trial court on count 2 be and are hereby set aside. [. . .] viii. The 2nd appellant be and is hereby sentenced to a term of three months' imprisonment. ix. The term of imprisonment set out in viii. above be and is hereby suspended for a term of three years, commencing today, upon condition that the appellant be not convicted for an offence of scandalizing the court during that period.").

²⁹ See *Swazi Chief Justice Michael Ramodibedi Blasts Media*, TIMES OF SWAZILAND, 20 August 2014, available at <http://allafrica.com/stories/201408210873.html>.

³⁰ See *Centre for Human Rights at the University of Pretoria Calls for the Acquittal and Immediate Release of Thulani Rudolf Maseko and Bheki Makhubu*, CTR FOR HUMAN RIGHTS – UNIVERSITY OF PRETORIA, 6 June 2014, <http://www.chr.up.ac.za/index.php/centre-news-a-events-2014/1323-centre-calls-for-the-acquittal-and-immediate-release-of-alumnus-thulani-maseko-and-bheki-makhubu.html>.

³¹ See *Introducing the AU/WCL 2010-2011 Humphrey Fellows*, AMERICAN UNIV. WASH. COLLEGE OF LAW – HUMPHREY FELLOWSHIP PROGRAM, http://www.wcl.american.edu/scholars/humphrey/10_11fellows.cfm.

³² See *Centre for Human Rights at the University of Pretoria Calls for the Acquittal and Immediate Release of Thulani Rudolf Maseko and Bheki Makhubu*, *supra* note 30.

Mr. Maseko is one of Swaziland's leading human rights attorneys and activists, having devoted his professional life to fighting for the civil and political rights of Swazi citizens, often challenging the government in court and sacrificing his safety and livelihood in the process. When he was called to the bar of the High Court of Swaziland in 1999, he co-founded an organization called Lawyers for Human Rights (Swaziland) ("LHRS"). LHRS worked to challenge the constitutional review and drafting process in Swaziland, which was entrusted to the government's Constitutional Review Commission ("CRC") without any participation by civil society actors. LHRS drafted a model Bill of Rights that was presented to the CRC, but ultimately rejected.

Later, he co-founded other non-governmental groups dedicated to pursuing further democratization by challenging the validity of the Kingdom of Swaziland's 2005 Constitution. He argued that civil society groups had a right to participate in the constitutional reform, which was denied, therefore rendering the Constitution invalid. Mr. Maseko also challenged the constitutionality of the ban on political parties, and brought other cases on behalf of human rights causes such as workers' rights and the right to free public education. Mr. Maseko has also represented a number of politically prominent individuals, including the leader of Swaziland's banned opposition party, the People's United Democratic Movement (PUDEMO), in actions involving the government of Swaziland.

In addition to his work as a human rights lawyer, Mr. Maseko has also pursued journalistic activities, serving as a feature writer for The Nation, an independent magazine in Swaziland, since approximately 2012. One of his opinion pieces published in that magazine is, in fact, the purported basis for the Swazi government's prosecution of Mr. Maseko, which gives rise to this Petition.

Mr. Maseko is a founding member of LHRS and the Southern African Human Rights Defenders Network. Through his work and study in the United States and South Africa, he has forged important relationships with human rights activists in these countries, as well as his native Swaziland.

Mr. Maseko was arrested once before for exercising his right to expression. In June 2009, Mr. Maseko was arrested and charged with violating Sections 5(1) and (2)(a)(i) of the Sedition and Subversive Activities Act of 1930 as Amended for alleged statements that the Lozitha Bridge, bombed in a botched assassination attempt against the Swazi King, should be renamed after the two men who died in the attempt. Mr. Maseko was released on bail, but no trial was held. Facing a renewed criminal trial for this offense, which has been currently scheduled for March 2015, Mr. Maseko is challenging the constitutionality of the act under which he was charged.³³

³³ See *Case Testing Terrorism Act Starts December 1* and *Thulani Not a Prisoner of Conscience – Ex-Minister*, *supra* note 4.

2. The Arrest and Arbitrary Detention of Mr. Maseko

In March 2014, Mr. Maseko published an article in The Nation, titled *Where the Law Has No Place*.³⁴ In this article, Mr. Maseko criticized the prosecution of Mr. Bhantashana Vincent Gwebu.

In brief, the facts of Mr. Gwebu's case are as follows: Mr. Gwebu was the Chief Government Vehicle Inspector. On Saturday, 18 January 2014, he found a government vehicle parked outside of a primary school, with no apparent official reason or permit to be there. The car was driven by the driver of High Court Judge Esther Ota, who was present. Mr. Gwebu proceeded to arrest and charge the driver for misuse of a government vehicle. The following day, the Chief Justice Ramodibedi issued a warrant for the arrest of Mr. Gwebu on charges of contempt of court. According to information available, Mr. Gwebu was held in custody for nine days without a charge sheet and without being informed of the charges against him.³⁵ At that point, he was released on bail.

In *Where the Law Has No Place*, Mr. Maseko challenged the handling of Mr. Gwebu's case and its wider implications for the rule of law in Swaziland. During this period, Mr. Makhubu, the editor of The Nation, also published an article in the magazine entitled *Speaking My Mind*, which discussed Mr. Gwebu's case and potential corruption in Swaziland.

On 17 March 2014, Mr. Maseko and Mr. Makhubu were named as defendants in a four-page Indictment issued by Nkosinathi Maseko, the Director of Public Prosecutions for the Government of Swaziland, accusing the two men of the criminal offense of "contempt of court."³⁶ The charges were based on statements made in the two articles mentioned above regarding the Swaziland judiciary and Chief Justice Ramodibedi in particular.

Chief Justice Ramodibedi is a controversial figure in Swaziland and his home country of Lesotho. Until April of 2014, Chief Justice Ramodibedi served concurrently as the Chief Justice of Swaziland and President of the Court of Appeals, the highest court in Lesotho. In April 2014, he resigned from his position as President of the Court of Appeals in Lesotho, as a tribunal was being constituted to consider his impeachment on account of numerous allegations of unethical conduct, including, among others, improper bias and partiality in favor of the Lesotho and Swaziland governments.³⁷

³⁴ See *Where the Law Has No Place*, THE NATION MAGAZINE, March 2014, available at <http://www.salo.org.za/wp-content/uploads/2014/03/THE-ARTICLE-THAT-GOT-HIM-JAILED-By-THULANI-MASEKO.pdf>.

³⁵ See *Bhantshana Arrested*, TIMES OF SWAZILAND, 21 January 2014, <http://www.times.co.sz/news/95096-bhantshana-arrested.html>.

³⁶ See Indictment, *supra* note 2, at pps. 2-3.

³⁷ See *Lesotho Judge Resigns in Face of Impeachment*, MAIL & GUARDIAN, 25 April 2014, <http://mg.co.za/article/2014-04-25-lesotho-judge-resigns-in-face-of-impeachment>; *Judicial Protocol Taken for a Wild Ride*, MAIL & GUARDIAN, 28 March 2014, <http://mg.co.za/article/2014-03-27-judicial-protocol-taken-for-a-wild-ride>; *The Taming of Swaziland's Judiciary*, MAIL & GUARDIAN, 16 May 2014, <http://mg.co.za/article/2014-05-15-the-taming-of-swazilands-judiciary>.

Mr. Maseko was charged under Count 2 of the Indictment, as follows:

In that upon or during the month of March 2014 and at or near Mbabane area, in the Hhohho Region, the said accused each or all of them, acting jointly and in furtherance of a common purpose did unlawfully and intentionally violate and undermine the dignity, repute and authority of the High Court of the Kingdom of Swaziland did issue and publish malicious and contemptuous statements about the case of the King versus Bhantshana Vincent Gwebu High Court Case No. 25/2014 a criminal matter currently pending before the high Court of Swaziland and therefore *sub judice* in the following manner:

- (a) That the arrest of Bhantshana Gwebu was a demonstration of “corruption”, abuse of authority and lacking in “moral authority” or was a “demonstration of moral bankruptcy”;
- (b) That the proceedings against Bhantshana Gwebu are “a travesty” of justice”;
- (c) That the proceedings against Bhantshana Gwebu amount to “a kangaroo process”; [and]
- (d) That the proceedings against Bhandshana Gwebu were aimed at settling personal scores and that the idea behind these proceedings was the ensure that he was “dealt with”[.]³⁸

Mr. Maseko was detained overnight at the Mbababne Police Station without access to his lawyer, and reportedly, Chief Justice Ramodibedi ordered the police to deny Mr. Maseko access to his lawyer during this period.³⁹

On 18 March 2014, Mr. Maseko and Mr. Makhubu were brought to Chief Justice Ramodibedi’s chambers. The lawyers representing the two men were not informed that this was taking place. However, by chance, the attorneys saw the prosecutor and followed him to the Chief Justice’s Chambers. There, Chief Justice Ramodibedi ordered Mr. Maseko and Mr. Makhubu remanded into custody for seven days, even though the prosecutor had not requested that the defendants be remanded.⁴⁰

On 25 March 2014, appearing before Judge Simelane, the prosecutor requested the continued detention of Mr. Maseko and Mr. Makhubu for seven days and that the judge set a trial date. Mr. Maseko’s attorney objected to the arrest, detention and request for a trial and indicated that he intended to petition for Judge Simelane’s recusal.⁴¹ Judge Simelane was appointed to

³⁸ See Indictment, *supra* note 2, at pps. 2-3.

³⁹ See *Thulani Maseko and Bheki Makhubu Contempt of Court Case: Timeline of Proceedings*, *supra* note 14.

⁴⁰ See *id.*

⁴¹ See *id.*

the bench in February 2014, after having previously served as the High Court Registrar in Mr. Gwebu's case.⁴² Mr. Maseko therefore believed he had sufficient grounds to request Judge Simelane's recusal on the basis of his prior involvement in, and possible testimony about, Mr. Gwebu's case, which was the subject of his allegedly contemptuous writings.

On 31 March 2014, Mr. Maseko's lawyer filed his protest against the constitutionality of his arrest, detention and indictment.⁴³ On 1 April 2014, Judge Simelane extended Mr. Maseko and Mr. Makhubu's detention for a third time until a next hearing the following week; meanwhile, the two defendants gave notice of their intent to file an application demanding the judge's recusal.⁴⁴

From the date of his arrest until 6 April 2014, Mr. Maseko's and Mr. Makhubu's detentions were continually extended by increments.

On 4 April 2014, Judge Dlamini of the High Court of Swaziland heard the challenge to the constitutionality of Mr. Maseko's and Mr. Makhubu's arrests, detentions and indictments. On 6 April 2014, Judge Dlamini declared the arrest warrants invalid because they were not issued in accordance with Swaziland's Criminal Procedure and Evidence Act.⁴⁵ Consequently, Mr. Maseko and Mr. Makhubu were released from custody.

The prosecution appealed this decision. On 9 April 2014, Mr. Maseko and Mr. Makhubu were re-arrested pursuant to arrest warrants issued verbally in open court by Judge Simelane.⁴⁶ Judge Simelane determined that, because an appeal was pending, Judge Dlamini's 6 April 2014 judgment and the subsequent release of Mr. Maseko and Mr. Makhubu should be stayed. LHRS appealed this decision on behalf of the defendants.⁴⁷

On 10 April 2014, Mr. Maseko and Mr. Makhubu appeared before Judge Simelane, who remanded them into custody until 14 April 2014, when he ordered the trial to begin despite the defense's arguments that the start of the trial should be delayed due to the pending related appeals.⁴⁸

The following day, the duty judge, Judge Bheki Maphala, was scheduled to hear Mr. Maseko's and Mr. Makhubu's applications for bail. Judge Maphala, however, was unable to find their court files. The files were later found in Judge Simelane's possession. Judge

⁴² See *Swaziland: Sentencing of Messrs. Thulani Rudolf Maseko and Bheki Makhubu to two years of prison*, *supra* note 7.

⁴³ See *Thulani Maseko and Bheki Makhubu Contempt of Court Case: Timeline of Proceedings*, *supra* note 14.

⁴⁴ See *id.*

⁴⁵ See Judgment on Release, *supra* note 13.

⁴⁶ See *Thulani Maseko and Bheki Makhubu Contempt of Court Case: Timeline of Proceedings*, *supra* note 14.

⁴⁷ See *id.*

⁴⁸ See *id.*

Simelane ordered that, as the trial judge, he would serve on all ancillary matters in the case, including the bail application. He postponed the hearing until 14 April 2014.⁴⁹

On 14 April 2014, Judge Simelane heard and denied the petition for his recusal as the presiding judge. Judge Simelane then remanded Mr. Maseko and Mr. Makhubu back into custody until 22 April 2014. On 22 April 2014, the trial commenced. The attorneys for the two accused requested that Judge Simelane provide the reasons for dismissing the petition for his recusal, which would allow them to appeal the decision. Judge Simelane refused to provide reasons.⁵⁰ Mr. Maseko and Mr. Makhubu pleaded not guilty to the contempt charges. Judge Simelane insisted that Mr. Maseko plead to two counts of the Indictment in which he was not charged. Mr. Maseko refused.⁵¹

Mr. Maseko's and Mr. Makhubu's trial on the contempt of court charge was heard before Judge Simelane from 14-30 April and 5-28 May 2014. The defense presented arguments that the articles at issue were constitutionally protected free expression. The proceedings also involved inquiries into the truth of the statements in Mr. Maseko's and Mr. Makhubu's articles.

On 19 May 2014, Judge Simelane denied the defense's application for acquittal, stating that the prosecution had made a prima facie case of contempt of court.⁵² The trial was then adjourned until 2 June 2014. On 4 June 2014, Mr. Maseko delivered a statement of defense taking issue with the proceedings to which he was subjected and Swaziland's judiciary in general; Judge Simelane ordered greater police presence at the trial and then adjourned proceedings before the closing arguments had concluded.⁵³ On 5 June 2014, Mr. Maseko concluded the reading of his statement of defense.⁵⁴

On 17 July 2014, Judge Simelane found Mr. Maseko and Mr. Makhubu guilty of the criminal offense of contempt of court. In his opinion, Judge Simelane stated:

I thus find it absurd for anyone to go out there and mislead the public on what allegedly transpired in that Court when the very person saying this was not in

⁴⁹ *See id.*

⁵⁰ *See Swaziland: Sentencing of Messrs. Thulani Rudolf Maseko and Bheki Makhubu to two years of prison*, INT'L FEDERATION FOR HUMAN RIGHTS (FIDH), <http://www.fidh.org/en/africa/swaziland/15825-swaziland-sentencing-of-messrs-thulani-rudolf-maseko-and-bheki-makhubu-to>.

⁵¹ *See id.*

⁵² *See Summary of Case Against Thulani Maseko and Bheki Makhubu*, AMERICAN UNIV. WASH. COLLEGE OF LAW, CTR. FOR HUMAN RIGHTS & HUMANITARIAN LAW, July 30, 2014, <http://www.wcl.american.edu/humright/center/ThulaniMasekoBhekiMakhubu.cfm>.

⁵³ *See id.*

⁵⁴ *Id.*

attendance. It is of paramount importance for journalists to verify what they write about. No one has the right to attack a judge or the Courts under the disguise of the right of freedom of expression. Inasmuch as this is a right enshrined in the Constitution, the Constitution itself makes the right not absolute.⁵⁵

Judge Simelane also stated:

The rule of law is meant to benefit everyone. Some journalists have this misconception that just because they have the power of the pen and paper they can say or write anything under the disguise of freedom of expression. This is a fallacy. It would be an unfathomable phenomenon to say that the right to freedom of expression is absolute with regards to our Constitution. There is justification for the restrictions placed by Section 24 of our Constitution on the right to freedom of expression. The object of the restrictions is for maintaining the integrity and dignity of the Courts and this is in the public interest. It would be absurd to allow journalists to write scurrilous articles in the manner the Accused persons did. Such conduct could never be condoned by any right thinking person in our democratic country.⁵⁶

On July 25, 2014, Judge Simelane sentenced Mr. Maseko and Mr. Makhubu to two (2) years in prison without the option of a fine or supervised release.⁵⁷ In Mr. Maseko's case, the prison term is counted from March 17, 2014, the date he was taken into custody.⁵⁸ As he meted out the sentence, Judge Simelane further stated:

... I am of the firm conviction that a sentence of Two (2) years imprisonment without the option of a fine in each counting respect of Accused 2 and Accused 4 respectively is commensurate with the offense committed and will serve as a deterrent to others, in particular the like minded journalists in this country.⁵⁹

Finally, Judge Simelane imposed a fine of fifty thousand Swazi Emalangeni (SZL 50,000) on each count for a total of one-hundred thousand Swazi Emalangeni (SZL 100,000), to be paid within one (1) month from the date of the judgment, and held that failure to make timely

⁵⁵ See Judgment on Conviction, *supra* note 2, at para. 24.

⁵⁶ See *id.*, at para. 63.

⁵⁷ See Judgment on Sentencing, *supra* note 2, at p. 9.

⁵⁸ See *id.*

⁵⁹ See *id.*

payment would result in the court authorizing the Attorney General to institute proceedings for recovery of the fine as a civil debt owing to the government of Swaziland.⁶⁰

The two-year sentence was particularly harsh, as conviction for “contempt of court” in Swaziland ordinarily carries a 30-day sentence or a fine in the amount of 30,000 Swazi Emalangeni (equivalent to approximately 2,100 Euros).⁶¹

C. Analysis

Mr. Maseko’s detention violates a number of his rights that are guaranteed by international law.

The United Nations Working Group on Arbitrary Detention (the “Working Group”) has identified five categories of situations that constitute arbitrary detention, of which the following two are applicable to the facts of this case:

- Category II – When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by Articles 7, 13, 14, 18, 19, 20 and 21 of the UDHR and, insofar as States parties are concerned, by Articles 12, 18, 19, 21, 22, 25, 26 and 27 of the ICCPR;
- Category III – When the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the UDHR and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character.⁶²

Mr. Maseko’s detention constitutes an arbitrary detention falling within Category II because he was imprisoned as a result of exercising his fundamental right of expression, as embodied in Article 19 of the International Covenant on Civil and Political Rights (ICCPR), to which Swaziland became a party on March 26, 2004.⁶³ This right is also embodied in Article 19 of the Universal Declaration of Human Rights (UDHR).⁶⁴

⁶⁰ *See id.*

⁶¹ *See Swaziland: Sentencing of Messrs. Thulani Rudolf Maseko and Bheki Makhubu to two years of prison*, (FIDH), *supra* note 50.

⁶² *Report of the Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/16/47, Annex ¶7(b) (“Revised Methods of Work”) (19 January 2011), at ¶ 22-24 [hereinafter Revised Methods of Work].

⁶³ *See id.*; International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, entered into force 23 March 1976, at art. 19 [hereinafter ICCPR].

⁶⁴ Universal Declaration of Human Rights, G.A. Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) [hereinafter UDHR].

Mr. Maseko's detention also constitutes an arbitrary detention falling within Category III because violations of the minimum international standards of a fair trial in his case were of such gravity as to give his deprivation of liberty an arbitrary character. Among other international norms relating to the right to a fair trial, the Swaziland government denied Mr. Maseko the right to a public hearing by an independent and impartial court and the right to be presumed innocent in a criminal proceeding in violation of the ICCPR and UDHR.

Your mandates already identified these areas of concern in your joint letter to the Government of Swaziland dated 2 April 2014. Events subsequent to 2 April 2014 only add further evidence of arbitrariness in relation to both Category II and Category III.

1. Category II: Freedom of Expression

a. Mr. Maseko's Conviction Violates International Standards on Freedom of Expression

(i) Relevant international standards on freedom of expression

ICCPR Article 19 provides as follows:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

The UDHR similarly affirms that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”⁶⁵

The UN Human Rights Committee, in its General Comment No. 34 (2011) on freedom of expression, has recognized the high importance of the ability of individuals and journalists to criticize public officials, as Mr. Maseko and Mr. Makhubu did:

⁶⁵ *Id.*, art. 19.

[I] in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high. Thus, the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. Accordingly, the Committee expresses concern regarding laws on such matters as, lese majesty, desecration, disrespect for authority, disrespect for flags and symbols, defamation of the head of state and the protection of the honour of public officials, and laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned. States parties should not prohibit criticism of institutions, such as the army or the administration.

...

The penalization of a media outlet, publishers or journalist solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression.⁶⁶

The right of lawyers to express opinions on public affairs and the administration of justice is further recognized by the UN Basic Principles on the Role of Lawyers, article 23 of which provides as follows:

Lawyers like other citizens 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.⁶⁷

With respect to restrictions on freedom of expression under article 19(3) of the ICCPR, the Human Rights Committee has stated in General Comment No. 34, that “the relation between right and restriction and between norm and exception must not be reversed”. The Committee emphasized that restrictions may only be imposed if they are “provided by law”; have the purpose of protecting respect for the rights or reputations of others, the

⁶⁶ U.N. Human Rights Comm., General Comment No. 34, 102nd session, Geneva, 11-29 July 2011, UN Doc CCPR/C/GC/34 [hereinafter General Comment No. 34], at para. 38 and 42.

⁶⁷ UN Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (27 August to 7 September 1990) and welcomed by General Assembly resolution 45/166, 1990.

protection of national security or of public order (ordre public), or of public health or morals; and conform to strict tests of necessity and proportionality.⁶⁸

With respect to the requirement that any restriction be “provided by law”, the Committee’s General Comment states as follows:

For the purposes of paragraph 3, a norm, to be characterized as a “law”, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.⁶⁹

Thus, even a restriction that might in some circumstances be for a valid ground, or theoretically could be proportionate, will be invalid if any legal provision upon which it is based is not sufficiently precise and predictable to meet the requirements of a “law” within the meaning of article 19(3) of the ICCPR.

With respect to the element of proportionality under article 19(3), the Committee has said as follows:

[R]estrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected...The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law. The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.⁷⁰

While the Human Rights Committee has suggested that “contempt of court proceedings relating to forms of expression may be tested against the public order (ordre public) ground” it has emphasized that, “In order to comply with paragraph 3, such proceedings and the penalty imposed must be shown to be warranted in the exercise of a court’s power to maintain orderly proceedings.”⁷¹

Further, any possibility for contempt of court proceedings to comply with paragraph 19(3) must be read in context of the Human Rights Committee’s overarching emphasis that:

⁶⁸ General Comment No. 34, *supra* note 66, paras. 21-22.

⁶⁹ General Comment No. 34, *supra* note 66, para. 25.

⁷⁰ General Comment No. 34, *supra* note 66, para. 34.

⁷¹ General Comment No. 34, *supra* note 66, para. 31.

Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19. Journalists are frequently subjected to such threats, intimidation and attacks because of their activities. So too are persons who engage in the gathering and analysis of information on the human rights situation and who publish human rights-related reports, including judges and lawyers.⁷²

The Committee has also said, with respect to the punishment of individuals for expression that allegedly damages the reputation of public officials, that:

Defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognized as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties. ... States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and **imprisonment is never an appropriate penalty.** (emphasis added)⁷³

In its 2008 decision in *Dissanayake v Sri Lanka*, the Human Rights Committee found a violation of article 9 (right to liberty) and 19 (freedom of expression) where criminal contempt of court proceedings were used to imprison an individual for having publicly criticized the judiciary.⁷⁴ The Committee concluded in part as follows:

The Committee recalls . . . that courts notably in Common Law jurisdictions have traditionally exercised authority to maintain order and dignity in court proceedings by the exercise of a summary power to impose penalties for “contempt of court.” . . . the imposition of a draconian penalty without adequate explanation and without independent procedural safeguards falls within the prohibition of “arbitrary” deprivation of liberty, within the meaning of article 9, paragraph 1, of the Covenant. The fact that an act constituting a violation of article 9, paragraph 1, is committed by the judicial branch of government cannot prevent the engagement of the responsibility of the State party as a whole.

⁷² General Comment No. 34, *supra* note 66, para. 23.

⁷³ General Comment No. 34, *supra* note 66, para. 47.

⁷⁴ Communication No. 1373/2005, UN Doc CCPR/C/93/D/1373/2005 (4 August 2008).

In the current case, the author was sentenced to two years rigorous imprisonment for having stated at a public meeting that he would not accept any “disgraceful decision” of the Supreme Court, in relation to a pending opinion on the exercise of defence powers between the President and the Minister of Defence. As argued by the State party, and confirmed on a review of the judgment itself, it would appear that the word “disgraceful” was considered by the Court as a “mild” translation of the word uttered. . . . The Committee finds that neither the Court nor the State party has provided any reasoned explanation as to why such a severe and summary penalty was warranted, in the exercise of the Court’s power to maintain orderly proceedings Thus, it concludes that the author’s detention was arbitrary, in violation of article 9, paragraph 1.

The Committee concludes that the State party has violated article 19 of the Covenant, as the sentence imposed upon the author was disproportionate to any legitimate aim under article 19, paragraph 3.⁷⁵

(ii) Application of the international standards on freedom of expression, to the facts of this case

In this case, the trial judge found contempt of court on the basis that Mr. Maseko “scandalized, insulted and brought to disrepute the dignity and authority of the Chief Justice”⁷⁶

As a matter of domestic law, the applicants contest whether “scandalizing the court” is a valid basis for a finding of contempt of court and consider that Mr. Maseko should never have been subject to charge or conviction for the criminal offence of “contempt of court” on such grounds; other common law jurisdictions whose courts may formerly have applied a “scandalizing the court” offence have ultimately abolished it as inconsistent with freedom of expression.⁷⁷

In any event, it is respectfully submitted that if the Working Group examines the substantive conduct described in the judgment and sentence, as the basis on which Mr Maseko was detained and is still being imprisoned it will be seen that any deprivation of liberty, let alone two years of imprisonment, is simply not capable of justification as a “necessary and proportionate” restriction on his freedom of expression, however it may be

⁷⁵ *Id.*, paras 8.2 to 8.4 (citations omitted).

⁷⁶ See Judgment on Conviction, *supra* note 2, at para. 46.

⁷⁷ The United States, Canada, and even the United Kingdom, the birthplace of the crime of contempt of court, all no longer recognize the variation of contempt of court known as contempt by scandalizing the court. After more than 80 years without a successful prosecution, the United Kingdom finally abolished the offense of scandalizing the court in 2013 on the basis that it was outdated and infringed upon the European Charter of Human Rights. See, *Contempt in Modern New Zealand*, NEW ZEALAND LAW COMMISSION, May 2014, at pp. 56, 61-63

http://www.lawcom.govt.nz/sites/default/files/publications/2014/05/nzlc_ip36_contempt_web.pdf.

legally characterized under national law. To the contrary, his imprisonment for political criticism of state institutions and public officials is precisely the kind of measure that the Human Rights Committee has said “can never be considered to be a necessary restriction on freedom of expression”.

Further, given that the judge (wrongly, in our submission) in his own written reasons relied on something akin to criminal defamation of a public official in his finding of contempt, the Human Rights Committee’s affirmation that “imprisonment is never an appropriate form of penalty” for such conduct is directly relevant, and any deprivation of liberty founded on such a conviction violates article 19 of the ICCPR, and thereby also constitutes arbitrary detention in violation of article 9(1).

In the present case, in their writings, Mr. Maseko and Mr. Makhubu were clearly exercising their freedom to speak on matters of public concern. This kind of expression is amongst the least susceptible to justification of restrictions. As stated by the Human Rights Committee, the foundation of freedom of expression and freedom of the media must include the right to criticize the government, including the judiciary.

Further, Mr. Maseko and Mr. Makhubu had a good faith basis for criticizing the judiciary’s mishandling of Mr. Gwebu’s case. Nevertheless, Judge Simelane rejected the defense’s evidence that Mr. Gwebu was denied assistance of counsel, including the testimony of Mr. Gwebu himself, and dismissed it outright as “precarious,” “unworthy of belief” and “far-fetched.”⁷⁸ Instead, Judge Simelane relied on his own participation in the events of Mr. Gwebu’s case, and even took judicial notice of what transpired, as the sole basis for his determination that Mr. Maseko’s criticism was unfounded.⁷⁹ But beyond the biased approach he took to evaluating the facts, Judge Simelane used contempt of court simply as a guise for suppressing speech critical of the Swazi judiciary, which is not a valid restriction on freedom of expression.

In this case, Swazi law on the offense of contempt of court and its interpretation by Swazi courts does not provide sufficient specificity to allow Mr. Maseko to understand how to curtail his speech to conform to its requirements. Accordingly, the legal basis invoked for their detention and imprisonment further violates article 19 because it is not “provided by law” within the meaning of article 19(3).

Additionally, even leaving aside all other issues, the penalties imposed on Mr. Maseko and Mr. Makubu’s freedom of expression for their purported contempt of court simply cannot be justified by any measure as a proportionate response to the publication of the articles for which they have been punished.

Furthermore, it is evident that the judgment and sentence against Mr. Maseko and Mr. Makubu were not directed to the legitimate aims identified in Article 19(3) of the ICCPR, but rather were intended to chill free speech and free expression, particularly with respect

⁷⁸ See Judgment on Conviction, *supra* note 2, at paras. 22-23.

⁷⁹ See *id.*

to speaking critically about the government and matters of public concern, such as instances of public corruption. This is apparent from Judge Simelane's threat that the two-year prison sentence for Mr. Maseko and Mr. Makubu "will serve as a deterrent to others, in particular like minded journalists in this country."⁸⁰

The Swaziland High Court's intent to produce a chilling effect on free speech in this case is also evidenced by the severity of its punishment of Mr. Maseko. Similar cases of contempt of court, including those relied upon by Judge Simelane in his judgment, have resulted in sentences far less severe than Mr. Maseko's. For example, in *Gallagher v. Durack*, a 1985 case cited by Judge Simelane, the Federal Court of Australia imposed a three-month sentence for contempt of court on an individual who published a statement calling the judiciary's impartiality into question.⁸¹ Judge Simelane considered this case analogous to Mr. Maseko's and even mentioned the three-month sentence issued by the Australian court, but nevertheless imposed a much longer sentence upon Mr. Maseko.

Even the Supreme Court of Swaziland has recognized that a two-year prison sentence for the crime of contempt of court is excessive. In the previous case against Mr. Makhubu (mentioned above), that court set aside the excessive two-year sentence imposed by the trial court and reduced the defendant's sentence to three months, which in fact was suspended upon the condition that Mr. Makhubu not commit the offense of scandalizing the court for three years.⁸² In that case, Judge Moore of the Swaziland Supreme Court recognized the limitations of a prosecution for contempt of court, stating: "[t]he crime of scandalizing the court was not created for the purpose of providing a salve for the wounded feelings of the judicial officer concerned or balm to soothe his bruised ego."⁸³

2. Category III: Right to a Fair Trial

The arrest and detention of Mr. Maseko is arbitrary under Category III because of the Swazi judiciary's failure to observe the international norms relating to the right to a fair and public hearing by an independent and impartial tribunal established by law. A deprivation of liberty is arbitrary under Category III where "the total or partial non-observance of the international norms relating to the right to a fair trial is of such gravity as to give the deprivation of liberty an arbitrary character."⁸⁴ The procedural irregularities that plagued the criminal proceedings against Mr. Maseko and Mr. Makhubu, as described above, implicate a number of internationally recognized procedural requirements that the judiciary failed to observe in relation to their right to a fair trial enshrined in Articles 14 of the ICCPR and Article 10 of the UDHR, as well as corresponding regional and domestic law and standards.

⁸⁰ Judgment on Sentencing, *supra* note 2, at para. 16.

⁸¹ Judgment on Conviction, *supra* note 2, at para. 44.

⁸² Judgment in *Swaziland Independent Publishers (PTY) Limited & The Editor of the Nation and the King* (74/13) [2014] SZSC 25 (May 30, 2014), at p. 72.

⁸³ *Id.* at p. 26.

⁸⁴ Revised Methods of Work, *supra* note 62, at para. 8(c).

Mr. Maseko's prosecution for contempt of court, and the manner in which pre-trial issues were dealt with, was a results-driven process designed to ensure a conviction and a disproportionately severe sentence in order to silence criticism of the judiciary: (the International Commission of Jurists (ICJ) conducted a trial observation, and is currently preparing a trial observation report which may elaborate on and add to the points set out below). The failure to comply with international fair trial standards is demonstrated by the following facts and analyses:

- (i) On 17 March 2014, Chief Justice Ramodibedi issued, on his own motion, the original arrest warrants against the two journalists accused of criticizing his handling of the Gwebu case;
- (ii) On 18 March 2014, Chief Justice Ramodibedi remanded Mr. Maseko and Mr. Makhubu to pre-trial custody. He did so in chambers, rather than in open court, without allowing the accused to consult with counsel and even though the prosecution did not request a custodial remand of the accused. The proceeding was in violation of the following national, regional and international laws and standards pertaining to the right to a fair trial:

- Violation of the right to a public hearing

The general rule concerning court hearings in criminal cases is that they must be public, as reflected in Article 14(1) of the ICCPR and Principle A(1) of the Principles and Guidelines on the Right to a Fair Trial in Africa (the African Fair Trial Guidelines). Having said that, pre-trial hearings need not necessarily be held in public, unless the particular circumstances call for a public hearing of a pre-trial matter.⁸⁵ In the particular situation of Mr Maseko, especially having regard to questions raised regarding the impartiality of the Chief Justice, the ICJ takes the view that a public hearing at this stage was warranted. In the circumstances of the particular case, the in-chambers determination to remand the accused in custody ran counter to the principle of transparency and public scrutiny, and thus violated Mr. Maseko's right to a public hearing. In the constitutional challenge to the detention, Justice Dlamini of the High Court expressed the view that, in such a contentious matter, the remand proceedings should have been heard in open court and not in the Chief Justice's chambers.

- Violation of the right to counsel

⁸⁵ *Reinprecht v Austria*, European Court of Human Rights Application No 67175/01 (Judgment of 15 November 2005), para. 41.

Everyone who is arrested facing a criminal charge has the right to the assistance of legal counsel, from the time of arrest, at trial, and also in pre-trial proceedings. This is reflected in international and regional law and standards,⁸⁶ as well as in section 16(2) of the Swazi Constitution. Disposing with the question of the remand of the accused in the absence of their legal representatives amounted to violations of Sections 16(2) and 21(2) of the Swaziland Constitution and of applicable international and regional law and standards.

- Violation of the right to hearing by an impartial court

Article 14(1) of the ICCPR guarantees that all persons must be heard by an independent court or tribunal, as does Article 7(1)(d) of the African Charter on Human and Peoples' Rights and Principle A(1) of the African Fair Trial Guidelines. Impartiality in that regard requires both subjective and objective impartiality, meaning that not only must a court or judicial officer act without bias or prejudice, without harbouring preconceptions about the particular case or the parties, but he or she must also act in a manner that excludes any legitimate doubt of impartiality. The latter requires judges to recuse themselves from matters where there might be an appearance of a conflict of interest. This has been reaffirmed by the UN Human Rights Committee and the European Court of Human Rights.⁸⁷ The requirement of impartiality is also guaranteed under section 21(1) of the Swazi Constitution.

It is notable in this regard that, when considering the accused's constitutional challenge to the arrest and detention, Justice Dlamini of the High Court considered that the Chief Justice should not have issued the warrant of arrest. In circumstances where the Chief Justice was the alleged victim of the purported contempt of court, Justice Dlamini took the view that any warrant of arrest should have been issued, if appropriate, by another judicial officer to avoid any actual or perceived bias. In the circumstances of the case, the Chief Justice should have recused himself from any matter dealing with allegations against, or pre-trial issues concerning, the accused. His dealing with the remand proceedings thereby violated the accused's right to a hearing before an impartial court or tribunal under national, regional and international law.

⁸⁶ See, e.g., Article 14(3)(b) ICCPR; Principle 1 of the Basic Principles on the Role of Lawyers; Principle 17(1) of the UN Body of Principles; Article 7(1)(c) of the African Charter; Principles G(b), M(2)(e) and M(2)(f) of the African Fair Trial Guidelines; and Rule 20(c) of the Robben Island Guidelines. See also Principle 3 (para. 20) of the UN Principles on Legal Aid.

⁸⁷ See, e.g.: Human Rights Committee, General Comment No 32, para 21; *Piersack v. Belgium* [1982] ECHR 6, para 30; and *Hauschildt v. Denmark* [1989] ECHR 7, para 48.

- Violation of the right to a fair hearing and the presumption of innocence

Along with the right to liberty, the presumption of innocence gives rise to a presumption in favour of release pending trial (“bail”). This presumption is reflected in Article 9(3) of the ICCPR and Principle M(1)(e) of the African Fair Trial Guidelines. Each of those provisions qualifies the presumption in favour of bail such that a remand on bail may be made subject to certain conditions or guarantees, or a remand in custody may be appropriate if “there is sufficient evidence that deems it necessary to prevent a person . . . from fleeing, interfering with witnesses or posing a clear and serious risk to others” (as expressed in the African Fair Trial Guidelines). Section 16(7) of the Constitution of Swaziland sets out a presumption in favour of bail, which may be subject to reasonable conditions.

No evidence was produced before the court that the accused posed a flight risk, a risk of interfering with witnesses, or a risk to others. No request was made by the prosecution for the accused to be remanded in custody.

- (iii) On 9 April 2014, Judge Simelane remanded the accused in custody. This was despite the judgment of Justice Dlamini on 6 April 2014, declaring the original arrest warrants invalid. Judge Simelane made his decision on the untenable ground that the prosecution’s appeal of Judge Dlamini’s judgment stayed its order releasing them from detention.
- (iv) On 11 April 2014, Judge Simelane denied the defendants’ application for bail pending the criminal trial even though the court was presented with no evidence that either of the two men presented a flight risk, a risk of interfering with witnesses, or a risk to others. This was contrary to the presumption in favour of bail, which in part derives from the presumption of innocence, and would therefore appear to have been in violation of Article 9(3) of the ICCPR, Principle M(1)(e) of the African Fair Trial Guidelines, and possibly Article 16(7) of the Constitution of Swaziland.
- (v) In response to an application from the accused, Judge Simelane refused to recuse himself from presiding over the criminal trial. This is despite the fact that: Judge Simelane personally witnessed the events underlying Mr. Maseko’s allegedly contemptuous article, and had taken judicial notice thereof; although the indictments did not directly refer to Judge Simelane, specific reference to him is reportedly made in one of the articles that formed the basis of one of the indictments; and Judge Simelane was, for these reasons, subpoenaed as a witness by the accused (which was in turn rejected by the judge as a defective subpoena).

The failure of Judge Simelane to recuse himself was contrary to the requirement of objective impartiality of the judiciary. As mentioned above, this requires judges to recuse themselves from matters where there might be an appearance of a conflict of interest. By acting as the trial judge in this matter, Justice Simelane acted in violation of the accused's right to hearing by an impartial court, in contravention of Article 14(1) of the ICCPR, Article 7(1)(d) of the African Charter, Principle A(1) of the African Fair Trial Guidelines and section 21(1) of the Swazi Constitution.

- (vi) Judge Simelane expressed bias in favor of the prosecution, including by reportedly not taking any notes during the defense's testimony.⁸⁸

There was thereby not only a lack of objective impartiality during the trial (see point (v) above), but also reasonable grounds to doubt the subjective/actual impartiality of the trial judge, and thus raising further grounds to conclude that the trial was in violation of Article 14(1) of the ICCPR, Article 7(1)(d) of the African Charter, Principle A(1) of the African Fair Trial Guidelines and Section 21(1) of the Swazi Constitution.

- (vii) Judge Simelane imposed a harsh sentence of two years' imprisonment despite a recent Swaziland Supreme Court case reducing Mr. Makhubu's prior sentence for the same offense of contempt of court from two years to three months.

Judge Simelane thereby appears to have failed to attempt to achieve consistency in sentencing. This might be seen as further evidence of bias, or of the results-driven approach taken by the court. It may also support the conclusion that the overarching right to a "fair" trial was further undermined in this aspect of the proceedings.

V. INDICATE INTERNAL STEPS, INCLUDING DOMESTIC REMEDIES, TAKEN ESPECIALLY WITH THE LEGAL AND ADMINISTRATIVE AUTHORITIES, PARTICULARLY FOR THE PURPOSE OF ESTABLISHING THE DETENTION AND, AS APPROPRIATE, THEIR RESULTS OR THE REASONS WHY SUCH STEPS OR REMEDIES WERE INEFFECTIVE OR WHY THEY WERE NOT TAKEN

Soon after his arrest in March 2014, Mr. Maseko brought an application to have his arrest and detention declared unlawful.⁸⁹ On 6 April 2014, Judge Dlamini in the High Court heard

⁸⁸ *The Taming of Swaziland's Judiciary*, *supra* note 37.

⁸⁹ See *Court Diary: Thulani Maseko and Bheki Makhubu Appeals*, SOUTHERN AFRICA LITIGATION CTR. BLOG, 4 November 2014, <http://www.southernafricalitigationcentre.org/2014/11/04/court-diary-thulani-maseko-and-bheki-makhubu-appeals/>.

this matter and released him after finding that the arrest warrant was invalid because, in issuing the warrant, Chief Justice Ramodibedi did not follow the correct procedure pursuant to Article 31(1) of the Criminal Procedure and Evidence Act.⁹⁰

The prosecutor immediately filed an appeal to this judgment and, on 9 April 2014, Judge Simelane verbally ordered in open court that Mr. Maseko be re-arrested on the grounds that, pending the prosecutor's appeal, Judge Dlamini's decision invalidating the original warrant was stayed.⁹¹ Mr. Maseko appealed this determination.⁹²

Despite the fact that the lawfulness of the original arrest and detention had yet to be finally determined, Judge Simelane proceeded with the criminal trial and convicted Mr. Maseko of contempt of court on 25 July 2014, sentencing him to two years in prison.⁹³ Mr. Maseko filed an appeal of his conviction and sentence.⁹⁴ The appeal against conviction and sentence has not yet been heard, but is presently anticipated for May 2015.

On 3 November, 2014, the Supreme Court of Swaziland declared it was unable to hear the appeal against Mr. Maseko's re-arrest of 9 April 2014 because the record of the proceedings was incomplete, as it did not include a written judgment from Judge Simelane.⁹⁵ However, no written record of the re-arrest exists because Judge Simelane issued the order verbally in open court. The Supreme Court postponed the matter indefinitely and indicated that Mr. Maseko would be entitled to submit an application to be released on bail, which would be decided by Judge Simelane.⁹⁶

On 3 December 2014, a panel of the Swaziland Supreme Court overruled Judge Dlamini's decision declaring Mr. Maseko's initial arrest on 17 March 2014 unlawful. The Court held that contrary to the prior ruling, Chief Justice Ramodibedi was authorized to issue the original warrants of arrest.⁹⁷

⁹⁰ See Judgment on Release, *supra* note 13, at pps. 17-18.

⁹¹ See *Thulani Maseko and Bheki Makhubu Contempt of Court Case: Timeline of Proceedings*, *supra* note 14.

⁹² *Id.*

⁹³ See Judgment on Sentencing, *supra* note 2, at p. 9.

⁹⁴ See *More Swazi-style (In)Justice for Jailed Journalists*, DAILY MAVERICK, 4 December 2014, http://www.dailymaverick.co.za/article/2014-12-04-more-swazi-style-injustice-for-jailed-journalists/?utm_source=Daily+Maverick+Mailer&utm_medium=email&utm_campaign=First+Thing+with+John+stupart:+Tuesday,+2+September+2014&utm_term=http://www.dailymaverick.co.za/article/2014-12-04-more-swazi-style-injustice-for-jailed-journalists/#.VIAEUKsij1p.

⁹⁵ See generally Judgment in *Makhubu and Another v. Rex* (18/2014) [2014] SZSC 43 (3 December 2014) (Moore J.) [hereinafter Judgment on Appeal], available at <http://www.swazilii.org/sz/judgment/supreme-court/2014/43>; *Mad Hatters Rule in Swaziland Court*, BUSINESS DAY, 7 November 2014, <http://www.bdlive.co.za/opinion/2014/11/07/mad-hatters-rule-in-swaziland-court>.

⁹⁶ See Judgment on Appeal, *supra* note 95; *Mad Hatters Rule in Swaziland Court*, *supra* note 95; *Bheki, Thulani Go Separate Ways*, SWAZI OBSERVER, Nov. 14, 2014, <http://www.observer.org.sz/news/67755-bheki-thulani-go-separate-ways.html>.

⁹⁷ *More Swazi-style (In)Justice for Jailed Journalists*, *supra* note 94; *Bheki, Thulani Bite Dust Again*, *supra* note

Further, as regards the appeal against conviction and sentence, and any possibility of applying for bail pending the appeal, it is submitted that based on the specific proceedings to date in Mr Maseko's trial, combined with the conclusions of international non-governmental organisations cited above concerning the more general lack of independence and impartiality of the judiciary on such issues, that it would be reasonable for Mr Maseko, and the Working Group, to conclude that any such remaining domestic procedures are highly unlikely to be effective.⁹⁸

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⁹⁸ Indeed, Mr Makhubu requested bail pending appeal but his request was denied. See Media Alert: Swazi journalist to spend Christmas in jail after judge denies bail, Media Institute of Southern Africa, 6 December 2014. Available at <http://misanwaziland.com/2014/12/06/swazi-editor-to-spend-christmas-in-jail-after-judge-denies-bail%E2%80%8F/>.