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Swaziland

Human rights at risk in a climate of political and legal uncertainty

29 July 2004
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INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON WC1X 0DW, UNITED KINGDOM

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On 26 June 2004 Swaziland became a State Party to two key human rights treaties: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Two months earlier, on 26 April, Swaziland had also become a State Party to the United Nations (UN) Convention on the Elimination of All Forms of Discrimination against Women and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. By becoming a State Party, Swaziland legally took upon itself to implement the provisions of these treaties.

These significant and welcome developments have occurred at a critical time for the country and arise from the Government's decision in March 2004 to accede to these four treaties without reservations. However these new commitments will not be meaningful unless and until the Government is willing to respect and strengthen the rule of law, and create a constitutional environment within which the human rights guaranteed under the treaties can be fully enjoyed by all Swazis.

As of late June 2004 there has been no comprehensive resolution of the crisis over the rule of law, which was triggered in November 2002 by the then Prime Minister Sibusiso Dlamini's public refusal to abide by two rulings of the country's highest court, the Court of Appeal. King Mswati III, as Head of State and Government, could have countermanded this action by the Prime Minister if he had deemed it appropriate. As he did not, the conclusion must be drawn that the King ordered or agreed with the Prime Minister's action.

The current Prime Minister, Themba Dlamini, appointed by the King following parliamentary elections in October 2003, has publicly asserted the importance of upholding the rule of law. In relation to several important cases ruled on by the High Court and the Industrial Court in May 2004, he has demonstrated this commitment. However, by the end of June there was still no breakthrough towards acceptance by the Government of the Court of Appeal rulings of November 2002. As all the judges of the Court of Appeal had resigned in protest at the time, the country remains without a Court of Appeal. The individuals whose rights were affected by the Government's refusal to accept the rulings – awaiting trial prisoners and members of families forcibly evicted from their homes in October 2000 – continue to have their rights violated and remain without access to legal remedy. There is also an increasing number of

civil and criminal cases, including one involving the imposition of a death sentence, at appeal stage which cannot be concluded.

This unresolved situation also has a more generalised impact as it undermines the integrity and future purpose of the current efforts to devise a new constitution for the country. The prolonged process of drafting a new constitution, which began in 1996, may be reaching a final stage this year despite continuing differences of opinion in the country over both the drafting process and the provisions in the draft, which was made public in 2003. The draft does contain a Bill of Rights, which could assist the country to begin moving towards compliance with its obligations as a State Party to international and regional human rights treaties. However many provisions of the Bill of Rights fall short of the standards required under the human rights treaties. In addition, certain other provisions in the draft constitution concerned with the relationship between Swazi customary law and statutory and common law, the judiciary and immunity for the Executive arm of government could further weaken the impact of the Bill of Rights.

The continuing uncertainties in the sphere of law and governance leave many Swazis vulnerable to human rights violations, including the denial of access to an effective remedy. There has been a persistent pattern of human rights violations, including violations of women's and children's rights, arbitrary detentions, abusive policing involving the use of excessive force, torture and other forms of ill-treatment, contempt for judicial rulings and harassment of judicial officers, restrictions on the rights of freedom of association and peaceful assembly, intimidation of journalists and mass forced evictions. At the same time, the country is experiencing grave humanitarian problems which are affecting the right to food and the right to health.

Amnesty International has prepared this report with the intention of highlighting the urgent need for the Government to commit itself fully to ending human rights violations and implementing its existing and new obligations under international human rights law. Parts I and II illustrate the entrenched nature of certain human rights violations in the country, concentrating on the constitutional and judicial crisis and the plight of evictees. The extent to which the draft constitution may improve the protection of and respect for all human rights is also explored in Amnesty International's Memorandum to the Constitution Drafting Committee (CDC), which is attached as Appendix A to this report.

In Part III of the report Amnesty International has made a number of recommendations to the Government, in the hope that they will contribute to improving the protection of human rights for all Swazis and the fulfilment of the country's international and regional human rights obligations. In light of the urgent humanitarian problems in the country and the entrenched nature of its human rights problems, Amnesty International has also made some recommendations to the international community and other countries with commercial or donor links with Swaziland.

This report summarizes a 101-page document (48,771 words)**,** SWAZILAND: Human Rights at risk in a climate of political and legal uncertainty (AI Index: AFR/55/004/2004) issued by Amnesty International in July 2004. Anyone wishing further details or to take action on this issue should consult the full document. An extensive range of our materials on this and other subjects is available at http://www.amnesty.org and Amnesty International news releases can be received by email:

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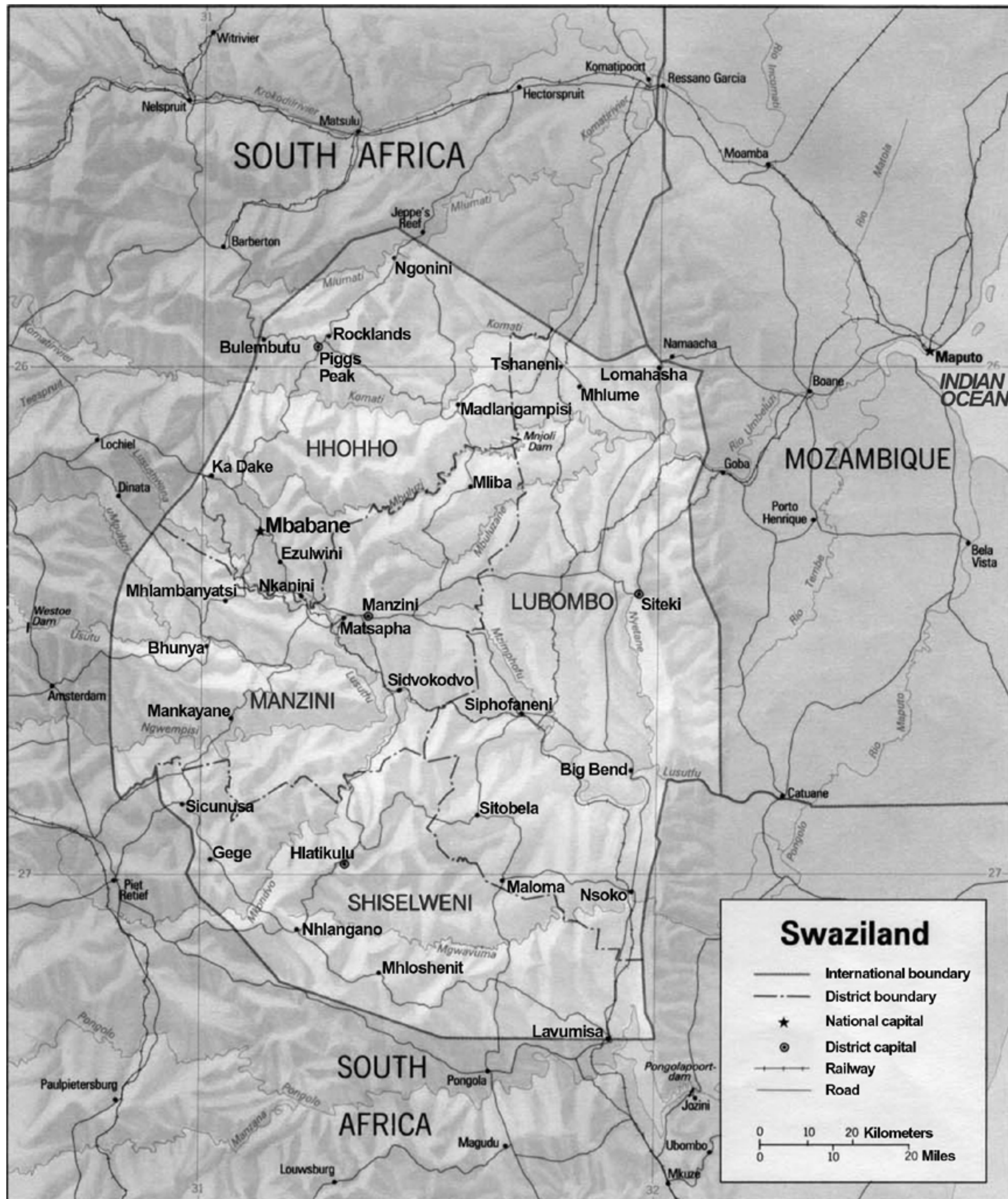
Kingdom of Swaziland



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SWAZILAND
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Summary

On 26 June 2004 Swaziland became a State Party to two key human rights treaties: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Two months earlier, on 26 April, Swaziland had also become a State Party to the United Nations (UN) Convention on the Elimination of All Forms of Discrimination against Women and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. By becoming a State Party, Swaziland legally took upon itself to implement the provisions of these treaties.

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As of late June 2004 there has been no comprehensive resolution of the crisis over the rule of law, which was triggered in November 2002 by the then Prime Minister Sibusiso Dlamini's public refusal to abide by two rulings of the country's highest court, the Court of Appeal. King Mswati III, as Head of State and Government, could have countermanded this action by the Prime Minister if he had deemed it appropriate. As he did not, the conclusion must be drawn that the King ordered or agreed with the Prime Minister's action.

The current Prime Minister, Themba Dlamini, appointed by the King following parliamentary elections in October 2003, has publicly asserted the importance of upholding the rule of law. In relation to several important cases ruled on by the High Court and the Industrial Court in May 2004, he has demonstrated this commitment. However, by the end of June there was still no breakthrough towards acceptance by the Government of the Court of Appeal rulings of November 2002. As all the judges of the Court of Appeal had resigned in protest at the time, the country remains without a Court of Appeal. The individuals whose rights were affected by the Government's refusal to accept the rulings – awaiting trial prisoners and members of families forcibly evicted from their homes in October 2000 – continue to have their rights violated and remain without access to legal remedy. There is also an increasing number of civil and criminal cases, including one involving the imposition of a death sentence, at appeal stage which cannot be concluded.

This unresolved situation also has a more generalised impact as it undermines the integrity and future purpose of the current efforts to devise a new constitution for the country. The prolonged process of drafting a new constitution, which began in 1996, may be reaching a final stage this year despite continuing differences of opinion in the country over both the drafting process and the provisions in the draft, which was made public in 2003. The draft does contain a Bill of Rights, which could assist the country to begin moving towards compliance with its obligations as a State Party to international and regional human rights treaties. However many provisions of the Bill of Rights fall short of the standards required under the human rights treaties. In addition, certain other provisions in the draft constitution concerned with the relationship between Swazi customary law and statutory and common law, the judiciary and immunity for the Executive arm of government could further weaken the impact of the Bill of Rights.

The continuing uncertainties in the sphere of law and governance leave many Swazis vulnerable to human rights violations, including the denial of access to an effective remedy. There has been a persistent pattern of human rights violations, including violations of women's and children's rights, arbitrary detentions, abusive policing involving the use of excessive force, torture and other forms of ill-treatment, contempt for judicial rulings and harassment of judicial officers, restrictions on the rights of freedom of association and peaceful assembly, intimidation of journalists and mass forced evictions. At the same time, the country is experiencing grave humanitarian problems which are affecting the right to food and the right to health.

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In Part III of the report Amnesty International has made a number of recommendations to the Government, in the hope that they will contribute to improving the protection of human rights for all Swazis and the fulfilment of the country's international and regional human rights obligations. In light of the urgent humanitarian problems in the country and the entrenched nature of its human rights problems, Amnesty International has also made some recommendations to the international community and other countries with commercial or donor links with Swaziland.

Part I: *CONSTITUTIONAL REFORM AND THE URGENT NEED TO IMPROVE RESPECT FOR HUMAN RIGHTS IN SWAZILAND*

Background

The southern African country of Swaziland has been engaged for the past seven or more years in a constitutional reform process which has yet to be completed.[1] In 1996 King Mswati III appointed a Constitutional Review Commission (CRC) to draft a new constitution and receive written and oral submissions from individuals on the content of a new constitution. In August 2001, after a much criticised process, the CRC presented a scanty report which asserted that "the Swazi nation" preferred no change to the political and legal arrangements which had been in place since the suspension of the Constitution in 1973.[2] The report provided no statistical information or other details of the methodology used to reach their conclusions. The media had also been prohibited from reporting their proceedings. In 2002, under Decree No.1, the King appointed the Constitution Drafting Committee (CDC) to finish the CRC's work by actually drafting a new constitution. In May 2003 the King made public the CDC's draft constitution. The CDC subsequently led a public consultation process on the draft, which was still continuing in June 2004.

The critical need for this process to be concluded, with an outcome which entrenches respect for human rights, has been underscored by two grave situations: the political and legal turmoil which arose from the refusal by the government of Prime Minister Sibusiso Dlamini to abide by certain rulings of the country's highest court and the growing humanitarian crisis in the country. The constitutional reform process will be meaningless without a genuine and long-term resolution of the crisis over the rule of law and the administration of justice. The Government of Swaziland will need to state fully and publicly its respect for the independence and integrity of the judiciary. Such respect should be ensured in practice at all levels. An end to the political and legal uncertainty in the country may also enable Swaziland to address more effectively its pressing humanitarian problems.

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[1] In 1973 King Sobhuza II issued a Proclamation on 12 April whereby he repealed the independence Constitution of 1968, including its Bill of Rights, banned political parties and vested all legislative, executive and judicial powers in the King. There were however some "saved" provisions, for example, relating to the establishment, powers and functions of the Judicature (see also footnote 61 below).

[2] The CRC's *Final Report on the Submissions and Progress Report on the Project for the Recording and Codification of Swazi Law and Custom,* contained a series of baldly-stated findings such as "Almost the entire members of the nation whom we interviewed recommend that the Monarchy continues as it is constituted currently…All the powers of governing (ruling) and reigning over the Kingdom must remain entrenched in the Ngwenyama [the King]"; "The nation recommends that rights and freedoms which we accept must not conflict with our customs and traditions as the Swazi nation"; "An overwhelming majority of the nation recommends that political parties must remain banned".

Following the parliamentary elections in October 2003, the new government of Prime Minister Themba Dlamini, who was appointed by the King, has been attempting to find a solution to the crisis which has left the administration of justice in disarray since the end of 2002.[3] The effort to find a solution officially is being led by the new Minister for Justice and Constitutional Development, Prince David Dlamini and has involved the assistance of Commonwealth advisers. The Minister, who is also the chairperson of the CDC, informed the Swaziland Parliament in late April 2004 that some progress was being made through his discussions with all the stakeholders in the justice, prisons and police sectors, including with the former judges of the Court of Appeal.[4] In late May 2004 Prime Minister Themba Dlamini told members of the business community that they were still working to find a solution to enable the Court of Appeal judges to resume their duties in Swaziland.[5] However, no breakthrough had been announced by late June. The unease and concern aroused by this lack of a breakthrough is evident in a statement released by the Law Society of Swaziland, on the eve of a "Smart Partnership National Dialogue" convened by the Government. The Law Society criticized the event as a "futile window-dressing exercise", noting that the first National Dialogue, which had been held in 2003, had "called for an unconditional return to the Rule of Law". This had not happened. In its statement the Law Society noted that it had "fully engaged itself in discussions with the Prime Minister [Themba Dlamini] and the Minister of Justice on the restoration of the Rule of Law", but had now concluded that "however well-intentioned these individuals may be, they have no power to effect the necessary changes". In the Law Society's view, the "Rule of Law was subverted in the name of the King, and only he can restore it".[6]

The existence of a parallel executive government, in the form of traditional advisers to the King, who is head of state and government with legislative and "inherent judicial powers", creates a high level of uncertainty in the sphere of governance and the administration of justice.[7] In a recent manifestation of this conflict in 2004, the Speaker of the House of

[3] See below for information on the events behind the resignation of all of the judges of the Court of Appeal in November 2002 and the conflict between the courts and police and prison services over accused persons' right to bail.

[4] Reported in The Times of Swaziland, 24 April 2004 and 1 May 2004. All the judges of the Court of Appeal were retired members of the South African judiciary.

[5] Reported in The Times of Swaziland, 28 May 2004.

[6] Statement of the Law Society of Swaziland Regarding the National Dialogue, 26 June 2004; The Times of Swaziland, 27 and 28 June 2004.

[7] An important traditional advisory body is the Swazi National Council (SNC), which refers in part to the process of the "summoning of the nation" by the King to consider certain issues. The term also appears to be used to refer to a committee appointed by the King to advise him. (CRC, *Final Report*, p. 96.) The former Prime Minister Sibusiso Dlamini is currently a member of the SNC committee. The "inherent judicial powers" refer to Swazi traditional law and custom, but the King also has the authority to appoint the judges of the Court of Appeal, High Court and Industrial Court which apply both statutory law and Roman-Dutch common law. See International Bar Association (IBA), *Swaziland Law, Custom and Politics: Constitutional Crisis and the Breakdown in the Rule of Law,* March 2003, pp.31-33, 38-39; Chucks Okpaluba and others, *Human Rights in Swaziland: The Legal Response*, Department of Law, University of Swaziland, 1997, pp.1-6.

Assembly, Marwick Khumalo, an elected member of parliament who had been unanimously voted into the position as Speaker of the House of Assembly, resigned on 9 March after being instructed to do so by the Governor of the Ludzidzini Royal Residence, Jim Gama, reportedly on the instructions of the King.[8] The instruction came after several months of growing pressure on the Speaker. During this period his parliamentary position was subjected to investigation by a committee chaired by Jim Gama. Marwick Khumalo was also summoned by police at night to appear at the royal palace where he was placed under pressure by the King's traditional advisers to resign.[9] Some sort of explanation for these events emerged publicly after 10 March.[10] The Prime Minister publicly stated that Marwick Khumalo's case had been dealt with by "appropriate traditional forums", but if he felt "aggrieved", he had the right to appeal to the King.[11] However there was widespread public anger over what many saw as harassment of an outspoken critic of government policies. There was concern too that the actions of the King and his advisers had undermined the Parliament as an institution.[12] When civil society activists attempted to mount a protest at the opening of parliament on 17 March by wearing black (mourning) clothes, they were reportedly denounced by Jim Gama as having committed a crime and being liable to punishment. Media workers from the government-owned Swaziland Television station were allegedly threatened with disciplinary proceedings and the loss of their jobs for having interviewed one of the protest organizers, Musa Hlophe, the co-ordinator of the Coalition of Concerned Civic Organizations (CCCO).[13]

That the stakes behind these political struggles are high is evident in the scale of the now widely recognized humanitarian crisis affecting the country. The United Nations Special Envoy for HIV/AIDS in Africa Stephen Lewis, after a visit in March 2004, publicly

[8] The Times of Swaziland, 12 March and 13 March 2004.

[9] Interview with Marwick Khumalo by Amnesty International, Ezulwini, 15 March 2004.

[10] It is hard to assess the factual nature and significance of the reported explanation which refers to a sexual scandal which occurred 25 years earlier within royal family circles, when Marwick Khumalo was 14 years of age. The Times of Swaziland, 12, 13 and 14 March 2004.

[11] Text of report by Radio Swaziland, 16 March 2004 (BBC news feeds, 17 March 2004).

[12] The Swaziland Parliament consists of two Houses: the House of Assembly with 55 MPs chosen by direct elections in a constituency-based system linked to the chiefdoms and 10 others appointed by the King, and the Senate with 20 members appointed by the King and 10 indirectly elected by the House of Assembly. With executive and legislative power vested in the King and political parties banned, the Parliament is in a very weak position. The issue of participation in Parliamentary elections is controversial amongst government opponents and critics. The Commonwealth election observer team in their report to the Secretary-General noted that "no elections can be credible when they are for a Parliament which does not have power and when political parties are banned" (Report of the Commonwealth Expert Team on the Swaziland National Elections 18 October 2003, cover letter 23 October 2003). Despite its weakness the Parliament has become involved in recent years in more active scrutiny of and debate on government policy particularly on budget issues and allegations of corruption.

[13] Reported in The Times of Swaziland, 08, 10, 11, 13, 17 March 2004 and 18 April 2004; IRIN, "King Opens Parliament amid Controversy", 17 March 2004; IRIN, "Local Press under Pressure", 19 April 2004; interview by Amnesty International with CCCO member organizations, 9 April 2004 and media sources 22 April 2004.

acknowledged that, at over 38 percent, Swaziland has the highest HIV prevalence in the world. AIDS-related conditions also account for over 90 percent of hospital admissions.[14] The number of children orphaned by AIDS is growing rapidly. UN agencies estimated that there were 35,000 such children in 2001 and that by 2010 there would be over 71,000 children orphaned by AIDS in a country with less than one million people.[15] The Food and Agricultural Organization of the United Nations (FAO) included Swaziland as one of 24 countries in sub-Saharan Africa facing "food emergencies" in its April 2004 report.[16] Drought is the main cause, but the impact of the HIV/AIDS pandemic on the rural economy is also identified as a contributing factor. The FAO and the World Food Program (WFP) estimated in March 2004 that 350, 000 people, a third of the population, would need food assistance in a society where two-thirds of the population live below the poverty line.[17] The International Monetary Fund (IMF) referred, in a report released in October 2003, to a "skewed" income distribution and "widespread" poverty, "with an estimated two thirds of Swazis living on less than US$1 per day" and a "third of the labour force…estimated to be unemployed".[18] The IMF also commented that political and legal uncertainties and conflicts were creating additional barriers to solving these serious socio-economic problems. Similarly, an Amnesty International representative was informed during a research visit in early 2004 that the climate of political uncertainty was undermining the ability of officials, international agencies and civil society organizations to respond effectively to Swaziland's humanitarian problems.[19] In addition violations of human rights may also be contributing in various ways to the problem of hunger and the rapid growth in the level of HIV infection. There is for instance a

[14] Notes for Press Briefing, United Nations, New York: Noon, March 31, 2004 Stephen Lewis, UN Secretary General's Special Envoy for HIV/AIDS in Africa; UNAIDS*, 2004 Report on the global AIDS Epidemic*, Geneva, June 2004, pp. 31, 32, 42, 190- 191; Ministry of Health and Social Welfare, *8th HIV Sentinel Serosurveillance Report,* December 2002. The rate of 38.6 %, comes from ante-natal clinic data, which has been confirmed as reliable and representative of infection rates in the adult Swazi population as a whole (see Final report prepared by Alan Whiteside and others for NERCHA and UNAIDS, *What is driving the HIV/AIDS epidemic in Swaziland, and what more can we do about it*, April 2003, pp 10-13, available at http://www.nu.ac.za/heard/papers/2003/HEARD_swaziland_report_fin.pdf)

[15] UNICEF, *AFRICA'S ORPHANED GENERATIONS*, New York, November 2003, p.51 (Table 2: Estimated Numbers of Orphans by Country, Year, Type, Age and Cause). The National Emergency Response Council on HIV/AIDS (NERCHA) informed Amnesty International on 23 February 2004 that they had identified 60, 000 orphans and 15, 000 orphan-headed households. It is not clear though if these figures include children orphaned for reasons other than the deaths of their parents from AIDS-related illnesses. UNAIDS estimates the number of orphans due to AIDS in 2003 at 65,000 (*2004 Report,* p.193).

[16] *FAO/GIEWS: Africa Report*, April 2004, prepared by the FAO Global Information and Early Warning System on the food supply situation and cereal import and food aid requirements for all countries in sub-Saharan Africa; WFP Emergency Report No.11, 12 March 2004, Part II.

[17] Idem, pp. iii, 3-4, 56.

[18] *Swaziland; Preliminary Conclusions of the 2003 Article IV Consultation Mission*, Mbabane, 8 October 2003 (http://www.imf.org/external/np/ms/2003/100803.htm)

[19] The representative was conducting research into the human rights aspects of the HIV/AIDS pandemic in Swaziland. A public report on the findings of that mission will be issued in late 2004.

developing consensus that laws and practices which discriminate against women and girls, as well as sexual and other forms of violence against them, are helping to fuel the HIV/AIDS pandemic in Swaziland.[20]

Human rights standards and the draft constitution

Against this very worrying background of serious political, legal and humanitarian problems, the government in March 2004 took a most welcome and significant step. Swaziland acceded to four core international human rights treaties after decades of having one of the poorest records in sub-Saharan Africa in this respect. The four treaties are:

- The UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
- The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Convention against Torture);
- The International Covenant on Economic, Social and Cultural Rights (ICESCR); and
- The International Covenant on Civil and Political Rights (ICCPR).

Swaziland's accession to these treaties was made on 26 March 2004, with CEDAW and the UN Convention against Torture coming into force on 26 April 2004 and the two covenants on 26 June 2004.[21] During visits to Swaziland in 2001 and 2003 Amnesty International representatives had been told by government officials that the government intended to ratify CEDAW but with reservations. However, in 2004 Swaziland accepted its obligations under this and the other treaties without entering any reservations. Following the accession to the treaties in March 2004 there seemed to be little official information about or public awareness that the Government had made this critical commitment. Advocacy, human rights, political reform and women's organizations, which have been campaigning for many years for the Government to make these commitments, initially had to struggle to obtain information confirming the development. Nevertheless the Ministry of Justice has proved open to discussing the implications of the ratifications when contacted by some of these organizations. It will be vital that the information about the treaties is widely known. Similarly the legal and practical implications of the country's commitment to observe and promote these human rights standards need to be understood fully, particularly during this period of constitutional reform.

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[20] This was the conclusion of the United Nations Development Programme (UNDP), *Gender focused responses to HIV/AIDS in Swaziland,* Mbabane, 2002, pp. 1-2, 31 and throughout. The findings were confirmed by Whiteside and others, *What is driving the HIV/AIDS epidemic in Swaziland,* pp. 17-29. See also below p.13.

[21] http://untreaty.un.org , Reference C.N.297.2004.TREATIES-3 (Depositary Notification), C.N.296.2004.TREATIES-2 (Depositary Notification), C.N.298.2004.TREATIES-1 (Depositary Notification), C.N.299.2004.TREATIES-3 (Depositary Notification) for CEDAW, CAT, ICESCR and ICCPR respectively.

The provisions in the treaties which Swaziland is now obliged to observe should have their immediate impact on the nature of the draft constitution. During 2002 the CDC had received submissions and advice from primarily expert bodies, including non-governmental organizations, but did not consult more widely before preparing the draft for presentation to the King. In this respect they saw themselves as merely completing the task begun by the earlier Constitutional Review Commission (CRC).[22] However, as already noted the CRC process was flawed in its lack of transparency and inclusiveness. Its report provided few clues regarding the submissions and evidence which were the supposed basis for its conclusions.[23] The CDC's draft, which had been made public by the King on 31 May 2003, was then distributed in English and later in SiSwati for public discussions. These public meetings were still continuing in June 2004. The lack of clarity over the mechanism for adoption of the constitution has caused widespread concern, particularly in view of the crisis over the rule of law. However, according to media reports the King declared that the constitution would be adopted in 2004 through some form of parliamentary procedure.[24] During the two-day Smart Partnership National Dialogue at the end of June, the King reportedly stated that the draft constitution would be adopted before the end of 2004.[25] At an event hosted by the British High Commission in the same month, the King's representative conveyed his message that patience was needed from the diplomatic community "as we try to bring more of our people on board in the new constitutional dispensation".[26]

There are clear disagreements between sectors of Swazi society over the proposed constitution. Traditional advisory bodies to the King are reported to fear that Swazi Law and Custom and the institution of the monarchy will be undermined, for instance, by the proposed Bill of Rights, the provision allowing women the right to "opt out" of customary practices and the possibility that political parties may be legalised. Civil society organizations, in turn, have expressed concern that the draft has left unchecked the powers of the Executive, limits public participation in the governance of the country and leaves unclear the status of constitutional law, relative to Swazi Law and Custom.

In July 2003 the Human Rights Association of Swaziland (HUMARAS),[27] a non-governmental body, organized a consultation on the draft constitution with representatives of various non-governmental organizations (NGOs), with observers present from the CDC, humanitarian organizations, diplomatic missions and international NGOs, including Amnesty

[22] Comments made by members of the CDC during a meeting with representatives of Amnesty International, Mbabane, 1 July 2003.
[23] See the CRC's *Final report.* See also the International Bar Association (IBA) report, *Striving for Democratic Governance: An analysis of the draft Swaziland Constitution,* August 2003, pp.4-5.
[24] Reported in The Times of Swaziland 12 March 2004.
[25] Reported in the Swazi Observer, 29 June 2004.
[26] As reported in The Times of Swaziland, 10 June 2004. The King through his representative was apparently responding to the speech of the British High Commissioner, Dr David Reader, who was urging the Government of Swaziland to bring to an end the legal and constitutional uncertainty of the past two years (News Release issued by the British High Commission, 8 June 2004).
[27] As a result of consultations at this event HUMARAS has now been replaced by the Human Rights and Democracy Institute of Swaziland (HURIDISWA).

International.[28] At the conclusion of the presentations and discussion, the participants concluded that the present draft constitution could only be regarded as an "interim measure" due to the need for greater civic education and the existence of "loopholes" in the draft. They recommended the establishment of a "National Constitutional Assembly" with broad representation to debate and resolve problems in the draft. In the interests of improved governance and accountability they agreed that the following should be ensured:

- That the supremacy of the Constitution is guaranteed and no-one should be above the law;
- That political parties are allowed to operate freely;
- That the doctrine of the separation of powers is appropriately enshrined;
- That the rule of law and the independence of the judiciary including the manner in which Judges are appointed are guaranteed;
- That a Constitutional Court be established; and
- That the King should not be immune from the provisions of the Constitution.

The participants also recommended that the provisions of international and regional human rights treaties which the country ratifies should be fully incorporated into domestic law. They agreed that the Bill of Rights, which in the draft constitution is envisaged as justiciable (enforceable by the courts), should include economic, social and cultural rights, on the grounds that this would in due course promote greater transparency and fairness in the use of Swaziland's limited resources. Finally, they encouraged international human rights and legal organizations to undertake an "audit" of the provisions of the draft constitution and make recommendations to the CDC.[29]

In September 2003 another meeting took place and involved some non-governmental organizations and political groupings who agreed to establish a "National Constitutional Assembly" (NCA), along the model of the similarly named Zimbabwean organization.[30] On 3 May 2004 the NCA published their analysis of the draft constitution, in which they noted the limitations on rights contained in the draft Bill of Rights and the entrenchment of unchecked powers of the head of state. They sharply criticized the process behind the creation of the draft constitution which they described as "not free, not transparent and not accountable to the people". They reiterated the call for the establishment of an elected "Constitutional

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[28] A list of participants and their organizations is attached at the end of the *Report of the HUMARAS Consultative Meeting on the Bill of Rights in the Draft National Constitution held at the Mountain Inn, 9th to 10th July, 2003*, Lomcebo Dlamini (Rapporteur), Lungile Magagula (Minute Recorder), Joshua Bheki Mzizi (Editor).

[29] *Report of the HUMARAS Consultative Meeting on the Bill of Rights*, pp. 31-33. See IBA, *Striving for Democratic Governance*, where a copy of the draft constitution is attached as an appendix to their submission to the CDC - http://www.ibanet.org/pdf/HRISwazilandAnalysis.pdf

[30] Some of the constituent organizations of the NCA are the Swaziland chapter of Lawyers for Human Rights and the Coalition of Concerned Civic Organizations.

Assembly" to fully debate and adopt a constitution.[31] On 16 June political and trade union organizations associated with the NCA lodged an application in the High Court. They are seeking, among other things, a declaratory order that the applicants are entitled to participate in the constitution-making process, an order directing the Government to review and set aside if necessary the findings and recommendations made by the CRC, and directing the government to convene and constitute a "constitutional assembly" to discuss the draft constitution.[32] During the Smart Partnership National Dialogue, the King reiterated the position that the Government had taken from 1996 onwards, that no "group [organization] submissions" on the draft constitution would be permitted.[33]

Amnesty International's memorandum on the Draft Constitution

In October 2003 Amnesty International sent comments and recommendations to the CDC on the proposed constitution. The full text of this memorandum is contained in **APPENDIX A** of this report, together with relevant excerpts from the draft constitution. Amnesty International submitted the comments in the hope that the CDC would consider and incorporate them with a view to strengthening the constitution's human rights provisions in line with Swaziland's international and regional human rights obligations.

Amnesty International welcomed some of the draft provisions, including some important advances for women's rights and the inclusion of an enforceable bill of rights. Nevertheless the organization expressed concern that the draft in general allowed wide scope for subsidiary legislation or for executive government organs to restrict the rights and freedoms it was proposing to protect, to an extent which Amnesty International saw as inconsistent with internationally recognized human rights standards. Some of the guarantees themselves fell far short of international human rights standards, while others appeared to entrench limitations and exceptions which could allow the state to restrict these rights in an arbitrary manner. The fact that Swaziland has now committed itself to uphold four more of the international human rights treaties, in addition to several others which it had long ago ratified or at least signed,[34] makes it all the more necessary and urgent that the proposed constitution entrenches the human rights standards which Swaziland is obliged to respect, protect and fulfil under international human rights law.

In brief, as noted in the attached memorandum to the CDC, the proposed constitution does not sufficiently protect:

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[31] IRIN, "Draft Constitution to be challenged", 03 May 2004; Interview by Amnesty International with NCA member organizations, 04 May 2004.

[32] *Swaziland Federation of Trade Unions & Others v. The Chair of the Constitutional Review Commission & Others;* interview by Amnesty International with the Applicants' legal representative, 30 June 2004; The Times of Swaziland, 17 June and 22 June 2004.

[33] Reported in the Swazi Observer, 30 June 2004.

[34] In 1995 Swaziland ratified both the UN Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights. It signed in 1992 but has not yet ratified the African Charter on the Rights and Welfare of the Child.

- **The right to life**, for instance, as the draft allows law enforcement officials to use lethal force in situations where there is no threat to life posed to police officers or others; the draft also does not outlaw the use of the death penalty although Swaziland has not conducted any executions since 1983[35];
- **The rights to personal liberty or a fair trial**, as many of the protections guaranteed in international standards are missing or not fully recognized;
- **The right not to be subjected to torture or other forms of ill-treatment**, despite the explicit prohibition of these abuses in the draft – the Bill of Rights provisions, which are enforceable through the courts, should incorporate the strongest possible safeguards to prevent torture;
- **The right not to be subjected to arbitrary search and seizure and the right to privacy**, as wide-ranging limitations are allowed;
- **The rights to freedom of conscience, belief, expression, opinion, peaceful assembly and association**, all of which are subjected to extensive limitation clauses that could permit the state, in its almost unbounded discretion, to restrict the enjoyment of these rights;
- **The rights of the child not to be subjected to forced labour and all forms of physical violence**, as the draft allows exceptions which may encourage human rights abuses;
- **The rights of women**, despite the huge advance inherent in the proposed prohibition of discrimination on the grounds of gender in the political, economic and social spheres and the guarantee of legal equality. Girls and young women, for instance, are not sufficiently protected against forced marriage; there should be a clear prohibition against discrimination on the grounds of sex and marital status and not just gender;[36] and

[35] Under the Criminal Law and Procedure Act No. 67 of 1938, Section 296 (1), the death penalty is mandatory for murder where the court finds no extenuating circumstances and discretionary in cases of treason. In July 1983 seven men and one woman were hanged. King Mswati III, at the time of his coronation in 1986, commuted all existing death sentences. A small number of death sentences have been imposed by the High Court in most years since then, although in the last three to four years the number has fallen to an average of one per year. (See Swaziland country entries in Amnesty International's global Annual Reports, where the figures noted are based on press reports and confirmed information from the High Court.) There is an automatic right of appeal. Since November 2002 there has been no Court of Appeal. Where the appeal fails the prisoner under sentence of death can appeal to the Prerogative of Mercy Committee which makes recommendations to the King, who has the power to commute or remit any sentence or grant pardon. (See *The Application of the Death Penalty in Commonwealth African States: Swaziland – Preliminary Report* , by G N K Vukor-Quarshie, paper presented to the First International Conference on the Application of the Death Penalty in Commonwealth Africa, Entebbe Uganda, 10 -11 May 2004.) To Amnesty International's knowledge the King has commuted the death sentences in all the petitions presented to him.

[36] Women and Law in Southern Africa Research and Educational Trust (WLSA) - Swaziland provide a comprehensive analysis of the potential positive impact as well as shortcomings of the draft constitution for women in their publication, *The Draft Constitution: What's in store for Swazi Women*, published with the support of the British High Commission, Mbabane, 2003.

- **Economic and social rights**, which are relegated to the section on "Directive Principles of State Policy" rather than included as enforceable rights in the Bill of Rights.

The enforcement of these rights could be further undermined by the lack of clarity in the draft constitution regarding which body of law: Roman-Dutch common law and statutory law, Swazi customary law or the constitution would have the higher or final authority. This potentially critical area of confusion in the draft, combined with the extensive limitations allowed on rights guaranteed in the draft, could have its most important consequences for individuals or organizations seeking remedies against human rights violations for which the Head of State directly or indirectly may be responsible. The draft constitution grants the King as Head of State sweeping executive powers, while also recognizing the King's role as traditional head (the *Ngwenyama*) of the Swazi Nation. As observed in the report of the International Bar Association's Expert Panel, the "draft constitution muddies the distinctions between the royal, executive and legislative functions of the King, potentially at the expense of the promotion of the rule of law".[37]

Women and Law in Southern Africa Research and Educational Trust (WLSA) – Swaziland expressed particular concern that this confusion in the draft constitution will compromise the new protections afforded women's rights. They note that

> "*In as much as the section [29] strives to be positive in uplifting the status of women, the challenge will come to the practical enforcement by women of this right in the present Swazi context where societal attitudes, expectations, and demands, the patrilocality of marital homes, as well as the potential traditional leaders' and community recrimination, sanction and ostracism of a woman who refuses to uphold a certain custom…, may militate against women being able to exercise and enjoy these rights. This is particularly the case as the Draft Constitution, despite asserting that customary law is subordinate to the principles of the Constitution, is evasive about the status of customary laws and their enforcement.*"[38]

[37] *Striving for Democratic Governance*, p.17.
[38] *The Draft Constitution: What's in store for Swazi Women,* [no page reference]

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Nonhlanhla Dlamini (left), Director of the Swaziland Action Group Against Abuse (SWAGAA), comforts a young survivor of rape. Sibongile (not her real name) was subjected to repeated sexual abuse by a male relative and raped and threatened with a knife by a neighbour. Following a police investigation two men were brought to trial on rape charges, but were acquitted in late 2003.

The lethal consequences of inequality for women

Although the police are making greater efforts to improve their handling of cases of sexual violence and criminal justice officials are beginning to make improvements in the conduct of court proceedings to reduce the trauma for victims, for most survivors access to police services and health care is still very difficult. This situation is due to distances, lack of reliable and affordable transport, and poverty. Longstanding discrimination against women under the law, for instance in the area of property rights, their generally low social status and situation of economic dependence, as well as the public tolerance of gender-based violence have contributed to making women and girls vulnerable to such violence, as well as to HIV infection through coercive sexual relations or rape.[a]

The rates of HIV infection in young people between 15 and 29 years ranges from 23 percent amongst 15-19 year olds to 47 percent amongst 25-29 year olds.[b] Epidemiological and qualitative studies have shown that the majority of those infected are young women and that a key driver of the epidemic in Swaziland is the combined effect of poverty and inequality for women.[c] The UN Secretary General's Special Envoy for HIV/AIDS in Africa, Stephen Lewis, has stated that "where AIDS is concerned, gender inequality is lethal".[d]

Swaziland has taken the vital step now of ratifying CEDAW without reservations. Yet, as WLSA-Swaziland points out in *Multiple Jeopardy*, ratification of CEDAW is not an end in itself. The provisions in the draft constitution guaranteeing legal equality for women and promoting other measures to improve their socio-economic position are long overdue steps in the right direction. However the Government must ensure that the protections afforded under these provisions are strengthened and are fully compliant with the country's obligations under CEDAW and are implemented as a matter of urgency.

a) The link between women's legal and socio-economic status and gender-based violence is fully explored in WLSA - Swaziland, *Multiple Jeopardy: Domestic Violence and Women's Search for Justice in Swaziland*, Mbabane, 2001

b) Information provided to Amnesty International by the National Emergency Response Council on HIV/AIDS (NERCHA), 23 February 2004.

c) Whiteside and others, *What is driving the HIV/AIDS epidemic in Swaziland,*; UNDP, *Gender Focused Responses to HIV/AIDS in Swaziland*, Mbabane 2002; FLAS, Panos, SAfAIDS and UNAIDS, *Men and HIV in Swaziland,* second edition 2003; UNICEF Mbabane, Annual Report 2003; UNDP, *Integrated Approach to Gender Equality in Swaziland,* Mbabane 2002; Ministry of Health and Social Welfare and Family Life Association of Swaziland (FLAS), *Swaziland Behavioural Surveillance Survey*, November 2002; SWAGAA, Annual Report 2002/2003, Matsapha; WLSA, *Lobola: Its implications for women's reproductive rights*, Weaver Press, Harare, 2002.

d) Speech by Stephen Lewis at the Centre for Strategic and International Studies, Washington D.C., 4 October 2002.

As noted in Amnesty International's memorandum to the CDC, the role that the new constitution will play in protecting human rights in Swaziland will also depend critically on the existence of a robust, independent and impartial judiciary and people's full and unhindered access to effective judicial remedies. Amnesty International welcomed the important statements of principle in the draft in which the independence of the judiciary is asserted and along with it their authority to decide matters without improper influences, threats, pressures or interference. However these important principles are unlikely to be realised as long as the draft constitution contains no effective safeguards to ensure the independence of the appointment and dismissal process, and proper conditions of appointment for judges. That these safeguards are necessary is evident from the history of repeated interference by members of the Executive in the operations of the judiciary in recent years.[39]

In this respect, Amnesty International noted that the UN Basic Principles on the Independence of the Judiciary[40] are helpful and should be reflected in the draft constitution.[41] For example, Principle 10 states that "any method of judicial selection shall safeguard against judicial appointments for improper motives". Principles 17 and 20 require that any proceedings to remove judges will require special safeguards including a fair hearing and an independent review of any decision to remove them; and, under Principle 18, judges may only be removed for reasons of incapacity or "behaviour that renders them unfit to discharge their duties".

Amnesty International recommended in its memorandum that the provisions in the draft constitution should be revised to make them fully compliant with Swaziland's obligations under international and regional human rights treaties. The final constitution should set the highest standard in this area. It should enable the courts to make sound judgments which are protective of human rights. It should provide clear guidance to government departments and the Parliament in their necessary and urgent task of amending national laws to make them consistent with these obligations.

In conclusion, as Swaziland has officially taken upon itself to abide by the international human rights treaties listed above, the recommendation made by Amnesty International - that the constitution should accord with international human rights standards - has now become a full-fledged legal obligation for Swaziland. Under Article 2(2) of the International Covenant on Civil and Political Rights, for instance,[42]

> *"Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."*

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[39] see further below.

[40] Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[41] The Basic Principles are referred to in Appendix A subsection 3.

[42] Similar provisions exist in the other treaties.

The Consequences of Impunity

Making the draft constitution and subsidiary legislation consistent with the provisions of international and regional human rights treaties is a necessary but not sufficient step for the Government to take in fulfilling its obligations. It must also change a longstanding and deeply entrenched pattern of conduct, that of being unaccountable to complainants and victims of human rights violations. As a consequence of this pattern of official conduct, many victims of human rights violations have been denied their internationally-recognized right to an effective remedy and reparations, which includes an enforceable right to compensation.[43] In turn police and other officials have escaped scrutiny and can be corrupted into believing that they are above the law.

For many years, for instance, victims of torture or ill-treatment or the use of unlawful and excessive force at the hands of the security forces have only been able to obtain some degree of justice and compensation through lodging civil claims against the authorities. Where complainants manage to file their claims prior to the end of the extremely short 90-day proscription period, they may then face very protracted proceedings. Their case may take a long time to appear on the court roll due to the limited resources of the courts. The officials who are the respondents in the claim appear also to play a game of obstruction and delay which is frustrating and discouraging to the complainant. Due to poverty and the lack of a legal aid system, not all complainants have access to lawyers to assist them in instituting claims. Even where the victim or their relatives may succeed in winning damages through court action, the authorities rarely admit liability and take disciplinary or criminal action against the offender.

A typical case is that of Thomas Mamba, who, eight years after being shot and seriously wounded by the police, was judged by the High Court in April 2004 to have a claim against the government for injuries and other losses he sustained. Acting Chief Justice Annandale ruled that even the very broad authority to use force that the police have under section 41 of the Criminal Procedure and Evidence Act (1938) was breached in this case. They were not undertaking an arrest and there was no reasonable suspicion that the victim, who was not offering resistance, had committed a crime.[44] Amnesty International is seeking information from Police Headquarters to confirm whether or not those police officers found by the civil court to have acted unlawfully are being investigated for possible criminal charges.

The distrust of police procedures and claims was evident in the case of a young woman, Mandi Hlophe, who died in custody at Manzini police station on 2 April 2004. She had been arrested for alleged theft. The police reportedly claimed that she had committed suicide using strips of blanket material in the cell.[45] Her family, fearful that she may have been tortured and that the police were covering up the truth, withheld permission for a post-mortem in the hope that an independent medical investigation could be instituted first. However they were unable

[43] See below.
[44] As reported in the Swazi Observer, 22 April 2004. The police shot Thomas Mamba on 18 March 1996.
[45] Reported in The Times of Swaziland, 5 April 2004.

to find the resources to secure the services of an independent doctor. The post-mortem examination was conducted eventually by the state pathologist alone. The family had not been informed of the results of official investigations by early July.[46]

The lack of independent, impartial and publicly accountable mechanisms for ensuring effective investigations of suspected human rights violations inevitably undermines public confidence in the police and other official organs of government. In 2001 the then Prime Minister Sibusiso Dlamini, in a commendable and unusual response to public concern over a number of deaths in custody, ordered an independent inquiry into these deaths, including those of two young men, Edison Makhanya and Sibusiso Jele. Their deaths had caused a particular public outcry, in part because of the unusual nature of the police claim that these two detainees had died by committing suicide by swallowing "weevil tablets"[47] within hours of their arrest. Amnesty International had assisted human rights lawyers and the families to obtain access to the services of an independent forensic pathologist. The police conspicuously attempted to obstruct the independent doctor's access to the mortuary, despite his having the families' agreement to represent them. Eventually the police permitted him to be present to observe the post-mortems, but prohibited him from taking notes, photographs or samples. During the public inquiry conducted by the acting Chief Magistrate Selby Gama as Coroner, police witnesses were summoned to give evidence under oath on the circumstances surrounding the deaths of Edison Makhanya and Sibusiso Jele. However the ability of the Coroner to establish the facts was hampered by conflicts in the police evidence, incomplete chain of custody records, important failures in investigation steps by police after the deaths occurred and serious delays in the completion of and access to the results of toxicology tests.[48]

Events two years later once again showed the urgent need for an impartial and independent body to conduct investigations into allegations of human rights violations. On 13 August 2003 police and members of the specialised public order unit, the Operational Support Services Unit (OSSU), broke up a large public demonstration in Mbabane with what appears to have been excessive force, causing injuries to demonstrators and bystanders. Amnesty International sent a detailed, six-page letter to Prime Minister Sibusiso Dlamini and to the Commissioner of Police Edgar Hillary expressing concern and seeking information on the steps which may have been taken to investigate alleged incidents of excessive force used to disperse demonstrators, indiscriminate beatings of bystanders and the targeting of some individuals for systematic beatings amounting to the infliction of torture. The security forces at the time,

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[46] Reported in The Swazi Observer, 23 April 2004. Interviews by Amnesty International with legal and NGO sources.

[47] These are aluminium phosphide tablets which are used for the control of insect and rodent pests in stored cereal and release phosphine gas when exposed to air. If ingested phosphine is released from aluminium phosphide by action of the stomach fluids. Phosphine is highly toxic and death can occur within 24 hours. Immediate hospital treatment would be imperative. (Chandré Gould and Peter Folb, *Project Coast: Apartheid's Chemical and Biological Warfare Programme*, United Nations (UNIDIR), Geneva, 2002, pp.94-95.)

[48] Amnesty International assisted in providing independent medical advice to the families and its representatives attended the last stage of the Coroner's proceedings in May 2001.

according to their own evidence in the Industrial Court, were equipped variously with shields, batons/long batons, rubber bullets, stun grenades, CS shells, "tearsmoke", R4 rifles, "riot guns" and shot guns. The full text of the letter is attached in Appendix B of this report. Amnesty International has to date received no response. More importantly, it appears that little was done by the authorities to investigate the alleged incidents and ensure that appropriate measures were taken against commanders or subordinate officers found to be responsible for human rights violations.

One of the cases raised in Amnesty International's letter was that of a branch official of the Teachers' Union (SNAT) and primary school teacher, Mbongeni Mathunjwa. His case illustrates the many difficulties confronting complainants. He laid criminal charges against the police after allegedly being assaulted by about 20 police officers armed with batons outside the Ministry of Agriculture Building on 13 August 2003. He also alleged that he had been shot in the leg with a rubber bullet. He required hospital treatment and suffered extensive bruising, abrasions and lacerations on various parts of his body. For several months after the assault he experienced headaches, dizzy spells and impaired vision as a result of head injuries.

After laying the charges against the police, Mbongeni Mathunjwa made inquiries from time to time about progress in the investigation of his case. In December 2003 he was informed by the duty officer at Mbabane police station that no action would be taken on his complaint because, he was told, the police on 13 August were acting in the course of their duties. He then sought legal advice about instituting a civil action for damages against the police. He learnt that there was a 90- day statutory period within which he had to have launched his case and this period had expired. His attorney, though, sent a letter of demand to the Attorney General and requested "condonation" of the delay. The Attorney General responded on 5 January 2004, refusing to respond to the action on the grounds that the "letter of demand" was "out of time in terms of the Limitation of Legal Proceedings Against Government Act 21 of 1972". Mbongeni Mathunjwa then applied to the High Court for an order granting him leave to institute proceedings against the Swaziland Government.[49] The High Court granted the application, allowing Mbongeni Mathunjwa to institute proceedings for damages against the government and the police.

The climate of public concern and distrust of the police intensified with a further death in custody in May 2004. On 21 May at 4 p.m., 31-year-old Mandlenkhosi Ngubeni was arrested at his place of work in Matsapha by police officers in connection with their investigation into the disappearance of money from his employer's safe. The police also arrested a woman friend. Both were taken to Matsapha police station for interrogation. The friend was released the following morning. On the afternoon of 22 May Mandlenkhosi Ngubeni's family were alerted by a call from a friend that he might be dead and his body lying in a funeral parlour. When the family saw his body, the signs of injuries and the fact that he had been in good health at the time of his arrest made them fear that he may have died as a result of torture. The family were not officially informed by the police until the morning of 23 May of Mandlenkhosi Ngubeni's death. They were told that he had died at 4 a.m. on 22 May. The

[49] Notice of Motion in *Mbongeni Mathunjwa v. Swaziland Government*, Civil Case No. 155/04, 22 January 2004.

family received a vague explanation from the police for why they had not been informed earlier and they were referred to the station commander for further information. They were told by the station commander that there would have to be an inquiry and he could not comment on what happened.[50] On 27 May the Times of Swaziland published a photograph of the body of Mandlenkhosi Ngubeni with signs of injury. On the same day the Deputy Commissioner of Police Isaac Magagula commented publicly on the case and commendably distanced the police from a reported initial police claim that Mandlenkhosi Ngubeni had died of natural causes. "Whoever said that did not represent the police force and we dissociate ourselves from those statements". The Deputy Commissioner added that in view of the allegations that the detainee had been assaulted there has to be a special team to conduct the investigation. The cause of death could not be known until the results of the post-mortem were known and an inquest held, he pointed out. He stated that he would not defend "unprofessional conduct" by any member of the police force.[51] The state pathologist conducted a post-mortem on 27 May. Notwithstanding the comments of the Deputy Commissioner, the confidence of the family and the public in general in the official investigation will be undermined by the lack of involvement of independent medical and other investigators. The family have instituted civil legal proceedings against the police.

The case of Mandlenkhosi Ngubeni highlights once again the urgent need for the establishment of a civilian oversight body to investigate serious allegations made against the police. Such a body should have investigative powers, access to independent forensic capacity and the authority to make recommendations and to report their findings to relatives and in due course to the public. Amnesty International wrote to Prime Minister Themba Dlamini on 28 May 2004 urging him to ensure that a fully independent and impartial investigation is conducted into the circumstances of the death of Mandlenkhosi Ngubeni and to make the results known to his family. Swaziland's obligation to implement the UN Convention against Torture came into force on 26 April 2004. Obligations under this treaty include:

- The state shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction (Article 2);
- The state shall ensure that all acts of torture are punishable offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture (Article 4);
- The state must conduct prompt and impartial investigations into all complaints and credible reports of torture or ill-treatment (Articles 12, 13);
- Victims of torture have an enforceable right to fair and adequate compensation…In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation (Article 14).

Guidelines for conducting these investigations are set out in the UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or

[50] Witness statement made available to Amnesty International, 10 June 2004.
[51] As reported in The Times of Swaziland, 28 May 2004.

Degrading Treatment or Punishment.[52] In this particular case, the investigation must also establish whether or not the death of Mandlenkhosi Ngubeni was the result of torture "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" (Article 1.1).

The essential components of an effective remedy are promptness, impartiality, independence, protection of complainants and witnesses, and thoroughness. It appears that there is little public confidence in internal investigations conducted by the police in Swaziland. In its letter of 28 May, Amnesty International recommended that the Prime Minister gives urgent consideration to the establishment of an independent oversight mechanism charged with responsibility to investigate serious allegations made against the police. Indeed the necessity for such a body has been raised during parliamentary debates in recent months.[53] The Office of the Prime Minister has reportedly also acknowledged that "unorthodox methods of investigation" by police lie behind the rising number of civil litigation cases against them. [54] In its 2002 report, *Policing to protect human rights: A survey of police practice in the countries of the Southern African Development Community, 1997-2002*, Amnesty International argued that capable and competent oversight bodies are indispensable to effective policing. They enhance public confidence in the police and, in the long run, strengthen the professionalism of the police through ensuring that they are accountable for their actions.[55]

The assault on the authority of the courts

In the context of a longstanding pattern of impunity for human rights violations committed by state officials, the judiciary and the magistracy have played a critical role in providing complainants with access to remedies and some measure of justice and protection. Their capacity to play this role was gravely undermined by the stance and actions of the then government of Prime Minister Sibusiso Dlamini, particularly in 2002 and 2003. These events triggered mass protest demonstrations in Swaziland and have been investigated and commented on by regional and international intergovernmental and non-governmental bodies.[56] The Commonwealth Secretariat through its Political Affairs Division has made a number of interventions in an effort to end the breakdown in the rule of law.

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[52] Annexed to UN General Assembly resolution 55/89 of 4 December 2000. A full exploration of the obligations of states parties is provided in Amnesty International, *Combating Torture: A manual for action* (AI Index: ACT 40/001/2003).
[53] The Times of Swaziland, 30 April 2004.
[54] Reported in the Swazi Observer, 17 June 2004.
[55] AI Index: AFR 03/004/2002, pp.48-65. Amnesty International sent copies of the report to the Government of Swaziland in 2002 and discussed its findings with the Commissioner of the Royal Swaziland Police Edgar Hillary in July 2003.
[56] See for example: the IBA report, *Swaziland – Law, Custom and Politics*; the report by the International Commission of Jurists', Centre for the Independence of Judges and Lawyers (ICJ/CIJL), *Swaziland - Fact-Finding Mission to the Kingdom of Swaziland*, 10 June 2003; the statements of the

In the wake of Prime Minister Sibusiso Dlamini's refusal in November 2002 to act on two rulings by the Court of Appeal and the subsequent resignation of the Court of Appeal, the Special Rapporteur of the United Nations Commission on Human Rights on the independence of judges and lawyers, Dato'Param Cumaraswamy, issued a strongly-worded statement. He expressed his grave concern at the government's refusal "to honour decisions of constitutionally constituted courts". Their action, he stated, was "a blatant breach of what is implied in principle 4 of the United Nations Principles on the Independence of the Judiciary and article 26 of the African Charter on Human and Peoples' Rights".[57]

In brief, the steps along the path towards the abrogation of the rule of law by the government of Prime Minister Sibusiso Dlamini included the repeated ignoring of court rulings, interference in court proceedings, intimidating judicial officers, manipulating terms and conditions of employment to undermine the independence of the judiciary, the effective replacement of the Judicial Services Commission with an unaccountable and secretive body (officially known as the Special Committee on Justice but popularly called the Thursday Committee), and the harassment of individuals whose rights had been upheld by the courts.[58]

Some of the important cases which illustrate these problems are:

UN Special Rapporteur on the independence of judges and lawyers, 4 December 2002, 15 April 2003 and 27 June 2003. A delegation of senior judges from South Africa, Lesotho and Uganda who visited Swaziland in September 2003 provided a confidential briefing on their findings to a meeting of chief justices and judges from 11 Southern African countries on 6 December 2003. See also Amnesty International press statements: *Swaziland: Grave concern at attack against High Court judges seeking to protect the rights of women*, AFR 55/004/2002 of 4 November 2002; *Swaziland: Continuing attacks on the independence of judges and lawyers*, AFR 55/005/2002 of 19 November 2002; *Swaziland: Subversion of the rule of law gravely endangers protection of human rights and jeopardizes the constitution reform process*, AFR 55/006/2002 of 4 December 2002 and entries on Swaziland in *Amnesty International Report* 2003 and 2004.

[57] United Nations Press Release, UN Expert Expresses Grave Concern Over Recent Developments In Swaziland, 4 December 2002 (available on http://www.unhchr.ch/huricane). Principle 4: "*There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review…in accordance with the law"*. Article 26: "*States Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."*

[58] The "Thursday Committee" or the Special Committee on Justice has been chaired by the Prime Minister and has included as its members Cabinet Ministers, the Attorney-General, the Director of Public Prosecutions, the Commissioner of Police and other heads of security services, the Chief Justice and some traditional advisers to the King (IBA, *Law, Custom and Politics*, p. 33). As will be seen below, it has reportedly interfered extensively and intrusively with judicial decisions. It is not clear that it has continued to operate in the same manner under Prime Minister Themba Dlamini as was the case with his predecessor.

I: Undermining the right to an effective remedy against forced evictions: The case of Chief Mtfuso II & others v. Swaziland Government and later cases

There were a series of applications to the High Court brought by the evicted residents of the rural communities of KaMkhweli and Macetjeni and subsequent rulings of the Court of Appeal, from late 2000 until November 2002. Over 120 men, women and children were forcibly evicted from their homes in the Lubombo region in October 2000 following their refusal to accept as Chief one of the brothers of the King. With one exception the courts upheld the right of the evictees to return to their homes. The government through the agency of the police ensured that they could not return to their homes. On 28 November 2002 Prime Minister Sibusiso Dlamini announced that he and his government would not obey the ruling of the Court of Appeal on 22 November 2002 which had upheld an earlier High Court ruling ordering the immediate committal to prison of the Commissioner of Police and another officer for repeated contempt of court. A detailed account of the evictions and the battle in the courts to reverse them is provided in Part II below.

II: Violations of the presumption of innocence: Government refusal to respect court rulings against the validity of the Non-Bailable Offences Order

The Non-Bailable Offences Order No. 14 of 1993 (with amendments) prohibits the Magistrates' Courts and the High Court from granting bail in any case involving an accused person charged with one or a number of scheduled offences.[59] The police do not have to demonstrate a *prima facie* case against the accused before charging them with a scheduled offence. The Court of Appeal in June 2001 described the 1993 Order as "a draconian one…inconsistent with the presumption of innocence and…an invasion of the liberty of the subject".[60] It found that the Order indeed excludes the jurisdiction of the courts to grant bail in certain cases and as such is in conflict with the "saved provisions" of the 1968 constitution.[61] It was thereby in conflict with the 1973 Proclamation as the "supreme law of Swaziland". The Court of Appeal ordered that the case of the Appellant, Professor Dlamini, should be referred back to the High Court for a decision on bail. The Court of Appeal nevertheless made a sympathetic reference to the government's obvious concern which underlay the 1993 Order and even suggested legislative steps to address this concern, while preserving the Courts' discretion to grant bail:

> *"We fully appreciate that in certain cases it would not be proper for a Court to grant bail. Such cases would include the probability of an accused interfering*

[59] The Order was assented to by King Mswati III on 18 August 1993. The schedule of offences includes murder, rape, robbery and a number of offences defined by statutes including the Public Order Act of 1963 and the Sedition and Subversive Activities Act of 1938.

[60] *Professor Dlamini v. the King*, Appeal Case No. 41/2000, judgment of 14 June 2001, Leon JP, p. 8.

[61] See note 1 above. Section 104 (1) provides that "The High Court shall be a superior court of record and shall have – (a) unlimited original jurisdiction in civil and criminal matters". This section is in Part 1 of Chapter 9 which was "saved" (retained) "with full force and effect" by Decree No. 7 of the King's Proclamation of 12 April 1973.

> *with crown witnesses, the danger of an accused escaping before trial and the seriousness of the offence. There is no reason why legislation should not be introduced that, where an accused person is charged with a scheduled offence, the Court hearing an application for bail, will be obliged to record its investigation regarding, and justify its findings on, the criteria set forth in the legislation, when granting or refusing bail".*[62]

The government did not take this advice, but instead issued eight days later a harsh decree which, among other things, reinstated and extended the 1993 Non-Bailable Offences Order.[63] Decree No.2 of 2001 caused a huge outcry in the country and attracted strong international criticism. Its provisions attacked the independence of the judiciary and on key issues removed the right to legally challenge actions of the Executive. It was hastily repealed and replaced by Decree No.3 of 2001 which, however, retained the provisions of the 1993 Order (as amended) denying the courts' jurisdiction to grant bail in certain cases.

In 2002 two separate challenges were launched against Decree No.3 on behalf of two pre-trial detainees, Ray Gwebu and Lucky Nhlanhla Bhembe, who had been denied bail in terms of this Decree. Their cases had been heard jointly by the High Court which dismissed their applications. The Court of Appeal heard their appeals against the High Court's ruling in November of that year.

The Court of Appeal rejected the argument of counsel for Ray Gwebu that Decree No.3 was invalid because it was inconsistent with the provisions of the African Charter on Human and Peoples' Rights regarding the presumption of innocence and the right to a fair trial. Swaziland is a party to that treaty, but the Court of Appeal observed that, while provisions of international agreements "unincorporated" into domestic law "may be used as aids to interpretation", they could not be "treated as part of domestic law for purposes of adjudication in a domestic court". The Court of Appeal also rejected a very different argument raised by counsel for Lucky Nhlanhla Bhembe, that, following the unlawful suspension of the 1968 Constitution in 1973 by King Sobhuza II, all orders-in-council and decrees issued by the King were invalid. The Court of Appeal took a more cautious and practical view, stating that the 1973 King's Proclamation, by which the Constitution was suspended, had operated in effect as supreme law over the following decades. However on its own terms and that of a 1978 King's Order-in-Council,[64] the King had no authority to issue Decree No.3, as it was in direct conflict with the 1973 Proclamation which preserved that part of the 1968 Constitution

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[62] *Professor Dlamini v. the King*, judgment, p.13.
[63] Decree No. 2, which was signed by the King and issued on 22 June 2001. See Amnesty International, "Swaziland: New Decree endangers fundamental rights and the rule of law" (AI Index: AFR 55/002/2001, 2 July 2001).
[64] The Establishment of the Parliament of Swaziland Order, in Section 80(2) which states "*Save in so far as is hereby expressly repealed or amended the King's Proclamation of the 12th of April 1973 shall continue to be of full force and effect: Provided that the King may by Decree published in the Gazette amend or repeal the said Proclamation after a new Constitution for the Kingdom of Swaziland has been accepted by the King and the people of Swaziland and brought into force and effect"*(emphasis added).

allowing the High Court "unlimited original jurisdiction in criminal and civil matters", including the authority to consider an accused person's right to bail. The Court of Appeal ruled that Decree No.3 of 2001 was invalid and ordered that the cases of the two appellants should be referred to the High Court for a decision on bail.[65]

This ruling was denounced by Prime Minister Sibusiso Dlamini on 28 November 2002 as an attack on the powers of the King and contrary to the interests of the country. He accused the Appellate judges of being influenced by "forces outside" the Swazi system and stated that the government did not intend to recognize the judgment. The non-bailable legislation would remain in force. "There will be no release of individuals detained in prison for an offence to which that legislation relates. The appropriate government agencies have been duly informed and have been instructed to ignore the Court of Appeal's ruling".[66]

The aftermath of this stance was an extraordinary period of chaos, with the courts granting in some cases bail to prisoners charged with "non-bailable" offences but criminal justice officials refusing to allow their release. There were on occasion scenes of violent disorder in the courts.[67] The number of people held unlawfully in custody after being granted bail and in many cases having paid their bail money stood at more than twenty by June 2004.[68] In the current search for a solution to the crisis in the rule of law it appears that there is still strong opposition amongst the King's traditional advisers and possibly from the King himself to the release of detainees charged with "non-bailable" offences in terms of Decree No.3 but granted bail by the courts. The former Prime Minister and current member of the Swazi National Council, Sibusiso Dlamini, spoke publicly in May 2004 in defence of his refusal to obey the Court of Appeal on this issue. Advocate Lucas Maziya, a prominent civil rights lawyer, publicly criticised him for defending the "indefensible" and creating a situation where "the law no longer protects citizens" who thus face "a grave and well-grounded risk of arbitrary action by the executive".[69]

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[65] *Ray Gwebu and Lucky Nhlanhla Bhembe v. the King*, Cases No. 19/2002 and 20/2002. judgment of 22 November 2002, delivered by Browde JA, with Leon JP, Steyn JA, Tebbutt JA and Beck JA concurring.

[66] Cited from the report of the ICJ/CIJL, *Swaziland: Fact-finding Mission to the Kingdom of Swaziland*, 10 June 2003, pp. 14-15. See also note 147 below.

[67] The Times of Swaziland, 12 March 2003 and 1 April 2004; the Swazi Observer, 22 April 2004.

[68] Interview with the President of the Law Society, Sibusiso Kubeka, 29 June 2004. The Swazi Observer on 30 March 2004 listed the names of 22 suspects who had been granted bail but whom the authorities had refused to release because they were charged with "non-bailable" offences.

[69] Opinion piece in The Times of Swaziland, 25 May 2004.

Ben Zwane © AI, 2003

III: Flouting court rulings protecting the rights of employees: the case of Ben Zwane

Ben Zwane battled for more than five years to retain his position as Clerk to the Swaziland Parliament after the then Prime Minister Sibusiso Dlamini in 1999 accused him of insubordination and "interdicted" him from continuing his work. In 2000 the High Court ruled that the "interdict" was illegal. The police however prevented him from entering the Parliament. The Court of Appeal upheld the High Court ruling. Meanwhile the Prime Minister had interdicted Ben Zwane again. In 2001 counsel for the Prime Minister conceded in the High Court they had no case to oppose a second order sought by Ben Zwane. The Prime Minister then "transferred" him to another post. On 6 February 2002 the Industrial Court granted an interim order allowing Ben Zwane to remain in his parliamentary position. On the same day the Prime Minister publicly stated that he would defy the court order. On 7 February the police dragged Ben Zwane out of the Parliament building. On 19 March 2002 the Industrial Court President Nderi Ndumo with two other members of the Court ruled that the Prime Minister had acted *ultra vires* (beyond his powers) in transferring Ben Zwane without the advice of the Civil Service Board.[a] The police continued to block his access to the Parliament. The Industrial Court again ruled against the Prime Minister, finding him in contempt of court. The Prime Minister "transferred" Ben Zwane to another post later in the year, this time with the apparent agreement of the Civil Service Board. However the Labour Commissioner ruled that the transfer was in effect a demotion and set it aside. The Prime Minister still refused to allow him to return to his work in Parliament. Ben Zwane applied to the Industrial Court again.

On 13 August 2003 Ben Zwane was injured when police fired rubber bullets and teargas at demonstrators near where he was driving. He lodged a complaint at Mbabane police station. As of May 2004 no action appeared to have been taken on his complaint. (See **APPENDIX B.)**

On 4 May 2004 the Industrial Court ruled that Ben Zwane's purported transfer to the Ministry of Agriculture was null and void and directed that he be reinstated into his position as Clerk to Parliament. Prime Minister Themba Dlamini stated publicly that he would comply with the court order. On 24 May the Industrial Court dismissed an application brought by Promise Msibi who claimed that he had been appointed to Ben Zwane's position by the former Prime Minister. The Court also dismissed Msibi's application to stay the implementation of the 4 May ruling. Ben Zwane was able to resume his parliamentary duties in June 2004.

After the 4 May ruling the former Prime Minister Sibusiso Dlamini, currently a member of the Swazi National Council, publicly defended the decisions he took, claimed that Ben Zwane had posed a "security risk to the head of state" and denied that he had defied any court rulings in this matter.[b]

a) *Ben M. Zwane v. Swaziland Government*, Industrial Court of Swaziland, Case No. 20/2002, judgment of 19 March 2002.

b) Reported in The Times of Swaziland 10 May 2004 and 16 May 2004.

IV: Undermining the role of the courts in protecting the rights of women and girls

The unprecedented legal challenge brought in the High Court by the mother of a young woman who was taken away from her school by agents of the King and held secretly at the Ludzidzini Royal Palace led to a blatant act of intimidation against the High Court judges hearing the case.

Eighteen-year-old High School student Zena Mahlangu had disappeared from her school on 9 October 2002. After frantic inquiries her mother, Lindiwe Dlamini, learnt that her daughter had been taken by two men, Qethuka Sgombeni Dlamini and Tulujani Sikhondze, and was being held at the Royal Palace at Ludzidzini. On 10 October she reported the matter to the police, but she heard nothing further from them. On the following day the two men came to her home and told her that her daughter was at the Royal Palace and had been "assigned Royal duties". She demanded that her daughter be returned to her custody. On 12 October her attorney delivered a letter to Qethuka Sgombeni Dlamini and Tulujani Sikhondze calling upon them to release Zena into her mother's custody by 5 p.m. on 13 October or face the possibility of answering charges of abduction. A copy of the letter was delivered to the Attorney General Phesheya Dlamini. The deadline passed.

On 14 October Lindiwe Dlamini filed an urgent application in the High Court for an order directing that Qethuka Sgombeni Dlamini and Tulujani Sikhondze produce the applicant's daughter (in court) and restore her to her mother's custody. As she stated in her affidavit, "the manner of Zena's abduction" caused her great concern for her daughter's safety. "I have been denied access to her, and her whereabouts have been hidden from me", she informed the court.[70]

Qethuka Sgombeni Dlamini, in an affidavit filed in response to the application, admitted that the High Court had jurisdiction to hear the case, but denied that he had abducted Zena Mahlangu on 9 October. He claimed that she had connived in the situation because she was pursuing a relationship with the King whom she had met at the time of the Reed Dance a month earlier.[71] He stated that on 11 October he and Tulujani Sikhondze went to the applicant's home and "informed her that Zena was at the Royal Palace and that she had been assigned to Royal duties. We did so…after getting an instruction from the Ngwenyama (the King). It was only on receiving such instructions that we realized that the said Zena may be taken as a bride to His Majesty". He denied that he was in any position to return Zena to her mother's custody as she was being "kept at a sacred place where no male may enter".

[70] *Lindiwe Dlamini v. Qethuka Sgombeni Dlamini and Tulujane Sikhondze,* High Court Civil Case No. 3091/2002.

[71] The Reed Dance or *Umhlanga* is a traditional ceremony, usually held over a number of days in August or September each year, during which unmarried girls cut reeds and present them to the Queen Mother. The King is present during the later stages of the ceremony which involves the girls dancing and singing in groups. (Swaziland National Trust Commission, http://www.sntc.org.sz .)

Tulujani Sikondze stated in his affidavit that his role was only to provide her with accommodation after she had been brought to the Royal Palace.[72]

The applicant in response to their claims denied the "false and speculative" allegations about her daughter's conduct and intentions behind her disappearance on 9 October. It was easy for them "to make allegations about [her] whilst she [was] detained and no one [had] access to her to ascertain the truth of the allegations". Even if their version were true, the applicant stated, they had at the very least admitted to conspiring "to remove Zena from [her] control and custody without [her] knowledge or consent, and against [her] will". The applicant denied that their conduct was consistent with Swazi law and custom or any domestic law in Swaziland. In so far as they claimed that they were acting on the instructions of the King, then Swaziland itself was flouting its obligations under international conventions.[73] The applicant now requested the High Court to direct "the Respondents or any other person having physical custody of the minor child Zena Mahlangu to produce the said minor child and to restore her to the custody of the applicant forthwith, and failing compliance with this order within 48 hours, [to authorise and direct] the Deputy-Sheriff to proceed to the place where the said child is kept and to take her and restore her to the custody of the Applicant forthwith".

Chief Justice Stanley Sapire, who was presiding with two other High Court judges in this matter, however took two strange decisions which prejudiced the applicant's case. The Attorney General had asked the High Court to agree to his being joined with the two respondents in opposing the application. His application in his capacity as representative of the King would have amounted to a waiver of the King's immunity from civil proceedings in his private capacity. The Chief Justice, possibly worried at this implication, encouraged the Attorney General to withdraw this application and then proceeded to appoint him as *pro amicus curiae* to advise the court on issues of customary law. This decision was made without prior notice to the applicant's lawyers and despite the fact that the Attorney General could not be an independent adviser to the Court. Not surprisingly, the Attorney General submitted a lengthy document which supported the respondents' position that the King had the right under customary law and practice to take girls as wives without parental consent.

[72] Affidavits of Qethuka Sgombeni Dlamini and Tulujani Sikhondze, filed in response to the application in the High Court on 17 October 2002. Under the common law in Swaziland both men and women reach majority status at 21 years of age, although women lose this status if they marry "in community of property" or without making an pre-marriage contract which specifically excludes the husband's "marital power". Parental consent would be required for a child under 21 years marrying according to "civil rites" under the Marriage Act (No. 47 of 1964). Under Swazi law and custom women are seen as perpetual minors under the guardianship of their fathers, or that of their husbands and their families upon marriage. (WLSA - Swaziland, *The Draft Constitution: What's in store for Swazi Women?*) A customary marriage has been described as "much a social process as it is a legal one" and "is characterized by the involvement of both families in negotiations leading up to the wedding itself" (R T Nhlapo, "Law versus culture: Ownership of freehold land in Swaziland" (1992), quoted in *Family in Transition: the experience of Swaziland,* Women and Law in Southern Africa Research Trust, Ruswanda Publishing Bureau, Manzini, 1998, pp. 164 -165).

[73] Affidavit of Lindiwe Dlamini , filed in the High Court in response to Respondents' affidavits, 18 October 2002.

The applicants' legal team were of the view that in terms of the civil law the parent's consent was necessary below the "age of majority" which was 21 years. In the High Court civil law prevailed over Swazi law and custom.[74]

At the core of the court action was a demand by the applicant for her daughter to be restored to her custody. However the respondents were denying that they had custody of or access to the applicant's daughter at Manzana Royal Guest House. The Court consented to the applicant's lawyers delivering court papers to the authorities in charge of the guest house which they attempted to do on the night of 22 October. The police refused them access, refused to call the appropriate person to come to the gate, refused to accept the court papers and threw them back into the lawyers' vehicle. The applicant's team were back in Court on 24 October intending to seek an order requiring the person in charge of the guest house to produce the applicant's daughter in court. The Court avoided the legal crux of the matter and instead appointed two lawyers, M Langwenya and J M van der Walt, as "curators of the court" to go to the Manzana Guest House and seek access to Lindiwe Dlamini's daughter. In a report dated 28 October 2002 they informed the High Court that they had been unable to see her as access had been denied by officials from Ludzidzini Royal Residence on grounds of protocol.[75] Despite this the Chief Justice remained reluctant to make an order compelling the authorities to allow the curators immediate access to Zena Mahlangu or compelling the authorities to produce her in court. The High Court remained without any direct insight into the state of mind, circumstances or wishes of the applicant's daughter.[76]

At this stage the traditional authorities increased the pressure on the High Court. On 30 October the chiefs of staff of the army, police and prison services, together with the Attorney General held a private meeting with the Chief Justice and his two fellow judges who were hearing the matter, Justices Annandale and Maphalala. Reportedly they told the judges that they must discontinue hearing the case or failing that they must resign. This was their "message" from Ludzidzini.[77]

The High Court, backed by advice from the Appellate Court judges, refused to withdraw from the case, a decision the Chief Justice announced in open court on Thursday 31 October. However on the following day the Attorney General sent a letter to them stating that "in the

[74] This was the case in view of the invalidity of the 1998 Swazi Administration Order (SAO) which had attempted to put both legal systems on a par (see below PART II for reference to the court rulings on the SAO).
[75] Report of the Court-appointed Curators to the High Court in *Lindiwe Dlamini v. Qethuka Sgombeni Dlamini and Tulujane Sikhondze*, Civil Case No. 3091/2002.
[76] In an interview reported in The Times of Swaziland on 10 November 2002, the representative of UNICEF in Swaziland, Alan Brody, saw this as the critical issue in the case. Under the UN Convention on the Rights of the Child, "the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child". (Art.12(2)). "Whether we define Zena [Mahlangu] as child or woman [under the law], the principle of taking her opinion into consideration should apply".
[77] Legal sources; The Times of Swaziland, 31 October 2002, 1 November 2002. Amnesty International, *Swaziland: Grave concern at attack against High Court judges seeking to protect the rights of women*, (AI Index: 55/004/2002, 4 November 2002).

event that you [the Chief Justice and Justices Annandale and Maphalala] elect to proceed with the case, as informed [on 30 October] you are expected to tender your resignation immediately upon passing your decision on the matter. In case your resignation letters are not received as stipulated, the Office of the Attorney-General is under strict instructions to submit the relevant instruments for your removal from office."[78] As the King's legal adviser who had also sought to join party with the respondents, the Attorney General blatantly infringed the UN's Basic Principles on the Independence of the Judiciary by his actions.

These two extraordinary acts of intimidation against the judiciary were an indication of the extent to which the traditional authorities saw as threatening even the somewhat equivocal interventions of the High Court on behalf of the applicant and her daughter. The pattern of intimidation and obstruction showed just how difficult it was to protect the internationally recognized human rights of women and girls, particularly where their rights were violated by unaccountable authorities and in a context of longstanding discrimination and subordination of women.[79]

The Attorney-General may possibly have over-reached himself with his letter, as he retracted it with an apology on 4 November.[80] However by this stage it was too late to affect the situation. In the preceding days Zena Mahlangu had been presented in public as the King's *liphovela* (fiancée). She had finally been permitted to contact her family by phone, but no personal access was allowed. In the wake of these developments and for personal reasons Lindiwe Dlamini decided to inform the High Court that she wished to postpone her case.[81] On 5 November 2002 it was postponed indefinitely.

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[78] Amnesty International has a copy of the letter which is on Swaziland Government headed paper and was dated and signed by the Attorney General on 1 November 2002. The Times of Swaziland, 5 November 2002.

[79] See Amnesty International, "*Grave concern at attack against High Court judges seeking to protect the rights of women*". Swaziland non-governmental organizations lent their support to the applicant during the proceedings. Among others, WLSA - Swaziland and the SWAGAA spoke out in her support. (The Times of Swaziland, 16 October 2002.) They wore black (mourning clothes) to court as a form of protest. In March 2004 the governor of Ludzidzini Royal Palace, Jim Gama, was reported stating that he was contemplating action against the women who went to court dressed in black. He made this comment in the context of condemning civil society organizations who wore black to protest the forced resignation of the Speaker of Parliament, Marwick Khumalo. (The Times of Swaziland, 17 March 2004 and see above pp.4-5)

[80] Statement by the Attorney-General regarding *Lindiwe Dlamini v. Qethuka Sgombeni Dlamini and Tulujane Sikhondze*, High Court Civil Case Number 3091/2002, Mbabane, 4 November 2002.

[81] Report of an interview with Lindiwe Dlamini by Janet Heard in The Guardian (London), 14 April 2003.

V: Harassment of judicial officers: the case of Justice Thomas Masuku

During this very difficult period of government defiance of the authority of the courts, members of the judiciary and justice officials were themselves targeted for harassment. The then Director of Public Prosecutions (DPP), Lincoln Ng'arua, came under intense pressure, after he had instituted proceedings against the Attorney General on charges of sedition and defeating the ends of justice. The charges had been laid in response to a complaint lodged by Chief Justice Sapire against the Attorney General for threats and interference in judicial functions in connection with the hearing of the *Lindiwe Dlamini* case. On 12 November 2002 the DPP was forced by government officials to attend a meeting of the Thursday Committee late at night where he was told to withdraw the charges against the Attorney General. The Attorney General reportedly was present at the meeting. Subsequently there were further acts of intimidation against the DPP. On two occasions he was locked out of his office, which had also been broken into and searched. Reportedly footage from a surveillance camera showed that those involved in the break-in included the Attorney General and a certain Moi Moi Masilela, who is an influential member of the Swazi National Council.[82] The DPP then faced what appeared to be a malicious prosecution on an old matter. As a result of the intimidation against him he concluded that he had been placed in an intolerable position and was unable to perform his functions. He resigned and left the country.

The President of the Industrial Court Justice Nderi Nduma was kept in a state of uncertainty for some weeks after his three-year contract expired on 27 February 2004. Although the Industrial Court was severely understaffed, he was unable to continue working while awaiting the King's decision on the renewal of his contract.[83]

Perhaps the most sustained example of harassment has been that of High Court Justice Thomas Masuku. On 21 May 2004 the High Court confirmed as final an interim *rule nisi*[84] which had been granted by the High Court on 12 December 2003, the effect of which had been to reinstate Justice Thomas Masuku as a judge of the High Court. The ruling of 21 May appears to have brought to an end the protracted crisis provoked by the unlawful and repressive manner in which Justice Thomas Masuku was removed from his position on the High Court bench in April 2003.

Under the "saved provisions" of the 1968 Constitution[85] a judge on the High Court "may only be removed from office for inability to perform the functions of his office, whether arising

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[82] See Amnesty International, *Swaziland: Continuing attacks on the independence of judges and lawyers* (AI Index: AFR 55/005/2002, 19 November 2002); IBA News Release, *Swaziland: Attorney-General Flouts the Law*, 29 November 2002. BBC News Online, Swazi prosecutor 'will not give in', 21 November 2002. Moi Moi Masilela reportedly was also a member of the committee which investigated the Speaker of the House of Assembly, Marwick Khumalo (see above pp.4-5). Times of Swaziland, 11 March 2004.

[83] Swazi Observer, 2 March 2004.

[84] A rule or injunction which becomes imperative and final *unless* cause is shown against it.

[85] See above footnote 1.

from infirmity of body or mind or any other cause or for misbehaviour, and shall not be removed except in accordance with the provisions of Section 100". In addition to these limited grounds for removing a judge, the Chief Justice must also have made a request to the King to investigate the removal of the judge and for the King to have appointed a tribunal to conduct the inquiry and reach a conclusion. In terms of the common law, the judge concerned would have the right to be heard also. Despite these requirements, which reflect international norms intended to protect the independence of the judiciary[86], the then Minister of Justice, Magwagwa Mdluli, announced at a press conference on the night of 3 April 2003 that Justice Thomas Masuku had been "transferred" from the High Court to the Industrial Court. There is no evidence that any of the requirements in terms of Section 100 had been followed nor had the judge himself been informed. He was to learn about it in the press on the following day.

On 7 April 2003 when Justice Masuku was hearing a case in the High Court counsel for the Government challenged his right to hear the case and showed him the government's Legal Notice No.29 of 3 April 2003 which purported to announce the "transfer" of Thomas Masuku to the Industrial Court.[87] Justice Masuku informed Amnesty International in July 2003 that this was the first occasion on which he had seen the legal notice. He subsequently wrote to the King's legal representatives informing them that what had been done was unconstitutional and asked them to withdraw the Legal Notice. As of May 2004 he had not received a reply to this letter.

Justice Thomas Masuku.
© AI, July 2003

The Law Society launched an urgent application in the High Court on 9 April 2003 for an order declaring unlawful both the Legal Notice No.29 and the removal of Thomas Masuku from the High Court.[88] In the founding affidavit of its application the Law Society stated that the situation created by the Legal Notice caused further damage to the rule of law, the integrity of the legal profession, which the Law Society represented, and to the administration of justice. The government, among other arguments in reply, asserted that the High Court had no jurisdiction to hear this application.

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[86] See UN Basic Principles on the Independence of the Judiciary, especially articles 17,18 and 20, referred to on p.16 above.

[87] Legal Notice 29 of 2003 purported to vary the terms and conditions of appointment of Justice Thomas Sibusiso Masuku and Justice Kenneth Phumlani Nkambule, who was a member of the Industrial Court.

[88] *Law Society of Swaziland v. Swaziland Government, Judicial Service Commission and Mr Justice Thomas Masuku*, Civil Case No. 743/2003.

Justice Stanley Maphalala, in his ruling made on 17 April 2003, commented that he had to consider first the question of the court's jurisdiction and if he should recuse himself [withdraw] from hearing the case before he could rule on any other aspect of the application. Having considered this question, he concluded that he ought to recuse himself. His reasons were telling. In his view the "variation of the terms and conditions of [Justice Masuku's position] is a direct attack on the security of tenure of Judges of the High Court". Each judge must therefore have a direct interest in this case as they "would do whatever possible to ensure that this very important tenet of the independence of the judiciary is maintained. [O]ne cannot say who may be the next Judge to be subjected to this undignified treatment in the prevailing circumstances". In support of his view, he referred to the comments of the Australian Chief Justice Sir Gerald Brennan in 1996, that if there is erosion of either of the "twin constitutional pillars of independence - security of tenure and conditions of service that the executive cannot touch", the "society will pay an awful price". Justice Maphalala stated that indeed the "executive has interfered with the pillars mentioned by the learned Chief Justice".[89]

Justice Maphalala said that he was "wary" of applying the "doctrine of necessity", which may have been a ground for overriding his reasons for recusal. Instead he recommended that "this case be heard by an independent Judge to be appointed in accordance with the Laws of Swaziland." As the matter was urgent he said he would ask the Registrar of the High Court to advise the relevant authorities of this recommendation "as soon as it is practicable". In the meantime he postponed the Law Society's case indefinitely.

The Law Society had in fact argued forcefully that it would be impossible to make such an appointment within "the laws of Swaziland". The Chief Justice Stanley Sapire had resigned by the beginning of April 2003 and the Judicial Services Commission could not therefore be duly constituted to meet in the absence of a properly appointed Chief Justice as well as a member of the Court of Appeal, all of whom had resigned in November 2002. The government would have to appoint an outside judge to hear the case. In the increasingly fraught environment of executive pressure on the judiciary Justice Maphalala was perhaps 'clutching at a straw' to avoid invoking the doctrine of necessity and proceeding to rule on the application before him.

When the government failed to act on Justice Maphalala's recommendation,[90] Thomas Masuku's lawyers filed an application in the High Court in May for an order allowing him to be joined as co-applicant in the case brought by the Law Society. They also sought a *rule nisi* to compel the government respondents to show cause why an order should not be issued by

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[89] Civil Case No. 743/2003, Ruling on Points of Law Raised in terms of Rule 33, 17 April 2003, S B Maphalala J.

[90] The Attorney for the Law Society Peter Dunseith wrote to the Acting Registrar on 10 June to ask what he had done to ensure that the recommendation of Justice Maphalala had been communicated to government. A government official had informed Mr Dunseith that the government knew nothing of the recommendation other than what had been reported in the press. However, if the government's legal representatives were in court to hear Justice Maphalala's ruling, they should have been aware of the recommendation made even if not formally informed of it by the Acting Registrar.

the court declaring, among other things, that Legal Notice No. 29 is invalid and unlawful, that Thomas Masuku continues to hold office as judge of the High Court and that his purported transfer to the Industrial Court is invalid and unlawful. In his accompanying affidavit Thomas Masuku stated that "Whatever the motive behind my removal and appointment might be, it has been calculated to strike at the heart of the independence of the judiciary. It negates the very essence of the principle that the judges of this court must in fact be and must be seen to be independent of the executive and not subject to its power of retribution."[91]

In response to this application Government Counsel, Advocate Ernest Twala, denied that the case was urgent and stated that it was more in the nature of a complaint of "unfair dismissal" which should be dealt with in the Industrial Court. He also argued that no judge of the High Court could hear the matter because of their inherent interest in the outcome. In a supplementary paper filed on 26 May 2003 he stated that the "Applicant [Thomas Masuku] elected not to report for duty at his new duty station and must bear the consequences. He has no right to be still occupying an office at the High Court and Respondents reserve the right to evict him and to stop his pay unless he sooner reports for duty at the Industrial Court".[92]

On 19 May 2003 the Attorney General, Phesheya Dlamini, sent a memorandum via the Registrar of the High Court to the "Honourable Presiding Judge" in which he stated that the government intended to apply for the recusal of the judge before the hearing of the Law Society case. Government Counsel Advocate Twala in a supplementary paper filed on 26 May reiterated that any judge of the High Court has an interest in the outcome and cannot preside over the matter, adding that this "is clear in this case because the presiding judge has compromised himself over the King's letter issue".[93]

Advocate Twala increased the pressure on the presiding judge, Justice Josiah Matsebula, in a letter sent to him on 3 June 2003. In the letter he referred to a meeting between them on the previous day in the office of the Acting Chief Justice and then proceeded to summarise the Government's position: that the matter was not urgent, that judicial appointments are made by the King, that the second Respondent (the Judicial Services Commission) has an advisory role only, that the two new judges appointed to the High Court [in terms of Legal Notice No.29] "meet the requirements [for independence] laid down by Justice Maphalala [in his ruling of 17 April]". One of the two judges he referred to had been transferred to the High Court from the Industrial Court. Both appointments had been fiercely opposed by the Law Society on the grounds that they had been made without recourse to the proper procedures in terms of the 1968 Constitution. In this context they were unlikely to be accepted as independent

[91] *Notice of Motion in the application of Thomas Sibusiso Masuku Law Society of Swaziland v. the Swaziland Government & Others*, Civil Case No. 743/2003, 15 May 2003.
[92] Amended Notice *Oto* to Raise Points of Law *In Limine* (preliminary legal issues), Civil Case No. 743/2003, 26 May 2003.
[93] Idem. The reference to the "King's letter issue" is not clear. It may refer to a letter which Advocate Twala sent to the King early in 2003 in which he denounced a "judicial rebellion" and stated that the "King and Parliament must clip the wings of the judges of the High Court as they fly too high".

adjudicators by the applicants.[94] Aware of this likelihood, Advocate Twala added that the Law Society "must be warned that the Government of Swaziland can be pushed around [only] to a certain point". He stated that "there is nothing irregular at all in informing the presiding officer by letter that he will be challenged on recusal" and expected his response to this letter. In an "additional notice of point *in limine*" (preliminary legal issue) filed in court on the same day Advocate Twala stated that the Law Society had no *locus standi* (no legal right to be a party in the case) in this matter and accused it of having "highjacked the issue…for the purpose of politicising it".

On 10 June 2003 Thomas Masuku's legal representatives wrote to the Registrar of the High Court objecting to the "irregular and unethical" action of Advocate Twala in writing directly to Justice Matsebula and conducting litigation outside of open court. They also objected to the implied threats against the applicants. On 18 June Advocate Twala sent a letter of apology to the Registrar and to Justice Matsebula for his previous letter which, he wrote, was the result of pressures and the expectations of his "clients who are also people in a position of authority over [him] as employers and the duty to obey orders of the employer arises very often".

However the damage had been done. On 20 June, Justice Matsebula, feeling the pressure of the government, refused to go to court for the postponed hearing on the application and handed the case file to the Acting Chief Justice.

As a result of the government's tactics of intimidation and its failure to appoint an outside judge as recommended by two High Court judges, as well as the absence of a Court of Appeal, Justice Masuku was left without an effective remedy for his complaint. The then Minister of Justice and Constitutional Affairs, Magwagwa Mdluli, emphatically and publicly stated that the government refused to "hire" a judge to hear this matter and accused Thomas Masuku of defying the appointing authority [the King].[95] As noted by the International Bar Association, the government, through "obstructing the determination of legal issues relating to the validity of the demotion [of Justice Masuku], ...may [be in] breach of Swaziland's international obligations under the African Charter on Human and Peoples' Rights, namely the right to have one's cause heard (Article 7), the right to equal protection of the law (Article 3(2)), together with the States Parties' obligation to guarantee independent courts".[96]

During a meeting with an Amnesty International delegation on 8 July 2003 Minister Mdluli made hostile references to court rulings by Justice Thomas Masuku and described the judiciary as being involved in an attack against the "other arms of government". The then Prime Minister, Sibusiso Dlamini, told Amnesty International on 9 July 2003 that it was

[94] In its application to the High Court on 9 April 2003, the Law Society attached to its affidavit an extract of minutes of a meeting of the Council of the Law Society of Swaziland on 4 April 2003 in which they resolved to institute legal proceedings in the High Court to set aside, among other things, "the purported transfer [from the Industrial Court] and appointment of Mr Justice Kenneth Phumlani Nkambule to be judge of the High Court" and also of "Mr Alex Shabangu to be judge of the High Court".
[95] Reported in The Times of Swaziland 18 July 2003.
[96] News Release 11 July 2003.

evident from his rulings that Justice Masuku was "anti-government" and that he had been transferred to another court where he would be "less political".

It is difficult to avoid the conclusion from these remarks as well as from the chain of events from 3 April 2003 that Justice Thomas Masuku was being punished for his forthright rulings[97] and refusal to be drawn into improper contacts with government ministers and officials, as for instance in their "Thursday Committee" meetings.[98]

Amnesty International raised its concern about the harassment of the judiciary and the treatment of Justice Thomas Masuku in particular in an "Oral Statement" delivered in November 2003 to the 34th Ordinary Session of the African Commission on Human and Peoples' Rights in Banjul.[99]

After months of government inaction on the case filed in May 2003 by Thomas Masuku's legal representatives for joinder with the Law Society in civil case 743/03, the applicants took steps to get the matter set down for a hearing on the second aspect of their application, for a *rule nisi*. Justice Maphalala presided and granted an interim *rule nisi* on 12 December 2003, with the consent of both parties. Under the terms of the interim *rule nisi*, the applicant Thomas Masuku was to continue to hold office as a judge of the High Court unless and until the government respondents provided compelling reasons why Legal Notice No. 29 of April 2003 should not be invalidated. A return court date was set for 30 January 2004.

However the court hearing was postponed on 30 January, at the request of the government respondents. Apparently the Attorney General was seeking informally to resolve the problem of Justice Masuku's position and the status of Legal Notice 29. By 30 April the government side had not filed any papers in the High Court nor shown any signs of having resolved the issue informally, presumably by attempting to persuade the King to withdraw Legal Notice 29. Justice Masuku and his legal team were entitled therefore to ask the High Court to make the interim order final. The Attorney General for the government pleaded for more time. The Acting Chief Justice with the agreement of both sides allowed the interim order to be extended for three more weeks. By 21 May government lawyers had still not filed any opposing papers in the High Court giving reasons why the Legal Notice should not be invalidated. Nor had the government withdrawn the Legal Notice. As a consequence the interim order of 12 December 2003 became final and Legal Notice No. 29 was invalidated. The purported transfer of Thomas Masuku from the High Court to the Industrial Court under this Legal Notice 29 was accordingly unlawful.[100]

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[97] An example of one such ruling is *Madeli Fakudze v. the Commissioner of Police, the Attorney General and Superintendent Agrippa Khumalo*, Civil Case No. 1935/2002), 9 September 2002 (see below p.50).
[98] See above note 58
[99] A copy of the Oral Statement, which summarised Amnesty International's human rights concerns in Swaziland, Mauritania and Liberia, can be obtained from the International Law and Organizations Program, Amnesty International, International Secretariat, 1 Easton St, London WC1X ODW, UK.
[100] In June 2004 the Attorney General filed an urgent application in the High Court for a variation of the court order of 21 May regarding the position of Justice Kenneth Nkambule. He had been transferred

Although Justice Masuku had been able to resume his duties on the High Court bench after the High Court had issued the interim order in December 2003, his position had remained precarious. The final court order has rectified his situation. However, the issue of the invalidity of the Legal Notice itself was dealt with only by default.[101] The Legal Notice has not been withdrawn formally by the Government. The manner in which it was issued remains as a precedent which could continue to undermine the independence and integrity of the judiciary as a whole. Its withdrawal would be one mark of the seriousness of the new Administration of Prime Minister Themba Dlamini to resolve the crisis in the rule of law.

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from the Industrial Court to the High Court under Legal Notice 29. He had not been a party in Justice Masuku's case over the previous 12 months, but his position on the High Court bench was immediately affected by default by the May ruling. Consequently the Law Society did not oppose the Attorney General's application, although it appeared to be legally untenable in several respects. When Justice Masuku's lawyer withdrew their objection to the application, Acting Chief Justice Annandale granted the Attorney General's application for an order which set aside Legal Notice 29 only in so far as it affected the position of Justice Masuku. (The Swazi Observer, 17 June 2004; The Times of Swaziland, 17 June 2004; Legal sources.)

[101] A full settlement of the issues would require a ruling on the main part of the application brought by the Law Society on 9 April 2003 (see above) or a formal withdrawal by the King of the defective Legal Notice.

PART II: *CASE STUDY: THE EVICTIONS IN MACETJENI AND KAMKHWELI*

> *"The people who were supposed to protect us came and broke down everything and took away everything…We were all driven away…The government uses nice words to describe what happened, they don't like to hear the word "eviction", but that is what it was, a forceful eviction".*
> (Comments of one of the Macetjeni evictees to Amnesty International, 5 July 2003)

Possibly the most sustained example of government refusal to abide by court rulings involves the evictions that were carried out in the two small rural communities of Macetjeni and KaMkhweli in October 2000. The forced removal of over 120 men, women and children from their homes in the Lubombo region on the night of 13 October 2000 was a brutal act which violated the human rights of those affected and has had political consequences which have persisted years after the event.[102] On that night Chief Mliba Fakudze, Chief Mtfuso Dlamini and their extended family members were evicted from their homes by armed members of the security forces, who also seized their property. Those who did not manage to flee were ordered to get into the security force vehicles and driven far away from their homes. The families were dumped in different locations and left without shelter, food or water. Their right to raise their case through traditional channels was obstructed for reasons which have not been publicly explained. However they were successful in obtaining a number of rulings in the High Court and the Court of Appeal which upheld their right to return to their homes.

Over a two-year period the Chief Justice, all other judges of the High Court as well as the judges of the Court of Appeal were involved at one time or another in hearing applications or appeals arising from the evictions and their consequences. All but one of the judgments went against the government. Nevertheless the government and the security forces acting on its instructions ignored the court rulings, culminating in the defiant public statement of former Prime Minister Sibusiso Dlamini on 28 November 2002 that the government had no intention of obeying the courts in this matter. The statement precipitated the resignation en masse of the judges of the Court of Appeal two days later.

Prelude to the evictions

The small rural communities of Macetjeni and KaMkhweli are located in the Lubombo administrative region of Swaziland, near Siphofaneni. Lubombo is an important agricultural region dominated mainly by commercial sugar cane farms.[103] The majority of people in the

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[102] Press reports at the time referred to several hundred people being evicted. Amnesty International has confirmed information on 119 individuals from six families, but does not have the information about two other families who were evicted on the night of 13 October 2000.

[103] *Swaziland Human Development Report 2000*, pp.26, 57; Humanitarian Coordination Swaziland at www.sahims.net ; Government of Swaziland website at www.gov.sz/home.asp?pid=1813 .

region, however, live on communal, small holdings on Swazi National Land and are involved primarily in maize production for subsistence.[104] The region has been badly affected by drought in recent years.

Chief Mliba Fakudze of Macetjeni and Chief Mtfuso of KaMkhweli appeared to have enjoyed the support of members of the local communities who under the traditional system were dependent upon the Chiefs for access to land and livelihood. It is not clear why the King decided or may have been persuaded to order the removal of the existing chiefs and replace them with one of his brothers, Prince Maguga. According to the former Prime Minister Sibusiso Dlamini, the late King Sobhuza II designated Prince Maguga Dlamini as Chief of Macetjeni and KaMkhweli.[105] However in an affidavit in the High Court, the Attorney General Phesheya Mbongeni Dlamini stated that

> "*There has been a long-standing chieftancy dispute between the first and second respondents* [Mliba Fakudze and Mtfuso Dlamini] *and the third respondent* [Prince Maguga] *with regard to the KaMkhweli and Macetjeni areas.…The first and second respondents are in possession of instruments which were purportedly signed by His Majesty King Sobhuza II in 1977; whilst the third respondent is in possession of a notice of appointment by His Majesty King Mswati III.*"[106]

Possibly the King's decision was intended to accommodate the interests of a powerful and influential person within royal circles.[107] Whatever the reason, the order for the removal of Chief Mliba Fakudze and Chief Mtfuso and their dependents from their homes and the local area was carried out with ruthlessness and sustained in the face of the protests of those evicted and court rulings exposing the unlawfulness of official actions. From the beginning those faced with eviction attempted to petition the King, but were apparently denied access to him although such would have been customary practice.[108] Amnesty International was told by one of the evictees that

[104] UNDP and Swaziland Human Development Forum, *Swaziland Human Development Report 2000*, Mbabane, October 2001, pp. 57, 69.

[105] The comment was made by the then Prime Minister during a meeting with Amnesty International representatives on 9 July 2003 in Mbabane.

[106] Founding Affidavit in the case *Attorney-General and the Minister of Home Affairs v. Mliba Fakudze, Mtfuso Dlamini and Prince Maguga*. The affidavit was signed and sworn to on 13 June 2002. It formed part of an unsuccessful attempt by the Attorney General to obtain a declaratory order to suspend the implementation of two judgments of the Court of Appeal earlier that month (see the judgment of Masuku J in *Madeli Fakudze v. The Commissioner of Police, the Attorney General and Superintendent Agrippa Khumalo*, Civil Case No. 1935/2002, pp.7 – 9; see also p.50 below.

[107] Prince Maguga is reportedly currently a member of the King's advisory body, the Swazi National Council, along with the former Prime Minister Sibusiso Dlamini.

[108] Subsection 28(11) of the Swazi Administration Order of 1998, in terms of which the authorities purported to have carried out the removals, provides that "Any person whose removal has been ordered under subsection (3) or who has, in terms of subsection (6), been removed may, within a period of not

> *"We reported our unhappiness and requested to approach the King to ask him if he made this decision. We were not allowed to have access to the King. For nearly four years we have been trying. We had to approach the court for help because we were repeatedly denied access to the King. Yet this denial of access is unusual".*[109]

The removal order affecting Chief Mliba Fakudze and his family was dated 12 July 2000 and was signed by King Mswati III. It purported to authorise under the terms of the Swazi Administration Order (SAO) No. 6 of 1998, the Minister of Home Affairs to remove Mliba Fakudze, Madeli Fakudze, Mahawukela Fakudze and Makhuphula Thwala and their dependants of Macetjeni area in the Lubombo region "under Chief Prince Maguga" to an area to be located by the Minister of Home Affairs. A subordinate order was issued by the Minister of Home Affairs, Prince Sobandla, pursuant to this order of 12 July, by which he ordered "Mliba Fakudze and his dependents to leave Macetjeni area in the Lubombo region under Chief Prince Maguga to Esihlutse under Chief Bhejisa on or before 5th September 2000".[110] According to evidence presented later in the High Court the procedures laid down in the SAO were not followed. These included that the original order should have been exhibited to Chief Mliba and his family, the written instructions from the King to the Minister authorising him to issue the removal orders should have been shown to them, the contents of the removal orders should have been explained to them and copies of the removal orders should have been deposited at the nearest police station.[111]

Chief Mtfuso and his family, who were faced with a similarly-worded order, applied to the High Court for an interdict to suspend the evictions until the applicants had had their case heard and decided by the King. They requested that the High Court order the Minister of Home Affairs and others to refrain from taking any action against them pursuant to the removal orders while they were awaiting the decision of the King.[112] The Attorney General

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more than thirty days from the date when the order was served upon him or such removal effected, apply to the *Ngwenyama* for the review of such an order or removal."

[109] Interview by Amnesty International representatives with evictees from Macetjeni and KaMkhweli with the assistance of an interpreter, Mbabane, 4 July 2003.

[110] Cited in *Minister of Home Affairs, Commissioner of Police, Regional Secretary-Lubombo, and Attorney General v. Chief Mliba Fakudze, Madeli Fakudze, Mahawukela Fakudze and Makhuphula Thwala*, Civil Case No.6/2002, judgment, 10 June 2002. Section 28 (1) of the SAO states that "Provided that such orders do not conflict with any law, the Ngwenyama may issue orders to be obeyed by Swazis within Swaziland … prohibiting, restricting or regulating the migration of Swazis from or to any particular area or areas under his jurisdiction". Section 28 (3) provides that the "Ngwenyama may at any time instruct the Minister of Home Affairs in writing to make an order containing such conditions as the Ngwenyama may consider appropriate for the removal of any person or any of his dependents living with him from one Swazi area to another Swazi area".

[111] These requirements are contained in subsection 28 (4) of the SAO and were not fulfilled (judgment of the High Court on 5 February 2002 in Civil Case No. 2823/2000 and upheld by the Court of Appeal on 10 June 2002. See further below.)

[112] Application in *Chief Mtfuso II, Isaac Dlamini and Makinini Sikhondze v. Swaziland Government*, 21 August 2000.

argued on behalf of the government that the High Court did not have any jurisdiction in the matter as it was an issue of Swazi Law and Custom.

On 5 September 2000, Chief Justice Stanley Sapire in the High Court ruled that the effect of the Minister's removal order should be suspended until those affected had received the King's decision on their appeal. The Chief Justice noted that although Section 28 of the SAO appeared to exclude the court's jurisdiction in such a matter,[113] the actual removal order in this case had been signed by the Minister and not the King. Accordingly the High Court could consider the question of its validity.

The government did not let the matter rest however. On 22 September the Attorney General went back to the High Court in an attempt to re-open the jurisdiction issue. He stated in an affidavit that the High Court did not have jurisdiction to decide this case because the orders of the Minister of Home Affairs were "merely giving effect to the removal orders by His Majesty the King". Chief Mtfuso and his legal representatives opposed this attempt on the grounds that it was being advanced three weeks after the High Court had heard full arguments and had reached a decision that the High Court did have jurisdiction and had accordingly issued an interim order suspending the eviction notice.

In an extraordinary about-turn which had disastrous consequences for the applicants, the Chief Justice decided to allow further arguments to be heard on the question of the High Court's jurisdiction. On 13 October 2000 the Chief Justice delivered his second judgment in the same case. He stated that his interim ruling of 5 September did not deal in a final manner with any issues between the parties "including that of jurisdiction". He went on to state that "[i]t is true that [he] could and should not have made the interim order, if the jurisdiction of the court was excluded [in terms of section 28 of the SAO]. There is however nothing which prevents [him] from correcting [his] error". Accordingly he dismissed the application of Chief Mtfuso and others with costs.[114]

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[113] Subsection 28 (10) states that "A court shall not have jurisdiction to inquire into any order made under Subsection (3)".

[114] Amnesty International was informed during a visit to Swaziland in May 2001 that on the day before the hearing the Chief Justice was summoned to the royal palace where, allegedly in the presence of the Attorney General, he was advised that he had made an "error" in his ruling on 5 September. The IBA report, *Swaziland Law, Custom and Politics,* notes that "despite the fact that [Chief Justice Sapire] has publicly opposed interference in judicial processes by the Executive (as in the Zena Mahlangu case), there is a widely held perception that the Chief Justice in some instances may have compromised himself by being too close to the Executive and by being a member of the Thursday Committee" (p.40).

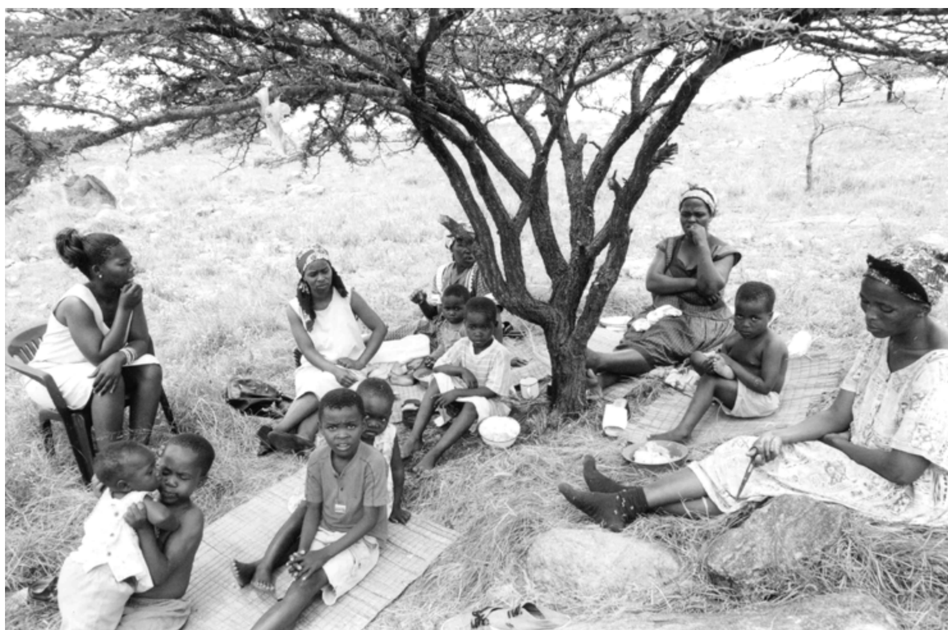
The Evictions

The evictions were carried out almost immediately on the back of this ruling. During the night of 13 October 2000 soldiers as well as armed police officers and armed Correctional Services officers arrived in trucks to evict the Chiefs and their families. The areas to which they and/or their property were dumped were Motshane, Dlangeni, Nkambeni and Emvembile in Hhohho region, Hluti and Mhlosheni in Shiselweni region, and Ngcoseni in Manzini region. None of them were removed to locations within the Lubombo region.

Chief Mtfuso got wind of the intended raid by the security forces and he managed to flee with other members of his household. However the security forces broke into the buildings in the family compound and removed everything. At the time of the evictions Chief Mtfuso was setting up a sugar cane farm for commercial purposes to help generate income. Among the property removed, stolen or lost by the security forces were irrigation and sprinkler pipes and signed cheques worth more than Emalangeni 40,000[115] intended for the cost of transporting sugar cane and paying workers. The security forces set up a camp in the compound to ensure that no-one could return. Later the encampment was moved closer to the main road between Siphofaneni and Big Bend and the security forces made periodic patrols to the homestead. Chief Mtfuso and his family went into hiding for some time after the night of the security force raids, but the pressure of police surveillance led them to decide to cross the border into South Africa where they sought asylum.[116]

Isaac Dlamini, an uncle of Chief Mtfuso, and his family were asleep in their home in KaMkhweli when the security forces arrived. Isaac Dlamini, in a vain attempt to stop the armed men from his entering his home, went out to speak to them. He had hoped that, as was customary, none of them would enter his house where the women and children were sleeping and he as head of the household was not there. Undeterred, the security forces went into the house and removed everything in it, forcing all the occupants into police vehicles. They were driven away and then dumped in open fields. There were no facilities, no food or water or shelter for the family, who included a child ill with asthma. They remained in these wretched circumstances until members of the Swaziland Red Cross Society assisted them with some tents. However the family had been dumped in a very windy and wet area and the tents would blow down. Family members became ill with pneumonia and other conditions. The Chief of the area where they had been left did not visit or otherwise show any concern for their welfare.[117]

[115] Equivalent to approximately US$ 5,800 at the 2000 exchange rate.
[116] Interview by Amnesty International representatives with family and legal representative on 5 July and 10 July 2003.
[117] Interview by Amnesty International representatives with family members on 4 and 5 July 2003, with the assistance of an interpreter.



Some members of the family of the late Isaac Dlamini shortly after they were evicted to an open area with no facilities. © Amnesty International.

The homes of Chief Mliba and his brother Madeli Fakudze in Macetjeni were similarly raided and stripped of their contents and the occupants forcibly removed. A member of Chief Mliba's family told Amnesty International on 5 July 2003 that it was difficult to talk about the distressing events of that night. There had been some violence in the months prior to the evictions, he said. A rondavel [118] where family members slept had been set alight, by "Maguga's people". It should have been possible, though, for something to have been done to resolve the conflict, but instead the security forces were sent to carry out the eviction of everyone in Chief Mliba's family.

> *"The people who were supposed to protect us came and broke down everything and took away everything. We were all driven away 40 to 50 kilometres. What did we do to deserve this? Maguga used his powers as a prince to insist on being made chief of this area. The people of this community did not want this. The government uses nice words to describe what happened, they don't like to hear the word eviction, but that is what it was, a forceful eviction. How else can you describe the taking of property without compensation? They destroyed years of work to build up this homestead."*

[118] A traditional round house made from mud bricks.

Figure 4 (above) and Figure 5 (below) Two views of the abandoned homestead of Chief Mliba Fakudze at Macetjeni. Both © AI, July 2003

The battle in the courts continues

The evictees continued to look to the courts for protection despite the impact of Chief Justice Sapire's ruling which had facilitated the evictions on 13 October. Two months later the Court of Appeal overturned Chief Justice Sapire's second judgment. In their ruling on 13 December 2000, the Court of Appeal upheld Chief Mtfuso's appeal. It confirmed that the Chief Justice's first ruling, on 5 September, in which he found that the High Court did have jurisdiction "*… was unequivocal, final and definitive and it was therefore not open to him to reverse it even if he later thought he was wrong. It is, therefore, the decision of this Court that the second judgment of the learned Chief Justice was bad in law and it must be set aside as a nullity".*[119]

Unfortunately the Court of Appeal was unable to deal with and settle a critical factual dispute, over whether or not Chief Mtfuso and his co-applicants in the High Court case had been given a hearing by the King in accordance with Swazi Law and Custom. The applicants had alleged in their founding affidavit in the High Court case that Chief Mtfuso and his council had gone to the Royal Palace at Ludzidzini to appeal to the King to review the removal orders. They were kept waiting for some hours and then were informed that they would not be permitted to petition the King because the matter had long been concluded. They were then "chased away". The Attorney General for the government denied this allegation in the High Court. The Court of Appeal noted that no oral evidence had been led on the issue in the High Court, because the Chief Justice had only considered the question of the High Court's jurisdiction before rejecting the applicants' case on 13 October.

The Court of Appeal's ruling restored the effect of the first High Court ruling. On being informed that "pursuant to the second judgment of the Chief Justice the appellants [Chief Mtfuso and others] and persons in their community affected by the order of the Minister of Home Affairs have been evicted from their homes in Ka-Mkhweli", the Court of Appeal stated that the effect of its judgment "is that the *status quo ante* must be restored, that they must be allowed to return and that the position must be maintained until the final determination of the [original] proceedings in the High Court."

The right of those evicted from Macetjeni to return to their homes was upheld in a separate ruling of the Court of Appeal in June 2001.[120]

The rulings of the Court of Appeal are defied

> *"We were very distressed. Some of us wished we could die. It is so hard to find a solution. We have always thought that the courts are the ones to have the*

[119] *Chief Mtfuso II, Isaac Dlamini and Makinini Sikhondze v. Swaziland Government*. Appeal Case No. 40/2000, Judgment of Browde JA, Steyn JA, Beck JA.

[120] Order granted by Leon JP, with Steyn JA and Beck JA concurring on 15 June 2001, in *Minister of Home Affairs, the Commissioner of Police, the Regional Secretary-Lubombo and the Attorney General Appellants v. Chief Mliba Fakudze, Madeli Fakudze, Mahawukela Fakudze, Makhuphula Thwala and their dependants*, Appeal Case No. 50/2000. The government had in fact abandoned its appeal during the course of the hearing in the Court of Appeal.

> *final word. So it is extremely difficult to understand in this situation why the rulings have not been accepted."*[121]

Prompted by the ruling in June, many of the evictees who had fled to South Africa returned to Swaziland to re-occupy their homes. They were faced however with armed police who refused to allow them to re-occupy them. While staying with a relative, Chief Mtfuso was approached by police and members of the royal family and asked to accompany them to Ludzidzini. Chief Mtfuso agreed but asked to go to his *kraal* (homestead) in KaMkhweli first. Superintendent Agrippa Khumalo from the Siteki Regional Police Headquarters reportedly replied, "You have no *kraal* anymore, you have been evicted". Provoked, Chief Mtfuso said that he would not go to Ludzidzini, particularly as could see no prospect of an audience with the King.[122] He returned to South Africa.

Amnesty International representatives visited Chief Mtfuso's deserted homestead at KaMkhweli, 5 July 2003. © AI, July 2003

The police obstruction of the funeral and burial of an evictee, Makhuphula Jeremiah Thwala, who had died on 22 August 2001, led his father Absolom Thwala urgently to seek the intervention of the courts. Absolom and his son had been among those who had sought to return to their home after the Court of Appeal ruling in June 2001. According to his testimony, which was not contradicted during the proceedings, when Absolom Thwala was preparing for the funeral he was confronted by a group of police officers led by Sergeant Mthethwa of Siphofaneni police station who told him that they would not allow the funeral to take place at Macetjeni as the deceased had been evicted the previous year. Sergeant Mthethwa stated that he would forcefully disperse the mourners if they did not leave.

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[121] Comments made to Amnesty International by some of the evictees from Macetjeni and KaMkhweli, during an interview with the assistance of an interpreter on 4 July 2003.
[122] Interview by Amnesty International with a family member on 10 July 2003.

On 5 September Justice Stanley Maphalala granted an order in the High Court restraining the police and others from interfering with the funeral and burial services at the family compound.[123] The High Court granted the order because it was consistent with the ruling of the Court of Appeal and also because, in Justice Maphalala's view, the respondents (the government) had failed to provide the High Court with any evidence to support their claim that a breach of the peace would ensue if the funeral and burial took place.[124] However the government immediately filed a notice of intention to appeal, which would have had the effect of suspending the original order. To the distress of the family members the police stopped the funeral procession, seized the coffin and took it back to the mortuary. Lawyers for the family had to go back to the court to ensure the original order was upheld.[125]

In a similar case the widow of Chief Mtfuso's son Mduduzi Dlamini won a High Court order in November 2001 against the authorities after they had disrupted preparations for his funeral. Mduduzi had fled to South Africa with his father in 2000 but returned after the ruling of the Court of Appeal in June 2001. When Chief Mtfuso went back to South Africa, Mduduzi was too ill to travel with him. After his death his widow, Nomcebo Dlamini, persisted in trying to persuade the authorities to allow the family to hold the funeral ceremonies at Chief Mtfuso's homestead. The security forces had erected razor wire to stop the funeral procession from entering Chief Mtfuso's *kraal*. Nomcebo Dlamini petitioned the High Court for an order restraining the government, the Attorney General and the security forces under their control from interfering with the funeral and burial of the deceased at Chief Mtfuso's *kraal*. In her affidavit Nomcebo Dlamini alleged that when she and other family members were clearing the grounds of the homestead in preparation for the funeral, *"a group of police officers and soldiers invaded the Chief's residence. They angrily ordered members of the family to immediately stop clearing the yard as no funeral would be allowed to take place at the Chief's residence. They even said they would make sure that the mourners were dispersed forcefully if we persisted in the preparations. Some of them even went to stand guard over the family graveyard and vowed that no one would be allowed to dig the grave there."* She alleged that the police cited as the basis for their stance the order evicting Chief Mtfuso II together with his entire household "including the deceased".

The government in response argued, unsuccessfully, that the High Court had no jurisdiction because the issue was first of all really about a dispute over chieftaincy and the High Court had no jurisdiction to hear the case.[126] Secondly, that the applicant, Nomcebo Dlamini, had no right to bury the deceased on the land in question. In relation to the second point, Prince Maguga submitted an answering affidavit in which he maintained that, as "Chief of Macetjeni and KaMkhweli…appointed by the Ngwenyama according to Swazi Law and Custom", his

[123] Prince Maguga had also filed an affidavit in which he stated his opposition to the burial taking place on the family compound.
[124] *Absolom Thwala v. the Swaziland Government and the Attorney General*, Civil Case No. 2294/2001, judgment of Maphalala J, 5 September 2001.
[125] Interview by Amnesty International with legal representatives on 4 July 2003.
[126] Government counsel cited Section 41 of the SAO which ousts the jurisdiction of the court in any matter relating to a dispute over the appointment or revocation of appointment of a person as a Chief.

permission for the burial "in his area" had not been sought. On 13 November 2001 Justice Kobus Annandale dismissed these points as irrelevant. The application to the High Court from Nomcebo Dlamini was simply concerned with the actions of the police and military in disrupting funeral preparations on a homestead where she had the right to be in terms of the ruling of the Court of Appeal in June 2001.[127]

On 26 November Justice Annandale gave his judgment on the merits of the application. He issued an order restraining the government and the security forces from interfering with the funeral and burial arrangements. He found that "*there is no reason advanced* [by the respondents] *that the gathering for the funeral of Mduduzi Dlamini, including the night vigil, had any of the qualities that may have moved the police to curtail it.* [In addition] *the eviction order that has already been addressed by a competent court has yet again been used to act upon, this in flagrant disregard of the clear order by the highest court of the land"*. Justice Annandale elaborated on this point by referring to a number of other cases where former evictees from both KaMkhweli and Macetjeni areas *"have been hampered in their declared liberties by the police and soldiers…Time and again"*, he warned, *"the authorities purport to rely on eviction orders that…are not applicable anymore and fail to take cognisance of subsequent orders of court. This practice has led to harsh criticisms and cautions that are not heeded to. The Rule of Law has to be maintained at all costs, otherwise 'the consequences will be too ghastly to contemplate'…"*[128]

Continuing police obstruction and harassment led Chief Mliba's brother, Madeli Fakudze, to approach the courts again. In his evidence to the High Court he described how, when he had attempted to return to his home on 17 October 2001, he had been confronted by a "*group of police officers who wanted to know why we had come back without first apologising to Prince Maguga who is claiming to be the rightful Chief of the Macetjeni and Ka-Mkhweli areas*." The police left when he showed them the order of the Court of Appeal of June 2001. However, just as he and his family were preparing to spend the night in their home, the police under the command of the Siphofaneni station commander returned and told Madeli Fakudze that the police had verbal orders from the Commissioner of Police to tell him and his family that they had to leave. Once again Madeli Fakudze showed them the order of the Court of Appeal. In his evidence to the High Court Madeli Fakudze alleged that the police replied that the orders of the Commissioner of Police overrode this court order. He further alleged that the police threatened to use force if he did not leave the house immediately. He appealed to them to allow him and his family to leave in the daylight as it was now 8 o'clock in the evening and there was no public transport. However the police were adamant.[129]

The High Court issued an order on 9 November 2001 restraining the Commissioner of Police and/or any other member of the security forces from preventing Madeli Fakudze from

[127] Ruling, In Limine, in Nomcebo Dlamini v. The Swaziland Government and the Attorney General, Civil Case No. 2941/2001, 13 November 2001.
[128] Judgment in Civil Case No. 2941/01.
[129] in *Madeli Fakudze v. the Commissioner of Police, the Attorney General and Abraham Dladla,*, Civil Case No. 3268/2001.

returning to and residing in his home in Macetjeni as allowed by the ruling of the Court of Appeal in June that year.[130]

Apology and punishment

The hostility shown by officials to the evicted families did not cease even where in a few cases some individuals felt unable to sustain their stance and agreed to "pay homage" to Prince Maguga as their Chief. In the case of Chief Mtfuso's uncle, Isaac Dlamini and his family, they returned from South Africa in the wake of the Court of Appeal's ruling in June 2001. Their attempts to reclaim their home in KaMkhweli failed, as members of the security forces confronted them and would not allow them in unless they apologised and paid allegiance to Prince Maguga. They left to stay with relatives while considering their situation. Isaac Dlamini, who was ill at the time, decided to go to Ludzidzini. When he arrived he did not have an audience with the King, but apparently saw officials of the royal palace who allegedly told him that if he did not recognize Prince Maguga, he should not attempt to set foot in his *kraal*. He agreed to make an apology.[131] Despite his co-operation with this demand, the family continued to be punished. They were allowed to return to their homes, but were not allowed to plough their fields, or to erect any new structures on the land. They lived "miserable lives", with a security camp right next to their homestead. On one occasion the Dlaminis' 21-year-old son was allegedly threatened with death when he went to the security force camp to fetch chickens which had strayed there.

Police/army encampment adjacent to the late Isaac Dlamini's homestead at KaMkhweli. © AI, July 2003

[130] The effect of this order was "pending the finalisation of Case No. 2823/2000". That case was finalised in a ruling by the High Court on 5 February 2002 (see further below).
[131] Interview by Amnesty International with family members on 4, 5 and 10 July 2003, with the assistance of an interpreter.

After the death of Isaac Dlamini in 2002 his widow bravely refused to accept this situation and hired a tractor, ploughed the fields and planted maize crops. The family's struggle was not over, though, as the land became blighted by drought and the crops failed. Although the World Food Program made emergency food available in drought areas, the local distributor allegedly denied Isaac Dlamini's family access; his widow was told that her husband had committed an "unforgivable sin".[132]

The threat of imprisonment and the issue of national security

Despite the new High Court order in his favour, Madeli Fakudze was still unable to occupy his home. His attempt on 9 December 2001 was immediately thwarted. The police demanded that he accompany them to a security force camp. He refused, but shortly after a "large group of police officers", under the command of Assistant Superintendent Abraham Dladla, arrived. When shown a copy of the court order, the officer allegedly refused to look at it, saying that he was not bound by any such document. He was emphatic that Madeli Fakudze must leave and allegedly threatened to use violence if he did not.[133] Faced with these threats Madeli Fakudze abandoned his attempt. Four days later he applied to the High Court for an order to commit Abraham Dladla to prison for seven days for contempt of the court order of 9 November 2001 and directing the Commissioner of Police to ensure access of the applicant to his home.[134]

The High Court did not rule on this case until 14 March 2002. Justice Josiah Matsebula granted the order but he suspended its implementation on condition that the respondents, the Commissioner of Police, the Attorney General and Abraham Dladla, allow Madeli Fakudze to return unimpeded to his homestead. The government, however, lodged an appeal.

In its ruling on 7 June 2002 the Court of Appeal expressed the hope that its judgment would *"bring to an end a most regrettable episode in the constitutional development of this country."* The Court of Appeal had "*gained the clear impression that the executive has taken every conceivable step, both legitimate and illegitimate, to delay and ultimately to thwart the orders issued by the courts arising out of the unlawful ejectment of the parties involved".*[135] In its judgment the Court of Appeal noted that the government had not denied the fact that they had prevented Madeli Fakudze from returning to his homestead and that they had done so "deliberately and with a full appreciation of the nature and consequences of their conduct". It was also clear to the Court of Appeal that Abraham Dladla had relied on instructions from the Commissioner of Police.

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[132] Interview by Amnesty International with family members on 4, 5 and 10 July 2003, with the assistance of an interpreter.

[133] Summary of High Court evidence in Appeal Case No. 13/2002 (erroneously referred to as Appeal Case No.8), in *Madeli Fakudze* (Respondent) *v. Commissioner of Police, the Attorney General and Abraham Dladla* (Appellants).

[134] in *Madeli Fakudze v. Commissioner of Police, the Attorney-General and Abraham Dladla,* Civil Case No. 3268/2001.

[135]Appeal Case No. 13/2002, judgment by Steyn JA, Browde JA, Zeitsman JA, 7 June 2002.

The issue of "national security" appeared to have been first raised by the government and police and defence force chiefs during the High Court proceedings presided over by Justice Matsebula. They had argued that there would be a threat to "national security" if the evictees returned to their homes. The Court of Appeal agreed with Justice Matsebula's decision to reject this argument as unfounded. He had not been impressed by the supporting affidavits filed by the Commissioner of Police and the Commanding Officer of the Umbutfo Swaziland Defence Force. In his evidence the Commissioner admitted that he was "fully aware of the court orders… ordering that the evictees be returned", but stated that he was not enforcing them for reasons of "the security of the nation". He stated that he was "in possession of verified information that [the security of the nation] is threatened" if he were to enforce the court orders. The Commander of the Defence Force had also alluded to the "threat to national security" which had made him deploy his troops in the Macetjeni area. He would withdraw them "as soon as the security problem has been overcome".

Both the Court of Appeal and the High Court concluded that the "national security" claim was merely the "latest innovation" by the government to avoid complying with court orders. In the words of the Court of Appeal it was "*remarkable that such an important issue should only surface now, when the threat of imprisonment is for the first time employed as a method to enforce compliance with the court order"*. Critically, the government had failed "*to disclose any information to the court…on which a reasonable apprehension could be based that a threat to national security may in fact exist or may arise if the court order is implemented"*. In the view of the Court of Appeal, the High Court had been correct in rejecting this defence, particularly with "the absence of a factual basis" for the claim and the fact that the national security threat has been "raised for the first time after a lapse of nearly two years".

Court finding against the validity of the removal orders

On 5 February 2002 the High Court issued a final ruling on the validity of the removal orders themselves. The Court found that the orders were invalid as they had been drawn up in terms of the Swazi Administration Order (SAO) which, for technical reasons, was not operative at the time. Even if the SAO had been operative the High Court found that the removal orders that were issued were inconsistent with the requirements of Section 28(3). This provision obliges the King to specify the conditions of removal rather than delegate that task to a subordinate, such as the Minister of Home Affairs in this case.[136]

The government lost its appeal against this ruling on 10 June 2002, when the Court of Appeal held that the provisions of the SAO had not been complied with, a fact which the government appellants did not deny. The Court of Appeal upheld the lower court's ruling that the removal orders should be set aside as having no force or effect. The delegation of authority to the Minister of Home Affairs regarding the conditions of the removal was invalid, exacerbating the gravity of the wrong inflicted on those evicted. In the opinion of the Court of Appeal,

[136] *Chief Mliba Fakudze, Madeli Fakudze, Mahawukela Fakudze and Makhuphula Thwala v. the Minister of Home Affairs, the Commissioner of Police, the Regional Secretary Lubombo, and the Attorney General*, Civil Case No. 2823/2000, judgment of Sapire CJ, Maphalala J and Masuku J, 5 February 2002.

> *"The removal of people from the area where they have lived most of their lives is a matter of considerable importance to the people concerned and to the country. Of equal importance is the area to which such people are to be relocated. Their relocation can bring about fundamental changes to their life-styles, the schooling of their children, their access to job opportunities and generally speaking to the quality of their lives. Such a fundamental invasion of their human rights certainly has 'significant discretionary components'* [citing legal authority]. *It is therefore clear that the discretion given to the King in such matters is not a discretion which he can delegate to one of his Ministers. For this reason alone the judgment of the* [High Court] *must be upheld".*[137]

The Court of Appeal dealt with one final issue, that of whether those evicted had been able to exercise their right, allowed under Section 28(1) of the SAO, to appeal to the King within 30 days for the order to be reviewed. The Court of Appeal had been unable to rule definitively on this issue as there had been no oral arguments heard or rulings made in the High Court on this question. However the Court of Appeal observed that Chief Mliba and others had alleged in their High Court papers that "all efforts by them to have the orders reviewed have been frustrated by government officials". The Court of Appeal concluded that "on the papers before us this appears to be the case".

The Executive's endgame

> "[The Applicant] *has suffered untold harm in being refused by the Respondents to return to his home on several occasions. He states that his home is in a serious state of disrepair and that he is leading a nomadic life which translates itself in part in the Applicant having no means of sustenance as the access to his ploughing fields is also denied. There is in my view no harm whatsoever that the Respondents, or the Government for that matter, would suffer if the Applicant were immediately allowed to return. He has not been linked to any violence or improper conduct in the area. Every passing day during which the access to his home remains denied brings untold trauma and suffering, particularly in the face of favourable orders of the High Court and the Appeal Court."*
> [Justice Thomas Masuku, High Court of Swaziland, 9 September 2002][138]

Despite two judgments against them by the Court of Appeal in June 2002 the police continued to obstruct the evictees from returning to their homes. On 18 June 2002 Madeli Fakudze, together with his legal representatives Attorney Ben Simelane and Advocate Lucas Maziya, attempted to enter his homestead. They were confronted by members of the security forces

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[137] *Minister of Home Affairs, the Commissioner of Police, the Regional Secretary-Lubombo and the Attorney General v. Chief Mliba Fakudze, Madeli Fakudze, Mahawukela Fakudze and Makhuphula Thwala*, Civil Appeal Case No. 6/2002, judgment of Zeitsman JA with Browde JA and Steyn JA concurring, 10 June 2002.

[138] *Madeli Fakudze v. Commissioner of Police, the Attorney General and Superintendent Agrippa Khumalo,* Civil Case No. 1935/2002, judgment, 9 September 2002.

armed with what appeared to be R4 rifles. Police Sergeant Fakudze ordered them to leave the premises. Police reinforcements were called. According to the founding affidavit of Madeli Fakudze, Superintendent Agrippa Khumalo arrived in a "fighting mood" with "many" other police officers. He allegedly refused to look at the court orders or listen to Madeli Fakudze's lawyers explain the implications of the Appeal Court rulings. He became "extremely agitated" when these judgments were mentioned and said that he would not allow Madeli Fakudze "under any circumstances whatsoever" to return to his home. His mere presence in the area would be interpreted as dereliction of duty on Superintendent Khumalo's part. He then called the members of the security forces to his side and threatened to use force against Madeli Fakudze if he did not leave immediately.[139]

Once again Madeli Fakudze had to turn to the courts for a remedy. He sought a High Court order to commit the police respondents - the Commissioner of Police and Superintendent Agrippa Khumalo - to prison for 30 days for contempt of court orders, specifically the Court of Appeal judgments of 7 and 10 June 2002. As he stated in the founding affidavit to this application, *"My houses are now in a serious state of disrepair and need urgent attention. I cannot feed my family because I have no access to my fields at Macetjeni as the security forces cannot allow me back to my home"*. For reasons which are not clear to Amnesty International the hearing of the case was postponed several times before being removed from the court roll. It was not until 26 August 2002 that the hearing went ahead in the High Court before Justice Thomas Masuku. He delivered his ruling on 9 September. It was highly critical of the actions of government officials in repeatedly ignoring and flouting court rulings during the preceding two years.

[139] Founding affidavit of Madeli Fakudze, in *Madeli Fakudze v. Commissioner of Police, the Attorney General and Superintendent Agrippa Khumalo.*

Buildings in the homestead of Madeli Fakudze. © AI, July 2003

The government and police respondents had sought court agreement, through a declaratory order, to postponing the hearing pending a decision in another matter. Justice Masuku rejected this submission, commenting that the applicant had already "suffered untold harm". In his ruling on the application for a committal order, Justice Masuku considered in particular the arguments and evidence presented to him regarding the claim by respondents that if the evictees were to return there would be "bloody anarchy" arising or a threat posed to national security; and the evidence of a deliberate intention to disobey court orders on the part of the respondents.

On the possibility of violence, the respondents had argued that if the evictees were allowed to return there would be serious violence and anarchy in the area. Justice Masuku acknowledged that clearly the police had a duty to prevent this using "valid remedies" if a court order could not be implemented without endangering the peace. However he was sceptical of the credibility of the evidence which the police respondents submitted to the High Court in support of their claim.

In his affidavit the Commissioner of Police, Edgar Hillary, had defended the police against the charges of contempt of court by stating that there was a "high likelihood of anarchy in the area" if he were to allow the applicant and the other evictees to return. In support of this he stated that "when the Applicant arrived he was given a hero's welcome which is usually accorded to the King…This isolated incident…revived the feelings of hostility between the factions of the community that pays allegiance to the currently reigning chief and the former chief, Mliba Fakudze." He argued that "state security considerations are very paramount as compared to the right to a home which is alleged to be infringed against the Applicant". The "many incidents" of anarchy and bloodshed prior to and after the evictions are evident, he

stated, in the memorandum "AG4", which was sent by the station commander of Siphofaneni police station to the Attorney General on 26 June 2002. The violence was "politically motivated" and perpetrated not just by members of the local communities, but also by "underground political pressure groups", the names of which he could not divulge. Similarly, he could not divulge much information on a "planned assassination of the Chief" (Prince Maguga) which was "aided and supported by some underground political movements". It was evident, he stated, that some of the evictees were working "hand in hand" with some "political activists" by the fact that when the applicant went to Macetjeni on 18 June, "the press was invited to cover the scene". He concluded from all of this that the Court should fairly view the "KaMkhweli and Macetjeni areas as if a state of emergency has been declared".[140]

In the "AG4" memorandum, which was submitted to the High Court with a Supporting Affidavit from Superintendent Agrippa Khumalo, there are 13 incidents listed as occurring from September 1998 to 26 August 2000.

- Five of the listed incidents involved damage to the property of one of Prince Maguga's Indunas (headmen), named as Almon Mhlanga and to another Induna, Simamile Gwebu. These acts were alleged to have been done by "anti-Maguga people"/ "a mob"/ "protestors (followers of Mliba)".
- Three incidents involved arson attacks or some other kind of attack on homes of people referred to as Prince Maguga's subjects; one of these incidents was noted as perpetrated by "a mob who are followers of Mliba". There was one further incident of arson on the house of one Noah Fakudze whose allegiance is not described. One of the incidents of arson led to the death of a 15 year old boy.
- There were two incidents listed of death threats made against an Induna and a follower of Prince Maguga by "Madeli's followers" and by "Mtfuso's followers" respectively.
- There was one reported incident of a house being blasted by a suspected landmine.
- The last incident involved "a group of people from KaMkhweli" disrupting a meeting of the Constitutional Review Commission.

As for the police response to these 13 incidents listed as occurring prior to the evictions in October 2000, in four cases there is a reference to an investigation still being undertaken. One case was said to be pending with the Director of Public Prosecutions. There is no information in the other eight cases on the police response or state of investigation into the allegations or any criminal justice outcome. This apparent lack of vigorous and urgent investigative activity on the part of the police sits very oddly with official explanations for the necessity to carry

[140] Respondent's Answering Affidavit in *Madeli Fakudze v the Commissioner of Police, the Attorney General and Superintendent Agrippa Khumalo.*

out the evictions and at night time.[141] While some of these reported incidents involve acts of violence of a serious nature, a prompt police response and prosecutions of suspects on criminal charges could have resolved the problem of communal violence without the state itself resorting to unlawful forced evictions.

A further eight incidents, which are listed as occurring after the evictions, are an odd mixture. They included peaceful protest actions (the delivering of mourning ties to a police station, the women's protest against Prince Maguga in which they were alleged to have bared their bottoms in public), a "welcome party" for Madeli Fakudze, a petrol bomb attack on the security force camp at KaMkweli which resulted in injuries to three personnel in December 2000 and a plot to assassinate Prince Maguga being "overheard" by his subjects. One other incident listed was the abandonment of the coffin of Mduduzi Dlamini which had occurred when the police forced the mourners to disperse.

Army encampment at the side of the road, Macetjeni. © AI, July 2003

Justice Masuku did not place much value on the "AG4" memorandum as evidence to support the claims of the Commissioner of Police in his defence. It "was not drafted in the ordinary course of duty but was written on the 26th of June 2002 to the Attorney General clearly for the purpose of meeting the deficiencies [which were identified by the Court of Appeal in the

[141] As stated for instance by the then Prime Minister Sibusiso Dlamini and the Commissioner of Police to Amnesty International representatives in meetings on 9 July 2003. See below for further detail.

state's evidence]." In his view "some if not most of the events recorded do not appear to be criminal or a danger to public peace or national security". In any event the police must investigate the incidents and bring the culprits to book, "rather than using them as an excuse to unfairly and unacceptably deprive the applicant and other evictees of the enjoyment of their homes."

On similar grounds Justice Masuku dismissed the claim by the respondents that the return of the evictees posed a threat to national security. The Commissioner of Police had "provided no basis or evidence for his assertion that the King declared that the return of the evictees will pose a threat to national security". The Commissioner's claim that the Attorney General had been asked to prepare a certificate signed by His Majesty the King and produced in court could not be supported. It was "common cause that such certificate was never filed before Court".

Turning to the question of whether the respondents had disobeyed the orders of court wilfully and with "bad faith", Justice Masuku cited the contents of the affidavit of the Commissioner of Police as evidence of his "intention to disobey the Court Orders". The Commissioner had admitted that his office had not ordered the officers in charge of the Macetjeni and KaMkhweli police posts to allow the evictees back to their former places of residence. His stated reasons for this stance, concluded Justice Masuku, are "those of a man who regards himself as the person who is the only and ultimate authority to decide whether or not he allows the evictees to return". The Commissioner of Police had in fact "substituted himself for the Court, such that Court Orders may not be enforced if he has any qualms about them".

Regarding Superintendent Agrippa Khumalo, he had not denied the allegations of the applicant, Madeli Fakudze, that he had refused to read the court order and threatened to use force on 18 June 2002 if the applicant and his legal advisers did not leave Macetjeni.

Justice Masuku concluded that both the Commissioner of Police and Superintendent Khumalo had acted wilfully and in bad faith in their actions. The only excuse of the latter, which was not acceptable in itself, was that he was acting on the orders of the Commissioner of Police. He ordered that both men should be committed to jail for 30 days for contempt of the Appeal Court judgments of 7 and 10 June 2002.

In his closing remarks Justice Masuku lamented the "*state of affairs where Orders of the Courts are being deliberately not enforced by the Executive. It is a sad day for any country when such episodes are witnessed, whatever the purported justifications. It is an injury to the judiciary, indeed the entire government and nation that may never heal. It robs the court, sometimes irredeemably of its esteem and dignity, reducing it to a toothless institution which issues inconsequential orders that may be defied at will and with impunity".*[142]

Unperturbed by these criticisms, the government and police lodged an appeal. However before the Court of Appeal had delivered its ruling, the Appellate judges were reportedly summoned to appear before the King. According to information provided to the International

[142] *Madeli Fakudze v. the Commissioner of Police, the Attorney General and Superintendent Agrippa Khumalo*, judgment, 9 September 2002.

Commission of Jurists by two former judges of the Court of Appeal, they were kept waiting for six hours before obtaining an audience with the King. They were then accused by the King of undermining the Monarchy and were ordered by him not to rule against the government in this case and in a second case, *Gwebu & Bhembe v. the King,* which concerned the discretion of the courts to grant bail to suspects charged with certain offences. The judges reportedly advised the King that they had not yet reached a judgment in these cases and their rulings were not open for discussion.[143]

On 22 November 2002 the Court of Appeal upheld the ruling of the High Court against the government and police respondents. The Court of Appeal also confirmed that the order of immediate committal to prison of the police officials concerned was justified, in view of their persistent and flagrant disregard for the Court judgments. However, their release should be immediate, once the police had complied with the order allowing Madeli Fakudze to return unhindered to his home. In its judgment the Court of Appeal emphasised that:

> *"The reason why the failure to comply with court orders is decried by the Courts is that the public look to the courts to ensure that justice is done. It is of obvious concern to the judges and magistrates if their orders are not carried out and if justice is thus denied to the litigants. As Masuku J points out in his judgment, where court orders are deliberately not enforced by the executive this results in an injury not only to the judiciary but to the entire government and nation".*[144]

No serious effort was made by anyone in authority to ensure compliance with the order of committal to prison of the Commissioner of Police and his subordinate officer, or, alternatively ensure that the order allowing Madeli Fakudze unimpeded access to his home was obeyed. The Commissioner himself was openly defiant and was reported to have declared that "only God can issue instructions for [his] arrest".[145] A senior police officer, Assistant Superintendent Christopher Dlamini, told Madeli Fakudze and his lawyer Ben Simelane that they could not enter Madeli Fakudze's home despite the order of the Court of Appeal. Both men had been stopped by police and Correctional Services officers armed with R4 rifles when they again attempted to enter the property. Assistant Superintendent Dlamini reportedly told them that

> *"Even if you have a court order I need an order from the police headquarters because what I have is an order not to open for him [Madeli Fakudze] to return home. That order can only be countered by another order from the Police Commissioner and not from the Court of Appeal...So long as our instructions are not changed and we are here, we cannot allow him to go in because we were instructed to prevent him from doing so".*

[143] Report of the ICJ/CIJL *Swaziland – Fact-finding Mission to the Kingdom of Swaziland,* 10 June 2003, p.14.

[144] *Commissioner of Police, the Attorney General and Superintendent Khumalo v. Madeli Fakudze*, Civil Appeal Case No. 38/2002, judgment of Browde JA, Beck JA, Zeitsman JA, 22 November 2002.

[145] The Times of Swaziland, 28 November 2002.

When asked by Attorney Simelane who had given him that order, Assistant Superintendent Dlamini replied: *"The Commissioner and he is the only one who can change it. So long as he has not changed the order, Fakudze will not be allowed to enter into his homestead".*[146]

The stance of the Commissioner of Police was sanctioned at the highest level of government. On 28 November 2002 Prime Minister Sibusiso Dlamini issued a public statement stating his refusal to obey or to have other government agencies obey the ruling of the Court of Appeal. The Prime Minister's statement referred also to the Court of Appeal ruling on the validity of the non-bailable offences legislation (*Gwebu & Bhembe v. the King*). The Prime Minister's statement was broadcast by the government-owned Radio Swaziland.

"The government wishes to express its disappointment at the recent judgments of the Court of Appeal in respect of Decree No. 3 of 2001 and the contempt of court case against the police. The effect of the Court of Appeal's judgments would be to strip the King of some of his powers, and the government is not prepared to sit idle and allow judges to take from the King's powers which were granted to him by the Swazi nation.

…Furthermore the government takes the view that the judgments are not in the interest of the country, and in particular the measures such as the removal of the non-bailable offences legislation and the return of the people to Macetjeni and KaMkhweli would lead to chaos and anarchy.

…Government does not intend to recognize the two judgments of the Court of Appeal…The government does not accept the judgment of the Court of Appeal in respect of the actions of the commissioner of police and his officers who acted properly and in accordance with Swazi Law and Custom. The nation shall not allow itself a situation of lawlessness that could definitively lead to bloodshed if the evicted persons were to be allowed to return to the areas concerned. Therefore the judgment in this regard will not be obeyed. The government agencies responsible for implementing the Court of Appeal judgment have, therefore, been instructed not to comply with it…This statement should not be viewed as interference with or contempt for the rule of law. It should be acknowledged that we are currently in a transitional stage and government's position on the above issues will be addressed in the new Constitution." [147]

On 30 November 2002 the judges of the Court of Appeal resigned in protest at the Prime Minister's statement. They said they would not reconsider their position unless the statement was withdrawn unconditionally and the government undertook to implement the rulings of the Court of Appeal.

In July 2003 Amnesty International representatives were told by the then Prime Minister Sibusiso Dlamini, during a meeting with him on 9 July, that the "Macetjeni and KaMkhweli problem" is a matter of Swazi Law and Custom and (by implication) not for the courts. "Everyone", he explained, "has a Chief and a right to a piece of land, [which] is administered

[146] The Times of Swaziland, 29 November 2002.
[147] As cited in the report of the ICJ/CIJL (see above note 66), pp.14-15, using BBC Monitoring of Radio Swaziland, 28 November 2002, 16:12 GMT.

by the Chief[148]…His Majesty has the right to appoint Chiefs". In the case of the Macetjeni and KaMkhweli people, the Prime Minister said, "[t]he King's father [King Sobhuza II] appointed a Chief [Prince Maguga] which they did not like, so there were fights [and] we had to separate the warring people." Some of them "ran away" to South Africa, he said, but "we still have room for them if they want to come back". He noted that the government had not dismantled the houses, which, he said, would "normally happen in an eviction". The Prime Minister stated that the "King is still waiting for them to go back". However, he said, "they can't go back because there is a risk of injury", although he did not specify to whom or from what source. In his view the manner in which they were evicted was justified. "These people were resisting. There was already violence, so it was right to take them at night to reduce further violence". He acknowledged that "they are destitute", but "they are not the only ones in this country who are destitute…Something could be done for them if they would come forward; but they seem to be insolent and won't accept the authority of Prince Maguga…We have spoken to Prince Maguga and asked him to accept them back if they apologise, but they seemed to have been promised more by others if they resist."

Amnesty International was also told by the Commissioner of Police Edgar Hillary, during a separate meeting on 9 July 2003, that the police had had to evict the people in Macetjeni and KaMkhweli "at night…because of the preceding period of serious violence". They had been served with eviction notices but the police could not enforce them in the day time "because of threats of more violence". As for documentation on these incidents of violence preceding the evictions, the Commissioner of Police said that the information was in the papers filed in court. He was of the view that the people "can return if they go through the proper process of apology". Several have done so, he said. He acknowledged that the evictees did not receive any resources or assistance from the other chiefs in the areas where the security forces took them. He told the Amnesty International delegation that the police have had to continue to stay in the Macetjeni and KaMkhweli areas because of possibilities of further violence.

The official position did not change prior to the October 2003 parliamentary elections and the appointment by the King of a new Prime Minister, Themba Dlamini, and a new Minister of Justice and Constitutional Affairs, Prince David Dlamini. There were hopeful signs in late 2003 and early 2004 that negotiations led by the new Minister of Justice to resolve the crisis in the rule of law would break the impasse created by the former Government's refusal to respect the rulings of the Court of Appeal. However at the time of completing this report no public announcement had been made on the outcome of these negotiations. In June the

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[148]The *Swaziland Human Development Report 2000* notes on page 69 that "Swazi National Land", which comprises "about 75 percent of the total land area is held by the King as *Ngwenyama* in trust for the Swazi nation. The responsibility to allocate the Swazi National Land to the people rests with over 200 chiefs (some studies estimate 300), who control settlements over more than half of the country". Those receiving land have no title deed and the chiefs have the authority to banish and evict people from chiefdoms. "The absence of formal boundaries between the chiefdoms, has, in recent years, led to many land disputes among neighbouring chiefdoms". See also the CRC, *Final Report*, where it is stated that "Before an individual can acquire the right to land, he must be officially recognised as a subject of the chief under whose domain the land falls….These rights fall away as soon as one moves and becomes a subject of another chief…[or] through banishment" (p.136).

Attorney General reportedly publicly referred to a government intention to "appeal" against the November 2002 ruling of the Court of Appeal. Furthermore on 23 June 2004 armed police again prevented Madeli Fakudze from entering his home in Macetjeni. They reportedly informed him and his lawyer that according to their instructions they were not to allow Madeli Fakudze to return to his home.[149]

Analysis of violations of human rights in the evictions case

By June 2004 the evicted families had been living as asylum seekers or internally displaced persons for more than three and a half years. In Amnesty International's view the Government of Swaziland has violated a range of civil and political, and economic, social and cultural rights through

- the forced evictions of Chief Mliba and Chief Mtfuso and their extended families,
- the use of force or threat to use force to prevent them returning to their homes,
- the dispossession or destruction of their properties,
- the effect of these actions on the victims' rights to livelihood, shelter, education and health, and
- The denial of an effective remedy to redress these violations.

These official actions have, directly or indirectly, violated a number of internationally-recognized human rights standards including the following rights guaranteed in treaties to which Swaziland has been or has become a State Party during the period in question (2000 – 2004):

I. Violations of the African Charter on Human and Peoples' Rights (the African Charter):

● ***Article 7***, which guarantees that everyone has the right to have her or his cause heard, and outlaws collective punishments. It states (in part):

"1. Every individual shall have the right to have his cause heard. This comprises:

> (a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; …

2. … Punishment is personal and can be imposed only on the offender."

● ***Article 14***, which states "that the right to property shall be guaranteed."

In October 2001 the African Commission on Human and Peoples' Rights, which oversees implementation of the African Charter, made a highly significant contribution to the

[149] As reported in The Times of Swaziland, 24 June 2004.

jurisprudence on the right to housing and not to be evicted in a decision concerning a complaint against the Federal Republic of Nigeria. In this decision the African Commission stated, in paragraph 60: "Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health … the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing."[150]

II. Violations of the UN Convention on the Rights of the Child (CRC):

- ***Article 3(1)***, which states: "In all actions concerning children … the best interests of the child shall be a primary consideration."

- ***Article 16***, which provides that children have the right to protection from interference with privacy, family, home and correspondence.

The Government of Swaziland has also violated the human rights enshrined in the Universal Declaration of Human Rights (UDHR), many provisions of which are widely accepted as reflecting customary international law.[151] The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights codify most of the provisions of the UDHR. On 26 June 2004 the Government of Swaziland became legally bound, as a State Party to these two Covenants, to implement the provisions in these treaties. While it cannot be said to be in breach retrospectively of its treaty obligations, if the Government and police were to persist in the kind of actions described in this part of the report, it will be in breach of one or more of the following provisions:

III. The International Covenant on Civil and Political Rights (ICCPR):

- ***Article 12(1)***, which provides that "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and to choose his place of residence". The United Nations (UN) Human Rights Committee, the UN body charged with monitoring States Parties' compliance with the ICCPR, in its General Comment 27,[152] made the following observations on this right: "The right to move freely relates to the whole territory of a State…" (paragraph 5); "…the right to reside in a place of one's choice within the territory includes protection against all forms of forced internal displacement. It also precludes preventing the entry or stay of persons in a defined part of the territory." (paragraph 7).

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[150] In *Centre for Economic and Social Rights and Social and Economic Rights Action Center (SERAC) v. Nigeria*. Communication No. 155/96, ACHPR/COMM/A044/1(2001).

[151] The UDHR was adopted and proclaimed by the United Nations General Assembly Resolution 217 A (III) of 10 December 1948.

[152] CCPR Human Rights Committee General Comment 27.Freedom of Movement (Article 12) [1999].

According to Article 12(3) of the ICCPR, a state may only restrict this right under exceptional circumstances which include protecting national security, public order, public health or morals, and rights and freedoms of others. Restrictions must be provided by law and must be consistent with all other rights recognized in the ICCPR. Paragraphs 11-18 of General Comment 27 state that any laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution. Restrictive measures must conform to the principle of proportionality and the test of necessity.

● ***Article 2(3)*** which provides for effective remedies for victims of human rights violations. Article 2(3)(a) requires states to "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity." Article 2(3)(b) calls for ensuring that complaints are dealt with by judicial or other competent bodies. Article 2(3)(c) provides, significantly, that "the competent authorities *shall enforce such remedies* when granted." [emphasis added].

● ***Article 14,*** which provides that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

● ***Article 17(1***), which prohibits arbitrary or unlawful interference with one's privacy, family, home or correspondence.

● ***Article 23(1)***, which obliges the state to protect the family.

● ***Article 24(1***), which obliges the state to protect the rights of the child without discrimination.

● ***Article 25(a),*** which provides that everyone has the right to take part in the conduct of public affairs.

● ***Article 7,*** which provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

In considering Israel's policies of house demolitions in the Occupied Palestinian Territories, the UN Human Rights Committee (HRC) has concluded that depriving persons of their homes in this way,

> "*…contravenes the obligation of the State party to ensure without discrimination the right not to be subjected to arbitrary interference with one's home (art. 17), freedom to choose one's residence (art. 12)... and not to be subject to torture or cruel and inhuman treatment (art 7*) ."[153]

The suffering and humiliation of the Macetjeni and KaMkhweli evictees as described in this report may be considered as warranting similar conclusions regarding this case.

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[153] UN Doc. CCPR/CO/78/ISR. (Concluding Observations/Comments), 5 August 2003, para. 16.

IV. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

● ***Article 16*****,** which prohibits cruel, inhuman or degrading treatment or punishment. Like the UN HRC, the UN Committee Against Torture, the UN body charged with monitoring States Parties' compliance with this Convention, has concluded that Israel's

> "*…policies on house demolitions may, in certain instances, amount to cruel, inhuman or degrading treatment or punishment (article 16 of the Convention)*".[154]

In Amnesty International's view, these conclusions are similarly applicable to the Macetjeni and KaMkhweli evictees.

V. The International Covenant on Economic, Social and Cultural Rights:

● ***Article 11(1***), which provides for the "right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing". The UN Committee on Economic, Social and Cultural Rights (CESCR), the UN body charged with monitoring States Parties' compliance with the Covenant, in its General Comment 4, states in paragraph 7, "…the right to housing should not be interpreted in a narrow or restrictive sense … Rather it should be seen as the right to live somewhere in security, peace and dignity."[155] Under paragraphs 7 and 9 the Committee observes that the right to adequate housing/shelter involves the concept of human dignity, the principle of non-discrimination and the right not to be subjected to arbitrary or unlawful interference with one's privacy, family and home.

In paragraph 17 of General Comment 4 the Committee "views many component elements of the right to adequate housing as being at least consistent with the provision of domestic legal remedies." These include the right to compensation after illegal eviction. In paragraph 18 the Committee states "… the Committee considers that instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law."

In its General Comment 7[156], the Committee quotes the UN Commission on Human Rights resolution 1993/77, paragraph 1, which states that "forced evictions are a gross violation of human rights." Under the Committee's General Comment 7, paragraph 3, forced evictions are defined as "permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection".

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[154] Report of the Committee against Torture, UN GOAR Supp. A/57/44 (2002), para. 52(j).
[155] CESCR General Comment 4: The right to adequate housing (art. 11, para. 1) [1991].
[156] CESCR General Comment 7: The right to adequate housing (art. 11 (1) of the Covenant): forced evictions [1997].

Paragraph 4 of General Comment 7 states that forced evictions frequently violate other human rights because of the inter-related nature of human rights. Paragraph 8 requires states to refrain from forced evictions. Paragraph 10 states that forced evictions can disproportionately affect the rights of vulnerable groups. Paragraph 12 prohibits forced eviction as a punitive measure, acknowledging that forced eviction can sometimes constitute a collective punishment. Paragraph 16 states unequivocally: "Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights."

VI. The UN Basic Principles on the Independence of the Judiciary

While not a binding document, this instrument elaborates on a basic principle crucial to the protection of human rights. This principle, the independence of the judiciary, is enshrined in Article 10(1) of the UDHR and provided for, as seen, in Article 14(1) of the ICCPR. Among the provisions of the Basic Principles breached by the Swaziland Government's contemptuous behaviour towards the courts are the following:

- "It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary" (Principle 1);
- "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason" (Principle 2);
- "There shall not be any inappropriate or unwarranted interference with the judicial process" (Principle 4);
- "Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties" (Principle 18);
- "All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct" (Principle 19);
- "Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review" (Principle 20).

PART III: *RECOMMENDATIONS TO THE GOVERNMENT OF SWAZILAND*

Serious and persistent violations of human rights have occurred and are still taking place in Swaziland. The discussions intended to bring to an end the rule of law crisis have still not achieved that result. Uncertainty remains concerning the constitutional reform and adoption process and time-frame.

Amnesty International accordingly urges the Government of Swaziland to seize the opportunity provided by its public commitment in March this year to implement four critical human rights treaties, [157] and, building on Swaziland's existing treaty obligations and commitments through its membership of the United Nations, the African Union and the Southern African Development Community (SADC), to now:

1. Ensure that the draft constitution is consistent with all of Swaziland's international and regional human rights treaty obligations;
2. Ensure that the full range of rights guaranteed in these treaties and other international and regional human rights standards are incorporated in the constitution as rights enforceable by the courts;
3. Establish a robust law reform process to facilitate the incorporation of Swaziland's human rights treaty obligations into domestic law and provide training on these obligations to all state officials;
4. Protect the right of all Swazis to an effective remedy, including access to justice, restitution, compensation and rehabilitation, by respecting the judgments of the courts of Swaziland (without prejudice to the right of appeal) and enforcing judicial remedies, as required under the International Covenant on Civil and Political Rights (Article 2), the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) (Article11), the Convention on the Rights of the Child (Article 39), the African Charter on Human and Peoples' Rights (African Charter) (Article 7) and the UN Declaration of Basic Principles of Justice for Victims of Crime and the Abuse of Power[158];
5. Protect the independence and impartiality of the judiciary as the cornerstone of a State committed to upholding its human rights obligations. Measures should be put in

[157] Namely the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the UN Convention on the Elimination of All Forms of Discrimination against Women, and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
[158] Approved by the UN General Assembly on 29 November 1985 (resolution 40/34) on the recommendation of the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders.

place to ensure that the independence of the judiciary is safeguarded in line with the UN Basic Principles on the Independence of the Judiciary and the New Partnership for Africa's Development (NEPAD) Declaration on Democracy, Political, Economic and Corporate Governance[159];

6. Protect the right to the presumption of innocence by restoring to the courts their discretion to decide matters of bail, as required under the International Covenant on Civil and Political Rights (Articles 9 and 14) and the African Charter (Article 7). In particular it should not be the general rule that persons awaiting trial are to be detained in custody. This should be done within a framework that takes into account the interests of justice, public safety and the safety of witnesses;
7. End the illegal detention of those prisoners to whom the courts had granted bail, in keeping with the ruling of the Court of Appeal, and as required under the International Covenant on Civil and Political Rights (Article 9) and the African Charter (Article 6) which prohibit arbitrary detention;
8. Protect the rights of the families evicted from Macetjeni and KaMkhweli to return to their homes, livelihood and schools without harassment, in keeping with the rulings of the High Court and Court of Appeal and as required by the International Covenant on Civil and Political Rights (Articles 2, 7, 12, 14, 17, 23, 24 and 25), International Covenant on Economic, Social and Cultural Rights (Article 11), the African Charter (Articles 7, 12 and 14) and the UN Convention on the Rights of the Child (Articles 3 and 16);
9. Ensure, in law and in practice, that all people are protected from, and are provided legal protection and redress for forced evictions that are arbitrary or contrary to the law, in accordance with relevant international human rights standards, as mentioned in recommendation no. 8. In the extreme circumstances when evictions are unavoidable, adequate compensation, as well as alternative suitable solutions must be provided to ensure evictees adequate standards of living, including housing, health, employment and education;
10. Revoke all laws and practices which violate the right to freedom of association and the right to participate freely in the government of one's own country, as required under the International Covenant on Civil and Political Rights (Articles 22 and 25) and the African Charter (Articles 10 and 13);
11. Facilitate "the development of vibrant civil society organizations", including creating and strengthening human rights institutions, as called for under the Declaration on

[159] Made in Durban on 18 June 2002. It is an Agreement by participating Heads of State and Government of the member states of the African Union to, among other things, co-operate in pursuing four broad objectives, including "Democracy and Good Political Governance" which is stated as involving enforcing "the rule of law", "the equality of all citizens before the law and the liberty of the individual", "adherence to the separation of powers, including the protection of the independence of the judiciary and of effective parliaments" and ensuring "the independence of the judicial system that will be able to prevent abuse of power and corruption" (Articles 7 and 14).

Democracy, Political, Economic and Corporate Governance of the New Partnership for Africa's Development (NEPAD), Article 15;

12. Protect the right to freedom of peaceful assembly, including the right to demonstrate, protest or meet, as required under the International Covenant on Civil and Political Rights (Article 21) and the African Charter (Article 11), subject only to those restrictions which are listed in Article 21 of the International Covenant on Civil and Political Rights. Any restrictions should be subject to judicial review;
13. Protect the right to freedom of expression and access to information without discrimination, as required under the International Covenant on Civil and Political Rights (Article 19), the African Charter (Article 9) and in accordance with the African Commission on Human and Peoples' Rights' Declaration of Principles on Freedom of Expression in Africa;[160]
14. Prohibit and make punishable the crimes of torture and other cruel, inhuman or degrading treatment or punishment under domestic law and ensure that all complaints of torture and other ill-treatment are subjected to thorough, independent and impartial investigations and the perpetrators brought to justice, as required under the UN Convention Against Torture, the African Charter (Article 5) and the International Covenant on Civil and Political Rights (Article 7);
15. Restrict in law the lethal use of firearms by police and other law enforcement officials to those circumstances where it is strictly unavoidable in order to protect life and only if other means remain ineffective, and ensure that any deployment of force is conducted according to the principles of necessity and proportionality, as provided by the International Covenant on Civil and Political Rights (Article 6) and required under the UN Code of Conduct for Law Enforcement Officials (Article 3), the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Principles 5 and 9), and the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions;
16. State publicly that human rights violations by police, military and correctional services officials will not be tolerated under any circumstances and that the need to investigate crime or deal with public disorder can never be used as a justification for human rights violations;
17. Ensure that training for law enforcement officials, in the areas of public order policing, arrest and detention procedures, the interrogation of criminal suspects and the handling of victims of crime, is based on international human rights standards and aimed at ensuring the highest standards of professional conduct;
18. Establish an effective, adequately resourced, accessible and independent body which is empowered to investigate complaints against law enforcement officials, including complaints of human rights violations;

[160] Adopted at its 32nd Session in Banjul on 19 October 2002. See also Commonwealth Secretariat, *Best Practice FREEDOM OF EXPRESSION ASSOCIATION & ASSEMBLY*, London, 2003.

19. Abolish the death penalty altogether in the new constitution and ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights which provides for the abolition of the death penalty;
20. Commit all levels of Government to pursue without delay, through law reform and all other appropriate means, "a policy of eliminating discrimination against women" and promoting their advancement and equality in the political, social, economic and cultural fields, as required under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
21. Ensure that the provisions of CEDAW are entrenched in the new Constitution and other national laws;
22. Ratify the Optional Protocol to CEDAW which establishes a process to enable individuals to lodge complaints with the UN treaty monitoring body, the Committee on the Elimination of Discrimination against Women;
23. Strengthen the commitment already made under CEDAW by ratifying the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women[161], and as urged by the African Commission on Human and Peoples' Rights at its 35th session in Banjul, The Gambia, in May 2004;
24. Take all necessary measures to protect women and girls against gender-based violence by officials, and exercise due diligence to protect them from such violence by private individuals, as well as ensure that women and girl survivors of violence have access to justice, care and treatment, including to prevent the transmission of HIV, as required under the 1993 UN Declaration on the Elimination of Violence against Women, the SADC Declaration on the Prevention and Eradication of Violence Against Women and Children[162] and on HIV/AIDS[163], the Protocol to the African Charter on the Rights of Women (Articles 3, 4, 5, 8 and 14) and the International Covenant on Economic, Social and Cultural Rights (Article 12);
25. Strengthen the protection for the rights of children, without discrimination, to their economic, social or family status, to adequate shelter, food, education and freedom from all forms of violence, including sexual violence and corporal punishment in homes, schools and the community at large, as required under the UN Convention on the Rights of the Child[164] and the African Charter on the Rights and Welfare of the Child[165]

[161] Adopted by the 2nd Ordinary Session of the Assembly of the African Union, in Maputo, 11 July 2003.
[162] Made at Grand Bay (Mauritius) on 14 September 1998.
[163] Made at Maseru (Lesotho) on 4 July 2003.
[164] As already noted, Swaziland ratified this treaty in 1995.
[165] As already noted, Swaziland has signed this treaty in 1992 but has not yet ratified it.

In addition to these human rights treaties and other standards mentioned here, the Swaziland Government should apply additional standards for human rights protection and promotion which have been set as part of intergovernmental agreements, such as:

- the Cotonou Agreement,[166]
- the Harare Declaration,[167] and the Commonwealth (Latimer House) Principles,[168]
- the SADC Treaty,[169]
- the Constitutive Act of the African Union,[170]
- the Declaration on Democracy, Political, Economic and Corporate Governance of the New Partnership for Africa's Development (NEPAD) and its related African Peer Review Mechanism,[171] and

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[166] The Partnership Agreement between the members of the African, Caribbean and Pacific Group of States (ACP) of the one part, and the European Community and its member States, of the other part, signed in Cotonou on 23 June 2000. Pillar I of the Agreement identifies "four key elements", including "respect for human rights, democratic principles based on the rule of law and transparent and accountable governance".

[167] Issued by the Heads of Government of the countries of the Commonwealth in Harare, 20 October 1991. Under the Declaration Commonwealth Heads of Government committed themselves to promote, among other objectives, "fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief", "equality for women, so that they may exercise their full and equal rights", "…the rule of law and the independence of the judiciary…".

[168] The Commonwealth Principles on the Accountability of the Relationship between the Three Branches of Government, as endorsed by the Commonwealth Heads of Government Meeting, Abuja, Nigeria, 2003, emphasise in Principle IV that an "independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice." Principle IV also states what steps should be taken to preserve judicial independence.

[169] The Treaty was signed on 17 August 1992 in Windhoek and its principles include Article 4(c) obliging member States to act in accordance with the principles of "human rights, democracy, and the rule of law".

[170] Adopted by the 36th Ordinary Session of the Assembly of Heads of State and Government of the Organization of African Unity on 11 July 2000, in Lomé (Togo). Under Article 4 the member states are obliged to function in accordance with 16 specified principles, including "(l) promotion of gender equality" and "(m) respect for democratic principles, human rights, the rule of law and good governance".

[171] See above note 159. Pursuing the objective of "Democracy and Good Political Governance" also includes ensuring "individual and collective freedoms, including the right to form and join political parties and trade unions, in conformity with the constitution" . In Article 9 "restoring stability, peace and security in the African continent…alongside democracy, good governance, human rights, social development, protection of environment and sound economic management" are listed as the "essential conditions for sustainable development". In Article 10 it is noted that "In light of Africa's recent history, respect for human rights has to be accorded an importance and urgency all of its own". In Article 11 the member states "accept as a binding obligation to ensure that women have every opportunity to contribute on terms of full equality to political and socio-economic development". Under their plan of action to "promote and protect human rights", the member states agreed to

- The Solemn Declaration On A Common African Defence And Security Policy.[172]

An end to human rights violations and to the political and legal uncertainty in the country, through implementing these recommendations, may enable Swaziland to address more effectively its pressing humanitarian problems, which relate to the right to health and the right to food.

Recommendations to states with commercial, donor, or other links with Swaziland and to international financial institutions and intergovernmental organizations

- Keep the human rights situation in Swaziland under review and encourage the government urgently to improve respect for the rule of law and for international human rights standards in law and practice;
- Encourage and support efforts by government and official bodies to implement Swaziland's obligations under human rights treaties, particularly in light of the pressures on resources created by the urgent humanitarian problems in the country;
- Support the advocacy and service provision activities of non-governmental organizations who are trying to promote reforms and an open climate of debate, as well as provide assistance to victims of human rights violations and those in need of humanitarian assistance.

"facilitate the development of vibrant civil society organizations, including strengthening human rights institutions at the national, sub-regional and regional levels", and "support the [African] Charter, African Commission and Court on Human and Peoples' Rights…".

[172] Adopted at the meeting of the Heads of State and Government of the Member States of the African Union in Sirte (Libya) on 28 February 2004. The Objectives and Goals enumerated in Paragraph 13 include "(j) respect for democratic principles, human rights, the rule of law and good governance".

APPENDIX A

MEMORANDUM TO THE CONSTITUTION DRAFTING COMMITTEE ON THE DRAFT CONSTITUTION FOR SWAZILAND

FROM AMNESTY INTERNATIONAL OCTOBER 2003[173]

Introduction

Amnesty International welcomes the opportunity to contribute further comments and recommendations to the Constitution Drafting Committee (the CDC) on the proposed constitution for Swaziland.[174] We understand that the CDC has completed its country-wide public consultations on the draft and is now preparing a revised version for presentation to King Mswati III this month. It is commendable that these consultations were conducted in a fully public manner, in contrast to the work of the earlier Constitutional Review Commission. Amnesty International will also be sending this memorandum to civil society organizations who have been involved in extensive discussions and public education on the content and implications of the Draft Constitution.

Our comments on the Draft Constitution are not intended to be exhaustive but highlight Amnesty International's main concerns. We are submitting them in the hope that the CDC will consider and incorporate them with a view to strengthening the Constitution's human rights provisions in line with Swaziland's international and regional human rights obligations.

The development of a strong constitution, while important, does not in itself guarantee adequate protection against human rights abuses. The Government of Swaziland will also have to demonstrate its determination to ensure that human rights are respected and that the institutions established to protect them are also able to operate independently and without harassment. In this context Amnesty International is very concerned that the stance by the government over the past year on a number of critical issues has damaged public confidence in the integrity and viability of the constitutional reform process and may also compromise the likelihood that the new constitutional framework can in fact deliver a new human rights dispensation. We refer in particular to the disregard shown by government and by police and prison officials for court rulings on bail and other matters over the past year. As a result of this crisis Swaziland has remained without a court of appeal for nearly a year. High Court judges, such as Justice Thomas Masuku, have been subjected to intimidation, demotion or

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[173] This memorandum was sent by Amnesty International to the Swaziland authorities in October 2003. In incorporating this text into the current document, we have inserted in footnotes some selected clauses/sub-clauses of the draft constitution to which AI's comments refer.

[174] On 11 July 2003 three Amnesty International representatives met members of the Constitution Drafting Committee in Mbabane for a discussion on the draft constitution, the public consultation process and method of its adoption.

other forms of pressure because their rulings have upheld the principles of human rights and the rule of law. Another worrying example is the government's apparent failure to make accountable members of the security forces who used excessive force against demonstrators and bystanders in Mbabane on 13 August 2003. This failure to act conflicts with Swaziland's human rights obligations and affects the ability of people to participate freely in the process of reforming the country's political and legal institutions.

Our comments on the draft constitution are organized below under the following headings:

1. **The Bill of Rights**
2. **Constitutional Provisions affecting the Rights of Women**
3. **Independence of the judiciary and the protection of human rights under the Constitution**
4. **Powers and Immunities of the Head of State**

1. BILL OF RIGHTS (Chapter IV, Sections 15-36)

General observations

Internationally recognized human rights are embodied in treaties and other instruments, and some are recognized under customary international law. They include, in particular,

- the International Covenant on Civil and Political Rights (1966) and its two optional protocols
- the International Covenant on Economic, Social and Cultural Rights (1966)
- the UN Convention on the Elimination of All Forms of Discrimination against Women (1976) and its optional protocol
- the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
- the UN Convention on the Rights of the Child (1989)
- the Rome Statute of the International Criminal Court (1998); and regional instruments such as
- the African Charter on Human and Peoples' Rights (1981)
- the African Charter on the Rights and Welfare of the Child (1990)
- the Protocol to the African Charter on Human and Peoples' Rights Establishing an African Court on Human and Peoples' Rights (1998)
- the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)
- the African Union Convention on Preventing and Combating Corruption (2003).

Although Swaziland is not yet a party to many of these instruments,[175] we are basing our recommendations upon the relevant provisions contained in these and other instruments that are increasingly accepted by the international community as basic minimum standards for the protection of human rights. Swaziland should ratify or accede, without reservations and at the earliest opportunity, to the above instruments. The provisions of the African Charter on Human and Peoples' Rights, which Swaziland has ratified, should be incorporated into the domestic legal framework.

Amnesty International is concerned that the Draft Constitution allows wide scope for subsidiary legislation or for executive government organs to restrict the rights and freedoms it guarantees to an extent inconsistent with internationally recognized human rights standards. Some of the guarantees contained in the Draft Constitution fall far short of international human rights standards while others entrench limitations and exceptions which may give the state wide powers to restrict these rights.

There are several fundamental human rights guarantees which Amnesty International considers should be strengthened or which are not found in the Draft Constitution. They include the right to freedom from arbitrary deprivation of life; the right to prompt and fair trials; the right to freedom of expression and association; and the right to be free from arbitrary arrest or detention. Others include the right to food, to housing, to health, to education and to work.

Comments on specific provisions

Section 15(2):[176] we welcome the provision making the rights enshrined in Chapter IV justiciable and binding on all organs of state.

Section 15(3):[177] this provision could be rephrased to prohibit discrimination by the state or any person against anyone on one or more grounds. The current formulation presents the risk

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[175] It should be noted that on 26 March 2004 Swaziland acceded without reservations to the International Covenant on Civil and Political Rights (but not its two optional protocols), the International Covenant on Economic, Social and Cultural Rights, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the UN Convention on the Elimination of All Forms of Discrimination against Women (but not its optional protocol). In 1995 Swaziland ratified both the UN Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights. Swaziland has signed (in 1992) but has not ratified the African Charter on the Rights and Welfare of the Child. Swaziland is not yet a party to the Rome Statute of the International Criminal Court, the Protocol to the African Charter on Human and Peoples' Rights Establishing an African Court on Human and Peoples' Rights, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or the African Union Convention on Preventing and Combating Corruption.

[176] **Section 15(2)** states: *The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, the Legislature and the Judiciary and other organs or agencies of Government and, where applicable to them, by all natural and legal persons in Swaziland, and shall be enforceable by the courts as provided in this Constitution.*

that only enumerated groups are entitled to the fundamental rights and freedoms in the constitution. We recommend also that the grounds referred to in the draft provision (gender, race, place of origin, political opinion, colour, religion, creed, age or disability) be expanded to include sex, marital status, sexual orientation, ethnic or social origin, culture, language and conscience. This reformulation would make the limitation noted at the end of Section 15(3) redundant.

Section 16 (1) – (2): although this section states that no person shall be deprived of life, it permits the use of the death penalty "in the execution of the sentence of a court in respect of a criminal offence under the law of Swaziland of which that person has been convicted". While Amnesty International welcomes the provision of the Draft Constitution to the effect that the "death penalty shall not be mandatory", this is clearly not enough to ensure the full guarantee of the right to life. The right to life, guaranteed by the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights, is the most fundamental of all human rights.

Article 6 of the ICCPR provides that

> *"1.every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*
> *2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.*
> *3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.*
> *4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.*
> *5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.*
> *6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."*

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[177] **Section 15(3)** states: *A person of whatever gender, race, place of origin, political opinion, colour, religion, creed, age or disability shall be entitled to the fundamental rights and freedoms of the individual contained in this Chapter but subject to respect for the rights and freedoms of others and for the public interest.*

Amnesty International considers that the death penalty itself is not only a violation of the right to life, but also the ultimate form of cruel, inhuman or degrading punishment. To the organization's knowledge, there is no conclusive evidence to suggest that the death penalty is a more effective deterrent against crime than other less severe forms of punishment. In practice, the death penalty is an arbitrary punishment. It is irrevocable and always carries the risk that the innocent may be put to death. Therefore, Amnesty International opposes the death penalty in all circumstances.

We recommend that the CDC take this opportunity to ensure that the Draft Constitution includes an express provision abolishing the death penalty. There has been no execution carried out in Swaziland since 1983 and commutations of death sentences have happened over the years through the exercise by the Head of State of the "prerogative of mercy". Such a step would be consistent with the international trend towards abolition. Nearly half of the countries in the world have abolished the death penalty in law or practice. They include a number of southern African countries such as Mozambique, Namibia and South Africa. An important manifestation of this trend is the adoption on 15 December 1989 by the United Nations (UN) General Assembly of the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty which entered into force in July 1991. Amnesty International recommends that Swaziland should sign and ratify the ICCPR together with its Second Optional Protocol.

Section 16(4):[178] this draft provision is inconsistent with international human rights standards regarding the use of force and firearms by law enforcement officials, such as under the United Nations Code of Conduct for Law Enforcement Officials (Article 3) and the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Principles 5 and 9). Under these standards potentially lethal force can only be used when there is a threat posed to the life of the law enforcement official/officials and/or other people. The current draft, however, also allows law enforcement officials and others to use lethal force in the defence of property, in making a lawful arrest or preventing the escape of a lawfully detained person and in preventing the commission of a serious criminal offence. In so far as these situations do not involve a threat to life, these grounds cannot be regarded, in the words of the Draft Constitution, as "reasonably justifiable and proportionate" under international human rights law. These provisions are open to abuse. In the case of "suppressing a riot, insurrection or mutiny", law enforcement officials would still be obliged to assess the extent of the threat to life posed in these situations.

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[178] **Section 16(4)** states: *Without prejudice to any liability for a contravention of any other law with respect to the use of force in such cases as are mentioned in this subsection, a person shall not be regarded as having been deprived of life in contravention of this section if death results from use of force to such extent as is reasonably justifiable and proportionate in the circumstances of the case -*

(a) for the defence of any person from violence or for the defence of property;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) for the purpose of suppressing a riot, insurrection or mutiny; or
(d) in order to prevent the commission by that person of a serious criminal offence.

Section 17(1) – (9): although this Section contains provisions on the right to personal liberty, and elaborates some safeguards against arbitrary arrest or detention, many of the protections guaranteed in international standards are missing or not fully recognized and entrenched in the Constitution. For example, international standards of fair trial provide that anyone arrested or detained must be notified at the time of the arrest of the reasons for their arrest or detention and of their rights, including their right to counsel. This information is essential to allow detained persons to challenge the lawfulness of their arrest or detention and, if they are charged, to start the preparation of their defence. However the Draft Constitution states only that "a person who is arrested or detained *shall be informed as soon as reasonably practicable*…of the reasons for the arrest or detention".

In addition to safeguards against arbitrary arrest or detention, it is essential to ensure that no detainee is held in incommunicado detention, or in a place other than an officially registered detention centre or prison, or held in any other manner intended to frustrate proper and prompt access to the detainee by legal representatives, doctors or next of kin.

Finally it is not clear why this Section on the protection of the right to personal liberty should include exceptions allowing for orders requiring a person to remain within a specified area or prohibiting that person from being within such an area (17(1)(j)(i-iii)).[179] There is a similar provision under Section 27(6) which contains a very far reaching limitation clause:

> *"Nothing contained in or done under the authority of any provision of Swazi law and custom shall be held to be inconsistent with or in contravention of this section to the extent that that provision authorises the imposition of restrictions upon the freedom of any person to reside in any part of Swaziland."*

The potential for abuse inherent in these provisions is evident from the history of the human rights violations committed against the families forcibly evicted from Macetjeni and KaMkhweli in 2000 and by the government's subsequent refusal to abide by numerous court rulings upholding the right of the families to return to their homes.

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[179] **Section 17(1)**: *A person shall not be deprived of personal liberty save as may be authorised by law in any of the following cases:*
states under sub-section (j)
(j) to such extent as may be necessary in the execution of a lawful order –
(i) requiring that person to remain within a specified area within Swaziland or prohibiting that person from being within such an area;
(ii) reasonably justifiable for the taking of proceedings against that person relating to the making of any such order; or
(iii) reasonably justifiable for restraining that person during any visit, which that person is permitted to make to any part of Swaziland in which, in consequence of that order, the presence of that person would otherwise be unlawful.

Section 19:[180] Torture and other cruel, inhuman or degrading treatment or punishment is absolutely prohibited in international law. Amnesty International welcomes the provisions of Section 19 of the Draft Constitution to the effect that, "the dignity of every person is inviolable… A person shall not be subjected to torture or to inhuman or degrading treatment or punishment". However, we would urge that this provision is strengthened in the Draft Constitution. While it is necessary for torture to be prohibited explicitly, it is equally important for safeguards to be introduced to prevent torture and to prevent the situation where torture is likely to take place. The Constitution as the most fundamental law should contain the strongest possible safeguards against this violation of human rights, instances of which do occur in Swaziland, primarily in the context of criminal investigations by police but also against political opponents.

Amnesty International recommends that in addition to the prohibition against torture and other forms of ill-treatment in the Draft Constitution, the draft should specifically incorporate those safeguards intended to prevent torture and other forms of ill-treatment which are included in international standards. These include that any complaint of torture or ill-treatment should be promptly and impartially examined by independent civilian judicial authorities. The Constitution should also specify that perpetrators of torture will be brought to justice. In this regard one of the provisions of Chapter VI, on "Directive Principles of State Policy", should be incorporated into Section 19, namely Section 58(3) that

> *"Law enforcement officials may not inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances as a justification of torture or other cruel, inhuman or degrading treatment or punishment."*

We recommend that the Constitution specifically prohibits the use during investigation or trial of evidence obtained by torture or ill-treatment. The government of Swaziland should ratify the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment without reservation.

Section 21: Section 21(2)[181] should be revised in line with the recommendations made for Section 15(3) above. Section 21(1) properly asserts that "All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law".

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[180] **Section 19** states:
(1) *The dignity of every person is inviolable.*
(2) *A person shall not be subjected to torture or to inhuman or degrading treatment or punishment.*

[181] **Section 21(2)** states: *For the avoidance of any doubt, a person shall not be discriminated against on the grounds of gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability.*

Section 22: although this section provides for the right to a fair hearing, the provisions are not fully in line with the principles set forth in international standards on fair trial.[182] For instance, the language of Section 22(2) could be strengthened by the addition that any person arrested on a charge should be informed immediately of the reasons for his or her arrest and must be informed promptly of any charges against them. Any person arrested, detained on or charged with a criminal offence must be informed immediately of their right to have the assistance of legal counsel.

Section 22(2) (a) provides the right to be "presumed innocent until [a] person is proved *or has pleaded guilty*".[183] A fundamental principle of the right to fair trial is the right of every person charged with a criminal offence to be presumed innocent until and unless proved guilty according to law after a fair trial. There is no provision in international or regional human rights standards for allowing any variation on this including the addition of the presumption of innocence until a person has pleaded guilty. The inclusion of this possibility also creates the danger of an accused person being compelled to confess guilt through coercion or as a consequence of lack of access to independent legal advice. The issue is critical also because of the longstanding government practice of creating "non-bailable" offences and the nearly year-long impasse over the enforceability of the Court of Appeal ruling against the validity of the relevant decree. Amnesty International recommends that the Draft Constitution contains a clear statement on the presumption of innocence and its centrality to the right to a fair trial.

The Draft Constitution does not provide for the right of everyone convicted of a crime to have conviction and sentence reviewed by a higher court. Article 14(5) of the International Covenant on Civil and Political Rights states that: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". The right to review ensures that there will be at least two levels of judicial scrutiny of a case, the second of which is by a higher tribunal than the first. The importance of the inclusion of this fair trial right in the Draft Constitution is underscored by the current rule of law crisis in Swaziland which has resulted in defendants in High Court matters being denied recourse to a higher tribunal of appeal. The right to a fair trial is fundamental. It should be guaranteed comprehensively.

Section 23: this section in fact provides very little protection against arbitrary search or entry and would give a licence to abuse. There is no requirement in Section 23(1)[184] for state agents

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[182] See a compilation and analysis of these standards in Amnesty International, *FAIR TRIALS MANUAL* (AI Index: POL30/02/1998). This manual, which was enclosed for members of the CDC in October 2003, is available on http://www.amnesty.org/ailib/intcam/fairtrial/fairtria.htm

[183] **Section 22(2)** states: *A person who is charged with a criminal offence shall be -*
(a) presumed to be innocent until that person is proved or has pleaded guilty;

[184] **Section 23(1)** states: *A person shall not be subjected —*
(a) to the search of the person or the property of that person;
(b) to the entry by others on the premises of that person;
(c) to the search of the private communications of that person;

to seek prior legal scrutiny and a warrant before entering premises or conducting a search or examining private communications. It is not an adequate safeguard against abuse of power to make these actions conditional only on obtaining the person's consent. There are no safeguards against pressure or coercion being used to obtain that person's "consent" and no mechanism for ensuring and recording that the consent was given freely. Furthermore the potential for abuse is increased by the wide-ranging limitations on the right to privacy provided for in Section 23(2).[185]

Sections 24, 25 and 26: these sections refer to crucial civil and political rights of freedom of conscience, belief, expression, opinion, assembly and association which go to the heart of the political conflict over rights and forms of governance in Swaziland since 1973. In the draft the fundamental right is asserted at the beginning of each of these sections,[186] but is then undermined by the use of the notion of the person's "consent" to the limitation of the exercise of that right and by extensive limitation clauses that can permit the state, in its almost unbounded discretion, to restrict the enjoyment of these rights.[187] These limitation clauses are

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except with the consent of that person first obtained.

[185] **Section 23(2)** states: *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 that –*

(a) is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilisation of mineral resources, or the development or utilisation of any other property in such a manner as to promote the public benefit;

(b) is reasonably required for the purpose of promoting the rights or freedoms of other persons;

(c) authorises an officer or agent of the Government or of a local government authority, or of a body corporate established by law for public purposes, to enter on the premises of any person in order to inspect those premises or anything on those premises for the purposes of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to that Government, authority, or body corporate as the case may be;

(d) authorises, for the purposes of enforcing the judgement or order of a court in any civil proceedings, the entry upon any premises by order of a court,

except so far as, in respect of paragraph (c) or (d) that provision or, as the case may be, the thing done under the authority of that Government, local authority or body corporate is shown not to be reasonably justifiable in a democratic society.

[186] **Section 24(1)**: *A person has a right to freedom of thought, conscience or religion.*

Section 25(1): *A person has a right of freedom of expression and opinion.*

Section 26(1): *A person has the right to freedom of peaceful assembly and association.*

[187] For example, **Section 24(2)** states that: *Except with the consent of that person, a person shall not be hindered in the enjoyment of the freedom of conscience.* In addition under Section 24(4) it is stated that *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 interest of defence, public safety, public order, public morality or public health; or

(b) that is reasonably required for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practise any religion or belief without the unsolicited intervention of members of any other religion or belief.

contrary to Swaziland's obligations under the African Charter on Human and Peoples' Rights and to other human rights standards. They could frustrate the achievement of one of the stated fundamental objectives of the Draft Constitution, namely to "promote good governance [and] the rule of law" in Swaziland.

Amnesty International urges that all the provisions of the Draft Constitution which enumerate the rights to freedom of assembly, association, expression and conscience incorporate the norms and standards of international and regional human rights instruments. These instruments stress that governments must guarantee the respect of the right of everyone to freedom of assembly and association, including the right to form and join political parties of one's choice, and freedom of conscience, opinion and expression, without any form of discrimination.

Amnesty International recommends that the Draft Constitution specifically safeguard the right to freedom of peaceful assembly and association in accordance with Article 20 of the Universal Declaration of Human Rights, Articles 21 and 22 of the International Covenant on Civil and Political Rights, and the African Commission's Declaration of Principles on Freedom of Expression in Africa, adopted at its 32nd Ordinary Session October 2002, Banjul, The Gambia.

The fundamental right to freedom of opinion and expression, as guaranteed by Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights, should be explicitly included in the Constitution. Limitations on the exercise of these freedoms specified by law are permitted, under Article 19(3) of the International Covenant on Civil and Political Rights, only in so far as they 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, or of public health or morals.

We also believe that the fundamental rights to freedom of thought, conscience and religion, which are guaranteed by Article 18 of the Universal Declaration of Human Rights and Article 18 of the International Covenant on Civil and Political Rights, should be explicitly included in the Constitution.

Section 27:[188] See above for comments under **Section 17**.

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[188] **Section 27** clauses (1), (3)(a), (4) and (6):
(1) *A person shall not be deprived of the freedom of movement, that is to say, the right to move freely throughout Swaziland, the right to reside in any part of Swaziland, the right to enter Swaziland, the right to leave Swaziland and immunity from expulsion from Swaziland.*
(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) for the imposition of restrictions on the movement or residence within Swaziland of any person or on the right of any person to leave Swaziland that are reasonably required in the interests of defence, public safety or public order;

Sections 28 and 29: See below under the Rights of Women

Section 30: The first subsection should be rephrased in direct and robust language to prohibit anyone from compelling a child to engage in "work that constitutes a threat to the health, education or development of that child." Section 18(3) (e) which is concerned with a limitation on the prohibition of forced labour and slavery in the context of "normal parental, cultural, communal or other civic obligations" should be made consistent with the provisions of Section 30 and the international and regional human rights standards on the rights of the child, such as Article 15 of the African Charter on the Rights and Welfare of the Child which prohibits child labour.[189]

Section 30(2), which prohibits the subjecting of a child to "abuse or torture or other cruel inhuman and degrading treatment or punishment", is undermined by the final phrase "subject to lawful and moderate chastisement for purposes of correction". The subjective nature of what constitutes "moderate chastisement" can only encourage the physical abuse of children, in a situation where the infliction of violent corporal punishment in schools in Swaziland is reported and is a serious human rights issue. The UN Convention on the Rights of the Child explicitly protects children from all forms of physical violence under Article 19 and from inhuman and degrading treatment or punishment under Article 37 and requires, under Article 28(2), that school discipline is "consistent with the child's human dignity and in conformity with the present Convention".[190] In southern Africa corporal punishment has been prohibited in Namibia and South Africa as a violation of the constitutional protection against torture and cruel, inhuman or degrading treatment or punishment.

Section 30(6) will impose an important obligation on the state, to ensure the right to free primary school education within three years of the promulgation of the constitution. The high

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(4) *If any person whose freedom of movement has been restricted by virtue of such a provision as is referred to in subsection (3) (a) so requests at any time during the period of that restriction not earlier than three months after the order imposing that restriction was made or three months after he last made such a request, as the case may be, the case of that person shall be reviewed by an independent and impartial tribunal presided over by a person appointed by the Chief Justice from among persons entitled to practise in Swaziland as advocates or attorneys and qualifying to hold high judicial office.*

(6) *Nothing contained in or done under the authority of any provision of Swazi law and custom shall be held to be inconsistent with or in contravention of this section to the extent that that provision authorises the imposition of restrictions upon the freedom of any person to reside in any part of Swaziland.*

[189] **Section 30(1)** states: *A child has the right to be protected from engaging in work that constitutes a threat to the health, education or development of that child.*

Section 18(3)(e) states: *For the purposes of this section, the expression "forced labour" does not include any labour –*

(e) reasonably required as part of reasonable and normal parental, cultural, communal or other civic obligations, unless it is repugnant to the general principles of humanity.

Section 30(6) states: *Every Swazi child shall have the right to free education in public schools at least up to end of primary school within three years of the commencement of this Constitution.*

[190] Save the Children, *ENDING CORPORAL PUNISHMENT OF CHILDREN*, published by The Save the Children Fund, 2001, pp. 16-19.

level of poverty and the impact of the HIV/AIDS epidemic in Swaziland have had a drastic impact on children's access to education, a key right protected under the International Covenant on Economic, Social and Cultural Rights (Article 13), the UN Convention on the Rights of the Child (Article 28) and Article 11 of the African Charter on the Rights and Welfare of the Child.

Section 33: This provision allows workers/employees to join a trade union and participate in collective bargaining and representation. It also will oblige the parliament to enact laws to protect employees against discriminatory and unsafe working conditions and against victimisation and unfair dismissal. Amnesty International recommends that the right to strike is also included in this section, as provided for under Article 8 of the International Covenant on Economic, Social and Cultural Rights.

Section 34:[191] This is a useful provision which will help ensure that administrative action is reasonable and procedurally fair and confirms the right of an aggrieved party to seek review of an unjust administrative action in a court of law.

Section 36:[192] This Section underscores the critical need to protect the independence and integrity of the judiciary. The High Court and the Supreme Court (of Appeal) will be at the

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[191] **Section 34** states:
(1) A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly in accordance with the requirements imposed by law including the requirements of fundamental justice or fairness and has a right to apply to a court of law in respect of any decision taken against that person with which that person is aggrieved.
(2) A person appearing before any administrative authority has a right to be given reasons in writing for the decision of that authority.

[192] **Section 36(1)-(4)** states:
(1) Where a person alleges that any of the foregoing provisions of this Chapter has been, is being, or is likely to be, contravened in relation to that person or a group of which that person is a member (or, in the case of a person who is detained, where any other person alleges such a contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.
(2) The High Court shall have original jurisdiction —
(a) to hear and determine any application made in pursuance of subsection (1);
(b) to determine any question which is referred to it in pursuance of subsection (3);
and may make such orders, issue such writs and make such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of this Chapter.
(3) If in any proceedings in any court subordinate to the High Court any question arises as to the contravention of any of the provisions of this Chapter, the person presiding in that court may, and shall where a party to the proceedings so requests, stay the proceedings and refer the question to the High Court unless, in the judgement of that person, which shall be final, the raising of the question is merely frivolous or vexatious.
(4) Where any question is referred to the High Court in pursuance of subsection (3) the High Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision or, if that decision is the subject of an appeal to the Supreme Court, in accordance with the decision of the Supreme Court.

heart of protecting, interpreting and enforcing the rights provided for in Chapter IV. (See comments below.)

2. CONSTITUTIONAL PROVISIONS AFFECTING WOMEN'S RIGHTS

Equality

There are a number of provisions which directly address or indirectly impact upon the rights and status of women. The proposed **Section 29(1)**[193] together with **Section 15(3)**[194] will prohibit discrimination on the grounds of sex and gender in the political, economic and social spheres and create legal equality for the first time between men and women. Amnesty International is aware that the office of the Attorney General with the assistance of the United Nations Development Program and civil society organizations began a process of identifying laws which are in conflict with the provisions of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). We hope that when the Draft Constitution is finally adopted as law, departments of state and the Parliament will give urgent priority to repealing or amending discriminatory laws. The government should move swiftly to complete the steps towards ratifying CEDAW and incorporating its provisions into national laws.

There are other sections of the Draft Constitution which, despite the implications of Section 29(1) and Section 15(3), discriminate against women. As publicly noted by the Swaziland Chapter of Women and Law in Southern Africa and others, **Section 44**[195] restricts the right to claim citizenship by birth to a child whose <u>father</u> is a citizen of Swaziland. There is no reference to the status of the mother, except in subsection 4 where her Swazi citizenship only

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[193] **Section 29(1)** states: *Women have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.*

[194] **Section 15(3)** states: *A person of whatever gender, race, place of origin, political opinion, colour, religion, creed, age or disability shall be entitled to the fundamental rights and freedoms of the individual contained in this Chapter but subject to respect for the rights and freedoms of others and for the public interest.*

[195] **Section 44** states:

(1) A person born in Swaziland after the commencement of this Constitution is a citizen of Swaziland by birth if at the time of birth the father of that person was a citizen of Swaziland in terms of this Constitution.

(2) A person born outside Swaziland after the commencement of this Constitution is a citizen of Swaziland if at the time of birth the father of that person was a citizen of Swaziland in terms of this Constitution.

(3) A person born outside Swaziland who becomes a citizen by virtue of subsection (2) shall cease to be a citizen if the father of that person was also born outside Swaziland unless, within one year after attaining the age of majority (or within such extended time as the Board may allow) that person notifies the Board in writing of the desire to retain the citizenship of Swaziland.

(4) Where a child born outside of marriage is not adopted by its father or claimed by that father in accordance with Swazi law and custom and the mother of that child is a citizen of Swaziland, the child shall be a citizen of Swaziland by birth.

becomes relevant to the child should the unmarried father fail to adopt or claim the child under Swazi law and custom. In addition to the discriminatory aspect in Section 44, we are concerned about the implications of **Section 54**, under which a Citizenship Board, to be appointed by the King, "shall have the exclusive authority" to investigate and decide to revoke the citizenship of any person. While the person concerned has the right to be heard and to be represented at the hearing of their case by the Board, there is no provision for review of the decision taken by a higher or independent tribunal or court. This safeguard should be included to protect against possible abuse of the Board's powers. There have been cases where the alleged citizenship status of government critics has been used as a basis for threatening their deportation.

Marriage and property rights

Section 28(2) provides that marriage should "be entered into only with the free and full consent of the intended spouses". The preceding **Section 28(1)** refers to "men and women of marriageable age" having the right to marry. **Section 35**[196] will oblige Parliament to take legislative steps to regulate the property rights of spouses, with the implication in subsection (1) that the rights will be described in a gender-neutral manner.

While Sections 28(1) and 28(2) are consistent with the provisions of CEDAW and should when implemented prevent forced marriages, they may not be sufficient to protect the girl-child against abductions and forced or early marriages. The phrase "marriageable age" does not make clear if the reference is to the requirements of civil rites marriage under statutory law and/or customary law where age in years does not determine a girl's capacity to marry.[197] The Draft Constitution is also in general unclear as to which legal system holds final sway (see further below). If the notion of "free and full consent" is to be given real content then the language of the Draft Constitution should make absolutely clear that these provisions protect the rights of girls against early or forced marriage. The CDC may find helpful guidance in the provisions relating to marriage in Article 6 of the new regional human rights standard, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, which was adopted by the 2nd Ordinary Session of the Assembly of the African Union in Maputo on 11 July 2003. The need for greater constitutional protection of the rights of the girl-child is of urgent concern, particularly in light of the disproportionate impact of the HIV/AIDS pandemic on adolescent girls and young women.

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[196] **Section 35** states:
(1) A surviving spouse is entitled to a reasonable provision out of the estate of the other spouse whether the other spouse died having made a valid will or not and whether the spouses were married by civil or customary rites.
(2) Parliament shall, as soon as practicable after the commencement of this Constitution, enact legislation regulating the property rights of spouses including common-law husband and wife.

[197] Nonhlanhla Dlamini, 'The Current Status of Women's Rights in Swaziland', in *Human Rights in Swaziland The Legal Response*, Department of Law, University of Swaziland, 1997, p.292.

Political participation

Various draft provisions, including **Sections 61(4)**,[198] **85(2)**,[199] **87**, **95** and **96**, will oblige the state to "ensure gender balance…in all constitutional and other bodies", "an equitable representation [of women] in Parliament", which should be "at least thirty [percent] of the total membership of Parliament", and for some 50 percent of the King's appointees to the House of Assembly and the Senate to be women. These 'quotas' are consistent with the recommendations in the Southern African Development Community's Declaration on Gender and Development,[200] but their effectiveness in promoting genuine participation of women in the political and decision-making processes of the country will depend on other measures taken to eliminate discriminatory laws and practices and to improve women's access to economic and social rights. Article 9 to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women obliges States Parties in subsection 1 to

> *"take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that: (a) women participate without any discrimination in all elections; (b) women are represented equally at all levels with men in all electoral processes; (c) women are equal partners with men at all levels of development and implementation of State policies and development programmes. 2. States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making".*

Economic and social rights

In Swaziland, as in many countries of the world, women form the majority of the poor. Several provisions in the Draft Constitution could help promote women's equal access to economic opportunities and redress the longstanding imbalance in allocation of the country's resources. **Section 33(4)** will oblige Parliament to enact laws to, inter alia, "ensure equal payment for equal work without discrimination". This is an enforceable right, as is the more broadly expressed obligation placed on the government in **Section 29(2)** to: "provide facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement". However the provision is accompanied by a limitation: that

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[198] **Section 61(4)**: *The State shall ensure gender balance and fair representation of marginalized groups in all constitutional and other bodies.*

[199] **Section 85** states:
(1) Subject to the provisions of this Constitution, the people of Swaziland have a right to be heard through and represented by their own freely chosen representatives in the government of the country.
(2) Without derogating from the generality of the foregoing subsection, the women of Swaziland and other marginalized groups have a right to equitable representation in Parliament and other elective public structures.

[200] A declaration made by SADC Heads of State or Government in 1997 in which they committed themselves to "Ensuring the equal representation of women and men in the decision making of Member States and SADC structures at all levels, and the achievement of at least thirty percent target of women in political and decision-making structures by year 2005".

this intervention will be subject to the availability of resources. In the chapter on "Directive Principles of State Policy" **Section 60(5)** requires that the "State shall afford equality of economic opportunity to all citizens and, in particular, the State shall take all necessary steps so as to ensure that full integration of women into the mainstream of economic development". Unfortunately the 'directive principles' are not included in the justiciable provisions of the Bill of Rights in Chapter IV. Amnesty International recommends that Section 60(5) and other provisions relating to economic and social rights are included in Chapter IV, to ensure that they can be effectively enforced through the courts. This approach would be consistent with the obligations of Swaziland under the African Charter on Human and Peoples' Rights.

The necessity for this is underscored by the provision relating to equality of access to land, a critical resource in a still predominantly rural society. **Section 212(1)** provides that "all land (including concessions) in Swaziland, save privately held title-deed land, shall vest in the King in trust for the Swazi Nation as it vested on the 12th of April, 1973". Subsection (2) states that "Save as may be required by the exigencies of any particular situation, a citizen of Swaziland, without regard to gender, shall have equal access to land for normal domestic purposes". This latter provision, which is intended to eliminate gender-based discrimination in access to land, is weakened by the fact that it is not part of the justiciable Bill of Rights and is further undermined by the broadly expressed limitation contained in Section 212(2). In addition the reference to the purpose of the access being for "normal domestic purposes" is both vague and restrictive in its implications.

There are several other critical factors which may contribute to making women's access to land arbitrary. They include the agency of the Chiefs through whom families obtain access to land. **Section 232** refers to the Chiefs as the "footstool of the [King as] *Ngwenyama"* and *"*the *Ngwenyama* rules through the Chiefs". A Chief is also described in Section 232(4) as "a symbol of unity and a father of the community". Subsection (7) requires that the Chief in the exercise of the functions and duties of *"*his office" enforces "a custom, tradition, practice or usage which is just and not discriminatory". Despite this positive requirement, rural women, whether single, married or widowed, will be dependent on their relationship to the Chief for access to land and even agreement on the manner in which it is utilised. The problems which can arise from this dependency are evident in the ongoing consequences of the forced evictions that were carried out against families in the Macetjeni and KaMkhweli areas in 2000.

The Land Management Board provided for under **Section 213**[201] to manage and regulate "any right or interest in land*"* is appointed by the King and answerable to the King. It may be

[201] **Section 213(1)-(6)**:
(1) There shall be established a Land Management Board (hereafter in this section referred as the "Board").
(2) The Board shall consist of a chairman and not more than four members appointed by the King on the advice of the Minister responsible for land affairs.
(3) The Members of the Board shall be appointed for a period of not more than five years and shall be eligible for re-appointment.
(4) The allowances payable to the members of the Board shall be charged on the Consolidated Fund.

difficult for rural women to have access to a remedy through this body which is not publicly accountable.

Discriminatory practices

Section 29(3) states that a "woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed." While this draft provision attempts to resolve conflicts between the rights guaranteed in the Constitution and the discriminatory implications of some customary practices, this formulation places the burden on the individual woman to assert her right to 'opt out' of any customary practices to which she may have objections. Yet this may be a difficult right for her to exercise due to the pressures she may be subject to within the family or local community or the precariousness of her economic circumstances.

The dilemma that some women may face could be increased by the lack of clarity in the Draft Constitution regarding the status accorded the different systems of law in the country. **Section 252(1)** [202] refers to the components of the common law which "shall be applied and enforced…except where and to the extent that those principles or rules are inconsistent with this Constitution or a statute". Simultaneously **Section 252(2)** states that "the principles of Swazi customary law …are hereby recognized and adopted and shall be applied and enforced as part of the law of Swaziland". Subsection (3) adds that subsection (2) will "not apply in respect of any custom that is, and to the extent that it is, inconsistent with a provision of this Constitution or a statute, or repugnant to natural justice or morality or general principles of humanity". Subsection (4) provides that the Parliament has the responsibility to "regulate the manner in which or the purpose for which custom may be recognized, applied or enforced;

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(5) The Board is responsible for the overall management, and for the regulation of any right or interest in land whether urban or rural or vesting in the King in trust for the Swazi nation.

(6) In performing its functions, the Board shall be accountable to the King through the Minister responsible for land affairs.

[202] **Section 252(1)-(4)**:

(1) Subject to the provisions of this Constitution or any other written law, the principles and rules that formed, immediately before the 6th September, 1968 (Independence Day), the principles and rules of the Roman Dutch Common Law as applicable to Swaziland since 22nd February 1905 are confirmed and shall be applied and enforced as the common law of Swaziland except where and to the extent that those principles or rules are inconsistent with this Constitution or a statute.

(2) Subject to the provisions of this Constitution, the principles of Swazi customary law (Swazi law and custom) are hereby recognised and adopted and shall be applied and enforced as part of the law of Swaziland.

(3) The provisions of subsection (2) do not apply in respect of any custom that is, and to the extent that it is, inconsistent with a provision of this Constitution or a statute, or repugnant to natural justice or morality or general principles of humanity.

(4) Parliament may –

(a) provide for the proof and pleading of the rule of custom for any purpose;

(b) regulate the manner in which or the purpose for which custom may be recognised, applied or enforced; and

(c) provide for the resolution of conflicts of customs or conflicts of personal laws.

and provide for the resolution of conflicts of customs or conflicts of personal law". The High Court and Supreme Court will be involved in ruling on applications or appeals arising from some of these conflicts through individual cases.

Parliamentary legislative processes and legal proceedings are often complex, difficult and drawn out and it will be some time before they can have a direct impact on the lives of most women. To strengthen the protection intended by the inclusion of **Section 29(3)**[203] Amnesty International recommends that the provision should be redrafted to place the onus on the State to protect women and girls from being subjected to those cultural practices which may be discriminatory in their application and/or violate other civil, political, economic and social rights. In this respect the CDC may find helpful the language of Article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Under this Article, States Parties are obliged to

> *"prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including: a) creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes; ... d) protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance".*

The right to health

Amnesty International recommends that the CDC considers the provisions of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa on this issue. Article 14 obliges States Parties to "ensure that the right to health of women, including sexual and reproductive health is respected and promoted". The UN Committee on Economic, Social and Cultural Rights, in its General Comment 14, interprets Article 12 of the Covenant on the right to the "highest attainable standard of physical and mental health" as obliging States Parties to implement measures to:

> *"Improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care, emergency obstetric services and access to information, as well as to resources necessary to act on that information".*[204]

[203] **Section 29(3)** states: *A woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed.*

[204] *General Comment 14: The Right to the Highest Attainable Standard of Health (Art.12)* (22nd Session, 2000), cited in BRINGING RIGHTS TO BEAR An Analysis of the Work of the UN Treaty Bodies on Reproductive and Sexual Rights, Center for Reproductive Rights and University of Toronto International Programme on Reproductive and Sexual Health Law, 2002, p. 152.

3. INDEPENDENCE OF THE JUDICIARY AND THE PROTECTION OF HUMAN RIGHTS UNDER THE CONSTITUTION

The role that the new Constitution will play in protecting human rights in Swaziland will depend critically on the existence of a robust, independent and impartial judiciary and full and unhindered access to effective judicial remedies. In this regard the Draft Constitution contains important statements of principle but also some important weaknesses.

Section 63(1) – (6)[205] of the Directive Principles asserts that the independence of the judiciary shall be guaranteed and enshrined in the constitution; that it is the duty of government bodies to respect the independence of the judiciary; that the judiciary should decide matters impartially without improper influences, threats, pressures or interference from any quarters affecting the judicial process; that the integrity of the process of appointing individuals of "integrity and ability, with appropriate training or qualifications in law" should be safeguarded and adequate terms and conditions of appointment be secured by law.

These principles are given concrete form in Chapter IX. **Section 139** provides that, "Justice shall be administered in the name of the Crown by the Judiciary which shall be independent and subject only to this Constitution". **Section 140(5)** states that "Subject to the provisions of this Constitution, the Chief Justice is the head of the Judiciary and is responsible for the administration and supervision of the Judiciary". The separation of powers is referred to in **Section 141(1)** whereby the "judicial power of Swaziland vests in the Judiciary. Accordingly, an organ or agencies of the Crown shall not have or be conferred with final judicial power". In sum, **Section 142(1)** provides that "in the exercise of the judicial power of Swaziland, the Judiciary, in both its judicial and administrative functions, including financial administration, shall be independent and subject only to this Constitution, and shall not be subject to the control or direction of any person or authority." Neither the Crown nor Parliament nor anyone acting on their authority "shall interfere with Judges or judicial officers, or other persons exercising judicial power, in the exercise of their judicial functions" **(Section 142(2))**.

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[205] **Section 63** states:
(1) The independence of the judiciary shall be guaranteed by the State and enshrined in the constitution. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
(2) The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
(3) The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue is within its competence as defined by law.
(4) There shall be no interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review in accordance with the law.
(5) Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments or promotion for improper motives.
(6) The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

We welcome these provisions which are directed toward the realization of the independence of the judiciary. However, there are others, relating to the appointment and dismissal procedures, which could undermine their effects. For example, **Section 154(1)** provides that "the Chief Justice and other Justices of the superior courts shall be appointed by the King on the advice of the Judicial Service Commission". **Section 160** provides for the establishment of the Judicial Service Commission which shall consist of the Chief Justice, two legal practitioners of not less than seven years practice and in good professional standing, the Chairman of the Civil Service Commission and two persons appointed by the King. In addition to the last two members, the two legal practitioners and the Chairman of the Civil Service Commission are appointed by the King. The Chief Justice is also appointed by the King, on the advice of the Judicial Services Commission. The Head of State is thus directly responsible for the appointment of all six members of the Judicial Service Commission who in turn are answerable to the King in several respects. The provisions relating to tenure and dismissal are also of concern for their lack of safeguards and independent procedures. Under **Section 156(1)** a judge holds office "during good behaviour" and "shall not be removed from office except for stated misbehaviour or inability to perform the functions of office arising from infirmity of body or mind" (**Sections 156(1), 159(2)**). The Judicial Service Commission is responsible for receiving and processing complaints concerning the judiciary (**Section 161(1) (e)**). It shall investigate on referral from the King and "recommend to the King whether the Chief Justice or a Justice ought to be removed from office" (**Section 159(3), 159(4)**).

Read together, these provisions therefore appear to grant wide powers to the Head of State and his appointees, without any checks or balances. These powers may be exercised to undermine the decision-making and institutional independence of the judiciary.

The independence of the judiciary is a vital element in the protection of human rights, including the right to fair trial. Legal provisions governing the selection, appointment, tenure and dismissal of judges in a country are among the significant factors which determine their independence. In this respect the UN Basic Principles on the Independence of the Judiciary are helpful and should be reflected in this Draft Constitution. For example, Principle 10 states that "any method of judicial selection shall safeguard against judicial appointments for improper motives". Principles 17 and 20 require that any proceedings to remove judges will require special safeguards including a fair hearing and an independent review of any decision to remove them; and, under Principle 18, judges may only be removed for reasons of incapacity or "behaviour that renders then unfit to discharge their duties".

Amnesty International recommends that the Constitution Drafting Committee incorporates the language and requirements of Principles 10, 17, 18 and 20 into the Draft Constitution to ensure that there is an independent and impartial Judiciary capable of upholding human rights without fear or favour. The provisions of the new Constitution should be capable of ensuring that there is no repetition of the past year's disastrous impasse over the status of court jurisdiction in certain matters and court rulings, and the pattern of interference with and pressures on members of the judiciary.

4. THE POWERS AND IMMUNITIES OF THE HEAD OF STATE AND OTHER STATE AGENTS

The King, as Head of State, has sweeping powers under the Draft Constitution. They include the power to appoint key authorities within the executive and other branches of government, such as the Prime Minister, the heads of the Defence Force, Police and Correctional Services (as the "commander-in-chief" of these agencies), the Attorney-General, the Chief Justice and other Justices of the superior courts, the members of the Judicial Service Commission, the Director of Public Prosecutions, the head of the Commission on Human Rights and Public Administration and the members of the Land Management Board.

The King's authority as Head of State also encompasses the power to declare a state of emergency, to appoint a proportion of the members of the House of Assembly and the Senate, to assent to and sign bills passed by Parliament or to withhold assent, to summon and dissolve Parliament "at any time", and to issue pardons, reprieves and commutations including of death sentences. The King also establishes the Tinkhundlas, which under the Draft Constitution are described as groupings of chiefdoms which act as nomination areas for the elected members of the House of Assembly (primary elections) and as constituencies for the secondary elections from those elected at the primary stage. As traditional head of the Swazi nation (the *Ngwenyama*), the King appoints the Chiefs who are described as the "footstools" of the *Ngwenyama* who "rules through the Chiefs". The bulk of the country's land and minerals "vests" in the King "in trust for the Swazi nation".

The Draft Constitution elaborates extensive powers of the Head of State, with potential for abuse, although the exercise of these powers appears to be subject to the overriding authority of the Constitution. **Sections 2(1)** and **2(2)**[206] are clear that the Constitution is "the supreme law" and that the "King and all the citizens of Swaziland have the right and duty at all times to uphold and defend this Constitution". **Section 5(4)** states that the "King has such rights, prerogatives and obligations as are conferred on him by this Constitution or any other law, including Swazi law and custom, and shall exercise those rights, prerogatives and obligations in terms of this Constitution". **Section 15(2)**[207] states that in regard to the rights and freedoms entrenched in Chapter IV they "shall be respected and upheld by the Executive, the Legislature and the Judiciary…and shall be enforceable by the courts as provided in this Constitution". We understand the "Executive" must include the King in so far as **Section 65(1)**

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[206] **Section 2(1) and (2)** state:
(1) This Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.
(2) The King and all the citizens of Swaziland have the right and duty at all times to uphold and defend this Constitution.

[207] **Section 15(2)** states: *The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, the Legislature and the Judiciary and other organs or agencies of Government and, where applicable to them, by all natural and legal persons in Swaziland, and shall be enforceable by the courts as provided in this Constitution.*

provides that the "executive authority…vests in the King as Head of State and shall be exercised in accordance with the provisions of this Constitution". Subsection (2) states that the "King shall protect and defend this Constitution and all laws made under or continued in force by this Constitution".

Nevertheless, while these provisions appear to be clear in their implications, their potential for curbing any possible abuse in the exercise of the powers of the Head of State may be undermined by the lack of clarity in the Draft Constitution regarding the status accorded the different systems of law in operation or which will be in operation in Swaziland, as already noted above concerning **Section 252.**[208] In Chapter IV also the extensive limitation clauses give the Executive ample scope to restrict the rights and freedoms provided for in the Constitution and even to completely override a requirement under the Constitution, as for example **Section 27(6)** already noted above.[209] So, while the Draft Constitution states on the one hand that it is the supreme law of the land, on the other hand there are other provisions which appear to be inconsistent with the principle of the supremacy of the Constitution.

A further obstacle to full protection for human rights under the Constitution arises from the provisions allowing wide-ranging immunities to the Head of State, the *Ngwenyama* and certain traditional authorities acting on his authority. The King, under **Section 12(1)**,[210] is granted immunity from "suit or legal process in any civil cause in respect of all things done or omitted by him in his private capacity; and being summoned to appear as a witness in any civil or criminal proceeding". A similar immunity is extended under subsection (2) to the Regent (the *Ndlovukazi*, the Queen Mother), who performs the functions of the King during his absence or unavailability, and the "Authorised Person" who does the same in the absence of the Regent. Under **Section 166(3) (c)** the Commission on Human Rights and Public Administration is prohibited from investigating "any matter relating to the exercise of any royal prerogative by the Crown". Under **Section 229(1) t**he *Ngwenyama* also "enjoys the same legal protection and immunity from legal suit or process as the King".

While the Draft Constitution grants the King as Head of State immunity for all acts done or omitted in his "private capacity", Amnesty International believes that the scope and operation of this immunity should not extend to include abuses of human rights. If the Head of State is suspected of having abused the human rights of any person while acting in his private capacity, he should still be held accountable. Immunity provisions cannot be used to diminish responsibility for abuses of human rights or to undermine the ability of victims to seek redress.

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[208] See above, p.86 and footnote 202 for comments on Section 252.
[209] See footnote 188
[210] **Section 12(1)** states: *The King shall be immune from –*
(a) suit or legal process in any civil cause in respect of all things done or omitted to be done by him in his private capacity; and
(b) being summoned to appear as a witness in any civil or criminal proceeding.

APPENDIX B

TEXT OF AI LETTER TO FORMER PRIME MINISTER SIBUSISO DLAMINI AND TO THE COMMISSIONER OF POLICE

Ref.: TG: AFR/55/2003.15

His Excellency the Prime Minister
Dr Barnabas S. Dlamini
Prime Minister's Office
PO Box 395
Mbabane
Swaziland
Per Fax: + 268 404 3943

12 September 2003

Dear Prime Minister,

I am writing to request information about the steps which your government, in particular your office which is responsible for the police, may have taken to investigate allegations of the misuse of force by police and members of the Operational Support Services Unit (OSSU) against demonstrators and bystanders in Mbabane on 13 August 2003. We are greatly concerned by reports that police and members of OSSU used excessive force against trade unionists and others who had assembled early on 13 August to participate in a lawful protest march in terms of the Industrial Relations Act.

Our inquiries so far have led us to conclude that the actions taken by the security forces to break up the demonstration violated the rights to peaceful assembly and expression of political opinion. In addition we have concluded that the security forces dispersed the demonstrators with excessive force, causing injuries to demonstrators as well as to bystanders. The incidents of stone-throwing and property damage inflicted by the demonstrators do appear to have occurred after the security forces broke up the demonstration and in reaction to their tactics. In contrast on the same day a similar and large demonstration took place in Manzini without incident and with good co-operation between police and demonstrators.

During the meeting last July between the Commissioner of Police, Mr Edgar Hillary, and Amnesty International's representatives, the Commissioner referred to the training which the Royal Swaziland Police have received in public order policing. The training, which he noted has been supported by the United Kingdom, included instruction in techniques based on a commitment to use minimum force and appropriate equipment to ensure that public gatherings can be controlled or dispersed without any unnecessary injuries to those involved

or members of the public. In Mbabane earlier this year some large demonstrations took place that were effectively and peacefully policed.

However any improvement in relations between police and civil society as a result will have been undermined by the events of 13 August in Mbabane. In an urgent application brought that day in the Industrial Court, the trade union federations and affiliated unions alleged that at about 9.30 am the police and OSSU "attacked our members and began beating them with batons and firing teargas. The assault by the police was particularly violent and aggressive. Innocent pedestrians and bystanders were also assaulted. People ran helter skelter into the roads and into nearby shops. The police pursued the fleeing workers, beating them furiously. Many people were injured and suffered bruises, lacerations and wounds….The assault by the police was unprovoked and unnecessary and constituted an unlawful breach of the Applicants' right to engage in peaceful protest action."

Our inquiries so far have indicated that the police used disproportionate force in dispersing the demonstrators and in some cases inflicted gratuitous violence on bystanders or appeared to be targeting individuals for systematic beatings amounting to the infliction of torture.

- Eyewitnesses have informed Amnesty International that they saw the police and other members of the security forces beating people with batons and gun-butts. One witness stated that as he came out of a shop in Mbabane at about 11.30 am he saw police "flogging" people with baton sticks and questioning people about why they were there. The witness said that these were "ordinary people going about their business" and were not marchers. An example was a woman with a baby on her back who was hit with a baton on the right side of her neck and on her buttocks by a police officer. She stood "confused" and in a state of shock after being hit. The witness also saw police beating other people at the bus rank and in the shopping plaza. The shop owner pulled the witness inside for his safety and closed the shop. The same witness later took an injured, middle-aged woman to a doctor for an examination after she had been hit by a police officer with a baton near her spine.
- A teacher who joined the demonstrators early on 13 August told Amnesty International that after the police commander ordered the workers to disperse from the Old Bus Rank, the police fired tear gas canisters and rubber bullets into the crowd of protestors who began to flee. He saw police "beating people at the old bus rank including hawkers who had no involvement with the protests at all. They seemed to beat anyone wearing a red t-shirt and this included passing shoppers outside MultiSave on Gwamile Street, to where [he] had fled". On the evening of 13 August he saw 14 protesters at the hospital being treated for their injuries. One of them, a hospital worker who had been "severely beaten", was kept in the hospital overnight.
- Reverend Hanson Ngwenya, who was monitoring the march for the Justice and Peace Committee, was injured on the foot when a teargas canister which

the police threw down near him exploded. His clothing was also damaged. The incident happened near the Ministry of Agriculture building.

- A witness told Amnesty International that he saw the security forces beat a trade unionist, Roland Rudd, on the head with gun butts and with batons which caused considerable bleeding, before the trade unionist was taken away into police custody.
- A passenger in a ministry of agriculture vehicle, Ben Zwane, the Principle Assistant Secretary, was injured by glass when a rubber bullet shattered the passenger window. He lodged a complaint against the police later on 13 August at the Mbabane police station. In a statement he described what happened when police were pursuing demonstrators and fired rubber bullets, one of which hit the passenger side of his vehicle. The glass shattered and splinters struck him in the head, face and neck. In a state of shock and while attempting to remove fragments of glass from his body Ben Zwane then suffered further injuries to his eyes when the police fired volleys of teargas at the fleeing demonstrators. He required medical treatment.
- A branch official of the Teachers' Union told Amnesty International that on the afternoon of 13 August when he was near the High Court building he had to flee into the Ministry of Agriculture building to escape tear gas and a police baton charge. He described how a policeman who entered the building after him "proceeded to beat [him] all over the body including to the head [with] a baton" in the presence of other people. He managed to run out of the building and "as [he] ran towards the gate other police beat [him] and [he] heard one policeman say "here is the culprit". Once out of the compound opposite the fire station [he] fell down onto the road and other police continued to beat [him] all over the body. Whilst lying on the ground [he] was hit by a rubber bullet below the knee." He was given first aid at the fire station and colleagues took him to a clinic in Lobamba and then Raleigh Fitkin hospital. He required stitches to his wounds on his head and other treatment and remained disabled and in pain for several weeks as a consequence of his injuries. He lodged a complaint with the police five days later, but has heard nothing further from any investigation.

The Industrial Court ruled late on the afternoon of 14 August that the Government and Commissioner of Police were to be "interdicted and restrained from interfering with the peaceful protest embarked upon by the Applicants in terms of the Notice to the Labour Advisory Board dated the 27th June 2003…and from preventing or obstructing the Applicants and their members from holding meetings at suitable venues". The Court also ordered the applicants and their members to "conduct the protest action…in a peaceful and orderly manner" and noted that they would "forfeit such right to peaceful protest if they have in their possession any weapons of the nature described in the Affidavits of the Respondents". Notwithstanding this court order, a number of trade union leaders and members were detained by police for some three to four hours on the evening of 14 August at the Matsapha

weighbridge to prevent them from delivering a petition to the delegates at the International Smart Partnership Dialogue in Ezulweni.

We are aware that the protest marches on 13 and 14 August were taking place in the context of the International Smart Partnership Dialogue and recognize that the government and the security forces were concerned to ensure the safety of the delegates, including visiting heads of state. Nevertheless it is difficult to understand, first of all, why the police officers in command of the units deployed that morning in Mbabane were so adamant that the protestors assembled at the Old Bus Rank should move to a more remote assembly point (Coronation Park), possibly contrary to an understanding reached between the police and the organizers earlier in the week, and why the security forces pursued the fleeing demonstrators so relentlessly at different stages during the day, beating them and passers-by indiscriminately. The difficulty in understanding why the security forces in the Mbabane area acted as they did is reinforced by the peaceful outcome of the demonstration in Manzini following the different approach taken by police there.

The affidavits submitted on 14 August by senior police and OSSU officers in the Industrial Court case appear to argue broadly on four grounds for the necessity of dispersing the protestors assembled at the Old Bus Rank:

1. Receipt of intelligence information just prior to the march on 13 August that allegedly linked (unnamed) people associated with the march to a plan to use "sophisticated weapons", as noted in the affidavit of the Commissioner of Police. The weapons are referred to as "petrol bombs" in the affidavit of Superintendent Nicholas Dlamini who also stated that the "information was confirmed after the arrest of Rolant Ruddy [sic] whose car was found with the petrol bombs". As a consequence of this information, according to the affidavit of the Commissioner of Police, he "had to order the police to step up their policing", that "extra care should be exercised and security measures [taken] for our guests and the public in general including not allowing activities in congested areas such as bus ranks and busy road intersections as well as SMART Partnership areas and the airport". However the Commissioner of Police in his affidavit also states that at the meeting between police and union representatives on 11 August the police told the latter that they were "free to engage in peaceful protest in any parts of the country except key areas due to security consideration namely Matsapha airport and the Smart Partnership Conference venues at Ezulweni".
2. In a number of the affidavits the police described the protestors as being armed with "all sorts of dangerous weapons" (undefined), or with sticks, or knob sticks or spears, or sjamboks, or were throwing stones at the police.
3. The alleged violence by protestors on 12 August, during a march to present a petition to the Minister of Public Service and Information, was said to have prompted the decision to order the marchers on 13 August to move to Coronation Park, according to the affidavit of the officer in command, Senior

Superintendent Sabelo Hlope. The incidents alleged included protesters damaging an entrance gate to the Ministry, insulting the police verbally, and being "uncontrolled" on return to the city (they were said to have blocked traffic and jumped on cars).

4. When the police ordered the workers to move from the Old Bus Rank to Coronation Park they refused, so the police had to disperse them.

With regard to the above justifications we would be keen to receive clarification on several points. The first explanation for the police decision to disperse the assembled protestors on 13 August involved a possible threat of serious violence which understandably the police would be anxious to pre-empt. In the papers before the Industrial Court both parties acknowledged that there were consultations and that agreement was reached between the police and union officials on 11 August regarding plans and routes for demonstrations in the following days. After receiving the information about the alleged bomb threats did the Commissioner of Police or any other senior police officer attempt to raise this with union officials and seek their co-operation in ensuring that necessary measures could be taken to protect the public, while allowing the march to proceed as agreed? As the Commissioner of Police noted in his affidavit, during the meeting on 11 August the police had only excluded the airport vicinity and Ezulweni for peaceful protest activities. For the police to suddenly insist on a change of assembly point without a serious attempt to explain why to the organizers is likely to be regarded as an act of bad faith. It would seem also to be a provocative and counter-productive approach to public order policing.

The affidavit of Inspector Sam Mahlobo of OSSU indicates that at some time between 5 a.m., when his unit left their base at Ngonini, and 9.30 a.m. on 13 August he received a briefing from the regional commander, Senior Superintendent Sabelo Hlope. He states that the commander told him "not to allow any demonstrations around town [Mbabane] save for Coronation Park". Inspector Mahlobo does not add what reasons were given for this order. The police thus appear to have taken an inflexible approach. We have been informed that from about 8 am police carrying batons were ordering the demonstrators to move from the Old Bus Rank and allegedly threatened to "bash" anyone who disobeyed.

Amnesty International has raised with your government separately our concern about the ill-treatment of Roland Rudd following his arrest by police on 13 August in connection with the investigation into petrol bombs or bomb-making equipment allegedly found in a vehicle on that day. It is a matter of public record that when Roland Rudd was brought to court from Matsapha Maximum Security prison he had visible injuries and was unable to walk properly. His lawyer informed the magistrate's court that Roland Rudd had sustained injuries as a result of beatings inflicted on him by police and had been denied access to necessary medical care. We welcome the fact that he and three other men arrested in connection with the same case have now been released from custody on bail pending trial on charges under the Arms and Ammunitions Act. We urge you to ensure that there is a full and impartial investigation into the alleged assault of Roland

Rudd and that any police officers found responsible for ill-treating or torturing him are brought to justice.

On the second explanation for diverting or dispersing the march, namely the weapons allegedly carried by the protestors, Senior Superintendent Sabelo Hlope stated in his affidavit that the "workers refused [to disperse] and became violent as they were carrying dangerous weapons which included spears." The statement suggests that at the time the police dispersed the workers they carried but had not used weapons. We have been informed by eyewitnesses that some of the demonstrators were carrying sticks or knob sticks. However bearing in mind that the police and OSSU on their own evidence were variously equipped with shields, batons/long batons, rubber bullets, stun grenades, CS shells, "tearsmoke", R4 rifles, "riot guns" and shot guns, it should not have been beyond police capacity to maintain control over the march while allowing it to continue. The information provided by the police in their affidavits, as well as eyewitness accounts also indicate that most of the stone-throwing and damage to commercial property happened after the police and OSSU broke up the demonstration. In our view the force used by the police to disperse the march and subsequently against individual demonstrators and bystanders was not proportionate to the threat posed.

With regard to alleged incidents on 12 August as justification for taking a hard line on the following day, we would be grateful to learn whether or not the police brought to the attention of the union leadership on that day any incidents involving demonstrators who were suspected of being responsible for any unlawful actions. We have been informed that the police were asked to do this as part of the process of co-operation between the police and the organizers of the demonstration, yet the police apparently did not raise any incidents with the organizers prior to 13 August.

Despite the explanations put forward by the police for their actions Amnesty International remains concerned that the police did not have a lawful basis for forcibly dispersing the demonstrators in Mbabane on 13 August. The heavy-handed policing resulted in injuries to participants in the march and to bystanders and precipitated counter violence from the demonstrators leading to property damage and in some cases injuries to police officers, according to the police affidavits. Criminal cases have been opened against a number of demonstrators in connection with these incidents. It is critically important also for the authorities to ensure that the complaints lodged against the police are fully, impartially and promptly investigated and that a thorough review is instituted into the police methods used in handling the Mbabane demonstration on 13 August. There should be no reprisals against complainants or witnesses. In view of the serious nature of the complaints and in the interests of restoring public confidence in the police, particularly at this time of constitutional reform, we urge you to ensure that this inquiry is conducted in a manner which accords with the police obligation to be publicly accountable.

In terms of international and regional human rights standards, Swaziland is obliged to investigate all allegations of excessive or illegal use of force and of ill-treatment amounting to torture by public officials. Those found responsible should be

brought to justice and the victims compensated. In addition, Swaziland, as a current member of the United Nations Commission on Human Rights, should provide an example to other countries by prompt attention to these obligations.

Yours sincerely

For Irene Khan Secretary General Amnesty International

cc. Commissioner of Police, Mr Edgar Hillary