

Mandates of the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Working Group on Arbitrary Detention; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Ref.: AL SWZ 2/2022
(Please use this reference in your reply)

26 July 2022

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the rights to freedom of peaceful assembly and of association; Working Group on Arbitrary Detention; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Human Rights Council resolutions 41/12, 42/22, 43/4, 41/18 and 49/10.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **arbitrary detention and criminalization of Mduduzi Bacede Mabuza, Mthandeni Dube, and Colani Maseko in the context of "Pro-democracy Protests" in the country**, in June 2021 and January 2022.

Colani Maseko is a student at the campus of Southern Africa Nazarene University (SANU) and the President of the Swaziland National Union of Students. Mr. Maseko has a leading role in the country's pro-democracy protests, is openly critical of the King Mswati III and has publicly advocated on several occasions for the release of the Member of Parliaments mentioned in the following paragraph.

Mduduzi Bacede Mabuza and Mthandeni Dube are Members of Parliament (MPs). These two Members of Parliament are known for being part of the "opposition" within the Parliament (so-called "radical" group). Given the lack of formal opposition parties in the Parliament and no means of affiliation thereto, the designation of being a "radical" group within the Parliament could be understood as functionally operating as an opposition party. Since the King's Decree on 12 April 1973, all political parties are banned in the country and parliamentarians are subject to merit-based constituency (administrative division) election. Mr. Bacede and Mr. Mthandeni have spoken out against the Cyber Crimes and the Cannabis Bill in the past, and are also known for their leadership during the pro-democracy protests.

In addition, we would like to take this opportunity to bring to the attention of your Excellency's Government information we continued receiving on **severe restrictions of fundamental freedoms** in the context of the repression of mass protests; excessive use of force by police officers; misuse of national security and counter-terrorism legislation ; arrests and criminal prosecution of protesters and human rights

defenders; attacks on leaders, activists and journalists; internet access restrictions; and discriminatory prohibition of assemblies related to the rights of lesbian, gay, bisexual, trans and gender diverse, and intersex (LGBTI) persons, as well as limitations of registering organizations advocating against violence and discrimination based on sexual orientation and gender identity.

Similar allegations have been subject to a previous communication with reference SWZ 1/2021, sent to your Excellency's Government on 3 August 2021. We regret to note that to date, your Excellency's Government has not provided a reply to the aforementioned letter.

According to the information received:

The case of Colani Maseko

On 31 January 2022, at approximately 7:30am, Colani Maseko was on his way to the SANU campus and was allegedly arrested by 10 police officers dressed in civil clothing. Mr. Maseko was charged with "sedition and malicious damage to property" for destroying photographs of King Mswati III.

On 4 February 2022, Mr. Maseko was granted bail of 15,000 Emalangeni (approximate 1,000 USD) and his passport was seized at Manzini Police Station.

In response to the arrest of and allegations against Mr. Maseko, the SANU stated in a public memorandum that Mr. Maseko had not been identified as the student responsible for the damage at school, specifically for destroying and removing the aforementioned photograph.

On 17 May 2022, Mr. Maseko took part in a protest at SANU, which was dissolved by armed forces who entered the university. Mr. Maseko was allegedly arrested by the military forces. He was detained and subsequently transferred to the hospital as he sustained injuries during his arrest. The University was closed following these protests, and reportedly, remains closed to this date.

The case of Mduduzi Bacede Mabuza and Mthandeni Dube

On 25 July 2021, the MPs Mduduzi Bacede Mabuza and Mthandeni Dube were arrested for their involvement in the pro-democracy protests. Both remain in pre-trial detention after being denied bail, and they are facing several criminal charges, among others of terrorism, sedition and trumped-up murder charges, under sections 5(1) of the 2008 Suppression of Terrorism Act and 4(b) of the Sedition and Subversive Activities Act of 1938, and regulation 4 of the Disaster management regulations under the Disaster Management Act 01/2006. The MPs have pleaded innocent to all the charges before the Mbabane High Court.

On 12 July 2022, after almost one year in pre-trial detention, the Mbabane High Court rejected the parliamentarians' application for acquittal in terms of Section 175 of the Criminal Procedure and Evidence Act, on the basis that there

is enough evidence to sustain a case. If convicted, the MPs would face a sentence of 20 years of imprisonment.

Internet and social media blackouts

On 29 June and 15 October 2021, the South African cellular network MTN together with other cellphone operators such as eSwatini Mobile and eSwatini Telecommunications Corporation allegedly stated that they received a directive from the Eswatini Communications Commission to suspend access to social media and online platforms until further notice; a directive that has been implemented as such by the respective telecommunications enterprises.

The aforementioned actions seem to be part of a systematic pattern of internet shutdowns since the pro-democracy protests erupted in June 2021. According to reports, such internet shutdowns aim to prevent peaceful protests and to curtail the flow of information on violations and attacks against protesters affecting, among others, freedom of opinion and expression.

General context of the counter-terrorism and national security legislation and the restrictions of peaceful assemblies

Both the Suppression of Terrorism Act of 2008 and the Sedition and Subversive Activities Act of 1939 have been a matter of concern to various stakeholders and UN bodies. In 2017, the Human Rights Committee expressed concern that counter-terrorism and national security legislation has been used to counter political opposition and social protests rather than to address legitimate threats of terrorism. In its observations, the Committee noted, *inter alia*, that the definition of “terrorist act” in the Suppression of Terrorism Act is overly broad and that neither this law nor the Sedition and Subversive Activities Act provide access to effective legal remedies and procedural guarantees (arts. 9, 14, 19 and 21) and recommended the Government to align its legislation with the ICCPR and ensure effective remedies and procedural safeguards against the misuse of anti-terrorism laws (CCPR/C/SWZ/CO/1). Furthermore, several stakeholders have raised concern that the referred pieces of legislation have been used to restrict peaceful assemblies by, among others, criminalizing its participants and organizers and designating political parties as terrorist groups (A/HRC/WG.6/39/SWZ/3, para. 20). Thus, this has created an unsafe environment for activists, human rights defenders, political leaders, students and journalists, among others, to express their dissent against the monarchy.

With regard to excessive use of force in the context of pro-democracy protests, the authorities allegedly beat peaceful protestors and used live ammunition, rubber bullets and tear-gas to disperse them. The Eswatini Commission on Human Rights and Public Administration/Integrity (NHRI) carried out an investigation on the June 2021 protests and 46 deaths, 245 injured persons and 235 arrests and detentions.

However, other sources reported more than 80 deaths resulting from excessive use of force against protesters since May 2021 as well as over 200

hospitalizations and over 1,000 arrests, including but not limited to the arrests and harassment of journalists covering the protests.

We have also received reports that restrictions of peaceful assemblies are particularly severe when it comes to claims related to sexual orientation and gender identity. Often, the country's security context would be allegedly evoked to prohibit such assemblies.

While we do not wish to prejudge the accuracy of these allegations, we express our deep concern about the claims of arrest and detentions of Mduduzi Bacede Mabuza, Mthandeni Dube, and Colani Maseko in the context of peaceful assemblies, specifically during pro-democracy protests. In particular, we are concerned about the physical integrity and continued prosecution of the above-mentioned individuals. We are also concerned that, in view of the allegations above, it appears that counter-terrorism and national security legislation has been misused to criminalize social, political, and cultural affiliations, and silence, among others, civil society organizations, political dissidents, and journalists. In this regard, we remind Your Excellency's Government that any restriction on freedom of expression that a government seeks to justify on grounds of national security and counter-terrorism must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest (CCPR/C/GC/34). Counter-terrorism and national security legislation with penal sanctions should not be instrumentalized against individuals peacefully exercising their rights to freedom of expression and freedom of peaceful assembly and association in a manner contrary to international law.

We further express our concerns about the allegations of excessive use of force which caused a significant death toll in the country. Moreover, we are seriously worried about the alleged lack of guarantees and protection of peaceful demonstrators and affiliates including but not limited to human rights defenders, activists, journalists, pro-democracy leaders and LGBTI activists. If the allegations are proven to be true, the aforementioned lack of protection would extend to judicial protection, i.e. the use of laws such as counter-terrorists laws to criminalize and suppress civic space in Eswatini.

Finally, we also express serious concern about the imposition of internet and social media shutdowns. These internet outages prevent peaceful demonstrators from sharing information during both, online and offline demonstrations, which would impede the full enjoyment of the right to peaceful assembly and of association, as well as the right to freedom of expression and opinion.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.

2. Please provide information regarding the basis for the arrests and detentions, in addition to charges of sedition brought against Colani Maseko, and charges of sedition and terrorism brought against Mduduzi Bacede Mabuza and Mthandeni Dube. Please explain how the Government's actions meet a clear national security interest and how it complies with the principles of necessity and proportionality and how it is the least restrictive means of protecting that interest.
3. Please provide the details, and where available, the results of any investigation and judicial or other inquiry undertaken in relation to allegations of human rights violations that may have been committed by police officers or other law enforcement officials against protestors, in particular the number of deaths and injuries caused by security forces. In addition, please provide information on the regulations and operational procedures for law enforcement agents concerning the use of force, including but not limited to the use of less-lethal weapons, during assemblies and how they are compatible with international human rights standards.
4. Please provide information on measures taken to ensure that all associations, especially student unions, political associations and LGBTI+ organizations, as well as journalists, are free to carry out their functions in a safe and conducive environment, without fear or threat of reprisals or intimidations for their work.
5. Please provide more detailed information on what basis, and under which conditions internet and social media shutdowns are being carried out during the protests. In particular, please explain how the alleged restrictions to internet access abide by the principles of legality, necessity, proportionality and non-discrimination when it comes to restrictions of peaceful assemblies.

We would appreciate receiving a response within 60 days. Past this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

We would like to inform your Excellency's Government that having transmitted an allegation letter to the Government, the Working Group on Arbitrary Detention may also transmit the case through its regular procedure in order to render an opinion on whether the deprivation of liberty was arbitrary or not. The present communication in no way prejudices any opinion the Working Group may render. The Government is required to respond separately to the allegation letter and the regular procedure.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Excellency, the assurances of our highest consideration.

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Special Rapporteur on the rights to freedom of peaceful assembly and of association

Mumba Malila
Vice-Chair of the Working Group on Arbitrary Detention

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Victor Madrigal-Borloz
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Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to refer your Excellency's Government to the International Covenant on Civil and Political Rights (ICCPR), acceded by Eswatini on 26 March 2004. In particular, we would like to refer to articles 6, 7, 9, 19 and 21, which guarantees the right to life, protection from torture and other forms of ill-treatment, the right to liberty and security of person, the rights to freedom of expression and opinion, and freedom of peaceful assembly, respectively.

Article 19 of the ICCPR guarantees the right to freedom of expression, which includes "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice". We would like to remind your Excellency's Government that any limitation to the right to freedom of expression must meet the criteria established by international human rights standards, such as article 19 (3) of the ICCPR. Under these standards, limitations must be determined by law and must conform to the strict test of necessity and proportionality, must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.

We recall that legitimate expression of opinions or thoughts must not be criminalized. In the resolution A/HRC/7/36 the Human Rights Council has stressed the need to ensure that national security is not used to unjustifiably or arbitrarily restrict the right to freedom of opinion and expression. Measures aimed to regulate the existence and work of civil societies and human rights defenders must comply with the requirements of proportionality, necessity, and non-discrimination. We further recall your Excellency's Government that in general counter-terrorism legislation should be in line with human rights obligations, protection of due process and international prohibition of arbitrary detention. In addition, judicial remedies should be available to all civil society actors affected by the counter-terrorism sanctions regime (A/HRC/40/52).

Article 21 of the ICCPR guarantees the right to freedom of peaceful assembly, and also dictates that any restrictions imposed on this fundamental freedom must abide the principles of legality and necessity. A necessity might be determined "(...) in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others".

As indicated by the Human Rights Committee, restrictions on peaceful assemblies must not be used, explicitly or implicitly, to stifle expression of political opposition to a government, challenges to authority, including calls for democratic changes of government, the constitution or the political system, or the pursuit of self-determination (CCPR/C/GC/37, para. 49). They should not be used to prohibit insults to the honor and reputation of officials or State organs (Ibid.) Moreover, the Human Rights Committee states that arrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the ICCPR is arbitrary (CCPR/C/GC/35, paras. 17 and 53).

With regard to the overly broad definition of terrorism and the lack of effective remedies for those designated as such, we also would like to remind Your Excellency's Government that the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has stressed that States must ensure that counter-terrorism legislation is limited to criminalizing properly and narrowly defined conduct, in a sufficiently limited manner so as not to crack down on civil society actors, based on the provisions of the international counter-terrorism instruments and strictly guided by the principles of legality, necessity, proportionality and non-discrimination (CCPR/C/GC/34 and A/HRC/40/52).

With regard to the internet shutdowns happening during the protests, the Special Rapporteur on the rights to freedom of peaceful assembly and of association has expressed the incompatibility of internet shutdowns with article 21 of the ICCPR. First, to meet the requirement of legality, restrictions on assemblies must have a formal basis in law, as must the mandate and powers of the restricting authority. Laws must be publicly accessible, clearly and narrowly drafted, and sufficiently precise to limit the discretion of the authorities while allowing an individual to act accordingly. National laws must also be in line with relevant international norms and standards (A/HRC/47/24/Add.2, para. 17).

We would also like to refer your Excellency's Government to article 9 of the UDHR, prohibiting arbitrary detentions, and article 9 of the ICCPR, enshrining the right to liberty and security of person. The latter establishes, in particular, that no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law. As indicated by the Human Rights Committee, as well as the jurisprudence of the Working Group on Arbitrary Detention, detention due to the peaceful exercise of rights such as the right to freedom of expression and the right to peaceful assembly, may be arbitrary. (CCPR/C/GC/34 para. 23).

With regards to security of person in article 9(1) of the ICCPR, this right concerns freedom from injury to the body and the mind, or bodily and mental integrity regardless of whether the victim is detained or non-detained (CCPR/C/GC/35, paras. 3 and 9). As interpreted by the Human Rights Committee, "the right to personal security also obliges States parties to take appropriate measures (...) to protect individuals from foreseeable threats to life or bodily integrity proceeding from any governmental or private actors. State parties must take both measures to prevent future injury and retrospective measures, such as enforcement of criminal laws, in response to past injury". Furthermore, we would like to recall that "States have a duty to prevent and redress unjustifiable use of force in law enforcement" (CCPR/C/GC/35, para. 9).

In relation to the excessive use of force by law enforcement officials, we also would like to draw the attention of your Excellency's Government to the Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. In particular, principle 12 of the Basic Principles provides that "(...) everyone is allowed to participate in lawful and peaceful assemblies, in accordance with the principles embodied in the Universal Declaration of Human Rights and in the ICCPR, Governments and law enforcement agencies and officials shall recognize that force and firearms may be used only in

accordance with principles 13 and 14”. These provisions restrict the use of firearms to situations of violent assemblies and provide that force and firearms may only be used as a last resort when unavoidable and require exercising the utmost restraint. In addition, pursuant to principle 5(c), law enforcement officials should ensure the provision of timely medical assistance to anyone injured as a result of the use of force of firearms.

We further refer to the compilation of practical recommendations for the proper management of assemblies that states that the use of force by law enforcement officials should be exceptional, and assemblies should ordinarily be managed with no resort to force (A/HRC/31/66, para. 57). Any use of force must comply with the principles of necessity and proportionality (Ibid.). These principles apply to the use of all force, including potentially lethal force (Ibid, para. 59). Firearms may be used only against an imminent threat either to protect life or to prevent life-threatening injuries (making the use of force proportionate) (Ibid.). In addition, there must be no other feasible option, such as capture or the use of non-lethal force to address the threat to life (making the force necessary) (Ibid.). Furthermore, firearms should never be used simply to disperse an assembly; indiscriminate firing into a crowd is always unlawful (Ibid., para. 60).

Moreover, we would like to draw your Excellency’s Government attention to the Principles on Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, in particular principle 9, recall the duty to conduct thorough, prompt and impartial investigations of all suspected cases of extra-legal, arbitrary and summary executions. As also confirmed by the Human Rights Committee in its General Comment No.31, a failure to investigate and bring perpetrators of such violations to justice could in and on itself give rise to a separate breach of the ICCPR (CCPR/C/21/Rev.1/Add. 13, para. 15).

On the same note, the Special Rapporteur on the rights to freedom of peaceful assembly and of association stated in a report in 2021 that providing accountability for violations of the rights to freedom of peaceful assembly and of association is essential to guarantee full exercise of those rights (A/HRC/47/24, para. 27). It was further indicated that “[a]ll complaints of human rights violations in the context of peaceful assemblies must be promptly, independently and thoroughly investigated. Additionally, a crucial element is to ensure accountability, bring perpetrators to justice, combat impunity and avoid repetition. It is also key that authorities publicly recognize when violations occur” (A/HRC/47/24, para. 46). Moreover, all perpetrators must be brought to justice and victims must be offered reparation even when they did not ask for remedies (A/HRC/47/24, para. 74, (f)).

We further wish to refer your Excellency's Government to the fundamental norms set out in the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the UN Declaration on Human Rights Defenders. In particular, we would like to refer to articles 1 and 2 which state that everyone has the right to promote and to strive for the protection and realisation of human rights and fundamental freedoms at the national and international levels and that each State has the primary responsibility and duty to protect, promote and fulfil all human rights and fundamental freedoms. Similarly, article 12 provides that the State must ensure the protection of everyone against any threat, retaliation, or pressure

resulting from the exercise of the rights authorized by the Declaration, as well as the right to effective protection of the laws when reacting to or opposing, by peaceful means, activities that cause violations of human rights and fundamental freedoms.

We respectfully remind your Excellency's Government of the relevant provisions of the United Nations Security Council resolutions 1373 (2001), 1456(2003), 1566 (2004), 1624 (2005), 2178 (2014), 2242 (2015), 2341 (2017), 2354 (2017), 2368 (2017), 2370 (2017), 2395 (2017) and 2396 (2017); as well as Human Rights Council resolution 35/34 and General Assembly resolutions 49/60, 51/210, 72/123, 72/180 and 73/174. All these resolutions require that States must ensure that any measures taken to combat terrorism and violent extremism, including incitement of and support for terrorist acts, comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law contained therein.

We recall the model definition of terrorism advanced by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, which provides clear guidance to States on appropriate conduct to be proscribed and best practices (A/59/565, para. 164 (d)). Those elements include i) acts, including against civilians, committed with the intention of causing death or serious bodily injury, or the taking of hostages; ii) irrespective of whether motivated by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, also committed for the purpose of provoking a state of terror in the general public or in a group of persons or particular persons, intimidating a population, or compelling a Government or an international organisation to do or to abstain from doing any act, and such acts constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism (E/CN.4/2006/98, para. 37).

We would also like to refer to Human Rights Council resolution 22/6, which urges States to ensure that measures to combat terrorism and preserve national security are in compliance with their obligations under international law and do not hinder the work and safety of individuals, groups and organs of society engaged in promoting and defending human rights. (OP 10). We would further like to refer to Human Rights Council resolution 34/5, which notes that, in some instances, national security and counter-terrorism legislation and other measures, such as laws regulating civil society organisations, have been misused to target human rights defenders or have hindered their work and endangered their safety in a manner contrary to international law. We would also like to bring to remind your Excellency's Government that the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism urged States to ensure that their counter-terrorism legislation is sufficiently precise to comply with the principle of legality, so as to prevent the possibility that it may be used to target civil society on political or other unjustified grounds (A/70/371, para 46(b)).

We recall that, under article 15(1) of the ICCPR, the principle of legal certainty, requires criminal laws to be sufficiently precise so that it is clear what type of behaviours and conduct constitute a criminal offense and what would be the legal consequences of committing such an offence. We remind your Excellency's that while a number of provisions of the ICCPR enable limitations on the basis of national security

(e.g., article 21), any such limitations must be legally based, necessary, proportionate, and non-discriminatory.

Finally, regarding the misuse of counter-terrorism and national security legislation, we would like to bring the attention of the Government to paragraphs 75(a) to (i) of the 2018 report of the Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism's (A/HRC/40/52) on the impact of terrorism measures on civic spaces and human rights defenders. Counter-terrorism legislation should not be misused against individuals peacefully exercising their rights to freedom of expression, peaceful association, and assembly. These rights are protected under the ICCPR and the Universal Declaration. The non-violent exercise of these rights cannot be a criminal offense.