IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 1703/2014

In the matter between:

MARIO THEMBEKA MASUKU 1ST APPLICANT

MAXWELL MANQOBA DLAMINI 2ND APPLICANT

and

THE PRIME MINISTER OF SWAZILAND 1st RESPONDENT

THE MINISTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS **2**nd RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS **3**rd RESPONDENT

THE ATTORNEY-GENERAL 4th RESPONDENT

AND THE CONSOLIDATED RELATED MATTERS 1703/14, 96/2014 782/14.

SUPPLEMENTARY AFFIDAVIT

I, the undersigned,

JEREMY JULIAN SARKIN

hereby make oath and say:

[1] I am an adult South African male, employed by the University of South Africa as a Professor of Law. I have an undergraduate degree and an Bachelor of Laws degree from the University of Natal, a Masters in Law degree from Harvard Law School and a Doctorate in Law in international and comparative law from the University of the Western Cape, in Cape Town, South Africa. I am admitted to practice as an attorney in South Africa and as an attorney in the State of New York in the United States of America. I have worked in many countries and have taught at numerous universities globally.

[2] I have written extensively on issues that are serving before this Court, including 14 books. I was appointed by the United Nations Human Rights Council to serve from 2008 to 2014 as a United Nations Special Rapporteur. I served during the period of 2009 to 2012 as Chair-Rapporteur of the United Nations Working Group on Enforced or Involuntary Disappearances.

[3] I submit this affidavit because of my expertise, my educational background, the research and writing that I have conducted, my work experience in many countries and my knowledge of the subject matter before this Court.

[4] I confirm my qualifications and work experience as contained in my curriculum vitae attached.

[5] The facts herein contained are save where the context indicates to the contrary within my personal knowledge and belief.

[6] The purpose of this affidavit is to respond to the inaccuracies contained in the Swaziland government's supplementary affidavit filed by the Director of Public Prosecution, Nkosinathi Macmillan Maseko.

[7] The affidavit sets out the true facts regarding terrorism and human rights in the global context. It deals with why relying on the advice given by the USA is problematic. The affidavit corrects the situation, as painted by the Director of Public Prosecutions, regarding the affect of 9/11 on counter-terrorism, and addresses how there has been a reversal in the trend of enacting harsh laws globally over the last ten years as the effects of draconian laws and practice became clear. The affidavit indicates that, contrary to the views of the Director of Public Prosecutions, the Swaziland terrorism law is out of step with the laws dealing with terrorism around the world. It indicates how the law is even out of step with federal law

dealing with terrorism in the USA. The affidavit indicates how the Swaziland terrorism law is deficient. It addresses the fact that the law is vague, uncertain and overbroad. The affidavit addresses why the definitions in the law are problematic, and how such provisions are viewed internationally. The affidavit examines the tensions between national security and human rights and the absolute necessity to protect human rights while counter-terrorism. The affidavit addresses the need for the correct balance between the competing interests, and why respecting human rights is a legal necessity, as well as why it is necessary for the country. The affidavit addresses the international law obligations that Swaziland has in this respect, and why the impugned sections violate international law as well as domestic law. It addresses the misconceptions by the Director of Public Prosecutions on what the effect will be of striking down the various impugned provisions, and why their removal will not encourage terrorist activities or ensure that Swaziland will be used as a base for terrorism.

[8] While the Director of Public Prosecutions notes in his affidavit that the events in the USA on September 11 2001 saw an urgent need for countries to adopt counter-terrorism measures, and that terrorism is a relatively recent phenomenon, in fact terrorism and counter-terrorism measures have been in existence around the world for many years. For example after the bombing of the French National Assembly in 1893 various measures were adopted that severely restricted free speech. Colonial powers adopted laws to deal with what they deemed terrorist

activities in their colonies. In 1937, the League of Nations believing the topic to be relevant and necessary, held a conference to try and adopt an international convention for the prevention and punishment of terrorism. One of the first acts of the wave of terrorism that has occurred around the world, over the last fifty years was on July 22, 1968, when the Popular Front for the Liberation of Palestine (PFLP) hijacked an airplane from Rome to Tel Aviv. Since 1972 as a result of the massacre at Lod Airport in Israel and at the Munich Olympic Games, the United Nations has been dealing with terrorism issues far more regularly. However anti-terrorism treaties began even before that time, and include the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft. Countries around the world have had anti-terrorism laws for decades. For example, in Egypt in 1981 after the assassination of President Anwar Sadat, an emergency law created special courts and allowed sweeping powers of search and arrest. Thus, terrorism is not new and neither are the regimes to counter it.

[9] It is true that in the post 2001 era there has been a flurry of activity to address issues relating to terrorism as a result of the occurrences in the USA on 9/11. While initially there was a sacrificing of democratic and human rights principles, more recently, there has been a reversal in that trend around the world, towards greater scrutiny of the extent to which counter-terrorism measures strike a better balance between the needs of national security and human rights protections. This will be further canvassed later.

[10] While there was an initial rush after 9/11 to adopt draconian laws to counter terrorism, these laws have permitted grave human rights violations to be perpetrated. Extrajudicial renditions, unlawful and indefinite detention and torture, committed in the name of security, have come to light. The enabling environment has allowed some of the worst excesses to be permitted and it has thus been realized that greater accountability and scrutiny of executive action in the name of countering terrorism, is needed. Without accountability and legality the executive was able to carry out activities that had no real connection to dealing with terrorism. Many people were rounded up, particularly by the USA, who had no connection to terrorism. Hundreds of people spent years in confinement, most of whom have been released without charge. This indicates the extent to which an anti-terrorism regime can be used in an improper way when the law gives wide executive discretion, and where there are few checks and balances. Where there are limited safeguards in the system, excesses in the name of counter-terrorism are likely.

[11] It is problematic that Swaziland has relied on the United States of America for guidance on its counter-terrorism laws, as noted by the Director of Public Prosecution in his affidavit. The USA's resort to a war theory to deal with terrorism, as it did during the presidency of George Bush, has not been accepted globally.

[12] The United States government's post-9/11 counterterrorism laws and practices have been extensively criticized and censured for their grave and frequent violations of human rights, internationally as well as domestically. While the early prevalent mood in countries around the world after the events in the USA in 2001, was far-reaching in the counter-terror measures that were adopted, these severe sentiments have diminished markedly in many countries globally since then.

[13] Under President Barack Obama's administration, the position of the USA on terrorism issues has changed both in its discourse and its practice. There are however still problematic practices, but these are not as severe as was the case in the years shortly after the events of 2001. While there are countries that have replicated the practice of the USA in the period after 9/11, there has not been a continuation of such practices, recently, to the same degree. Today a number of countries have reversed course to provide greater human rights protections in their quest to deal with terrorism. This they have done understanding that it is a necessity for legal and other reasons.

[14] The STA that Swaziland has adopted is reflective of the draconian and overreaching laws and practice of the USA with respect to terrorism that occurred shortly after 2001.

[15] Countries cannot replicate the laws and practices of another state. Even though the Director of Public Prosecution states that the advice by the

USA was taken, and made applicable to the circumstances in Swaziland. The fact is that the conditions and circumstances in the two countries are very different. The USA has suffered terrorism very differently to what Swaziland has. The context is different. The way the legal system and the protections available in the systems are very dissimilar. The UN Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has warned against the replication and use of the law of one country in another. On a visit to South Africa, he warned that: "if sections of the South African Counter-Terrorism Act are inserted into a national framework with less developed legal safeguards, it may indeed threaten human rights."[1] This is extremely relevant for the Swaziland circumstances.

[16] However, the STA goes even further than the laws of the USA, with respect to various sections of the Act.

[17] The United States defines terrorism in its Federal Criminal Code and lists the crimes associated with terrorism. In Section 2331 of Chapter 113(B), terrorism is stated to be: "activities that involve violent... or life-threatening acts... that are a violation of the criminal laws of the United States or of any State and... appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by

[1] UN Press Release, UN Special Rapporteur on Human Rights and Counter Terrorism Issues Preliminary Findings on Visit to South Africa, 26 April 2007.

mass destruction, assassination, or kidnapping; and...(C) occur primarily within the territorial jurisdiction of the United States..."[2] Thus, the United States terrorism law is much narrower and lists what is associated with terrorism rather than leaving the definition wide open and vulnerable to uncertainity, as is the case with the STA. The USA law only allows issues which can be legitimately linked to terrorism to fall under the rubric of their law. Thus, the STA has certain provisions that are out of step with the federal terrorism law in the USA.

[18] The STA is also out of step with international practice. It is out of step with counter-terrorism laws in many countries, including the Southern African region and the Commonwealth.

[19] The general public, as well as the courts in Europe, the United States and other regions, are increasingly pressing governments to respect human rights in combating terrorism. Today the laws adopted in post 2001 era, are being read in a much narrower way than what was originally envisaged. To ensure greater human rights protections, greater oversight is being sought in many places. For that reason, for example, the OSCE has appointed an Anti-Terrorism Co-ordinator whose main goal is to ensure that anti-terrorism measures taken by participating states are fully compliant with OSCE commitments and international human rights law. When Mauritius legislated new laws on the Prevention of Terrorism, the president and some time later his deputy refused to give assent to it and

[2] Understanding and Responding to Terrorism Huseyin Durmaz 208.

resigned. Kenya withdrew counter-terrorism laws after public protests in 2012.

[20] The STA, in the part impugned by the applicants, defines terrorism and terrorist group using very broad, vague and open-ended language. The conduct it can cover may have nothing to do with terrorism, and may do nothing to stop terrorism, terrorist attacks or those bent on such activities. It also can cover activities that may not be connected to terrorism. While there may be acts that are criminal, those should not necessarily be contained in the law as it then attempts to extend the law to issues that are not connected to terrorism. The law is vague, in the part impugned by the applicants, in that it fails to give reasonable notice of what is covered by it. The law allows for arbitrary and discriminatory enforcement. It gives the executive wide and unchecked powers.

[21] The United Nations Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has noted that precision in the definition is a critical requirement that includes a requirement that "the law is adequately accessible so that the individual has a proper indication of how the law limits his or her conduct; and the law is formulated with sufficient precision so that the individual can regulate his or her conduct."[3]

[3] UN Doc. E/CN.4/2006/98, para. 46

[22] The Human Rights Committee, as well as other tribunals and institutions, has held that over-broad and imprecise definitions of 'terrorist acts' in domestic laws renders that law contrary to the provisions of the ICCPR. This is a treaty that Swaziland is obliged to comply with, as is discussed below.

[23] A terrorism law must be directed at terrorist activities in the narrow sense, and not just crime in general. Terrorism needs to be defined in the law in line with the generally accepted definitions of what it is, rather than to leave it loose and allow other activities to fall within the confines of the law. A law that permits many activities to be captured within it is seen to be in violation of international law and specifically the various treaties that Swaziland has ratified.

[24] A law dealing with terrorism must not be so overbroad as to restrict legitmate democratic activities. To do so violates both international and domestic laws. While there is no universally accepted definition of terrorism it is generally seen to be acts of violence that target civilians for political or ideological aims.

[25] Schmid and Longman in a study reviewing over 100 definitions offer a list of common elements. They discovered that there were 22 common elements to these definitions, the most shared being 'violence', 'force',

'political', and 'fear, terror emphasized' and 'threat.'[4] Weinberg and others too found that in the 73 definitions they examined most frequently used elements were "violence, force, political and threat.[5]

[26] The central tenant of a counter-terrorism law should be aimed at preventing and dealing with violence and threats of violence. The fact that some the aspects of the definition of a 'terrorist act', in the STA are not limited to dealing with the threat of, or actual use of, violence renders the law problematic. Parts of the definition of terrorism in the STA is so wide as to allow it to be used in many circumstances that should not fall within the ambit of the law.

[27] While there are many definitions of what comprises terrorism, in 1994, the General Assembly's Declaration on Measures to Eliminate International Terrorism, contained in resolution 49/60, stated that terrorism includes "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes" and that such acts "are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them."

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[4] Schmid, A. P. and A. Jongman (1988). *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature*. London, Transaction Publishers.
[5] Weinberg, L., et al. (2004). "The Challenges of Conceptualizing Terrorism." *Terrorism and Political Violence* 16(4): 777-794.

[28] The UN Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has noted that: "That an act is criminal does not, by itself, make it a terrorist act … Crimes not having the quality of terrorism regardless of how serious, should not be the subject of counter-terrorist legislation. Nor should conduct that does not bear the quality of terrorism be the subject of counter-terrorism measures, even if undertaken by a person also suspected of terrorist crimes."[6]

[29] In 2004 the Security Council, in resolution 1566 (2004), referred to "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a Government or an international organization to do or to abstain from doing any act".

[30] Also in 2004 the Secretary-General's High-level Panel on Threats, Challenges and Change described terrorism as any act "intended to cause death or serious bodily harm to civilians or non- combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act" and identified a number of key elements, with further reference to the definitions contained in the 1999

[6] UN Doc.E/CN.4/2006/98, paras. 39 and 47.

International Convention for the Suppression of the Financing of Terrorism and Security Council resolution 1566 (2004).

[31] In 2006 the UN Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism noted that the definition of terrorism at the domestic level should be defined: "by the presence of three cumulative conditions: (i) the means used, which can be described as deadly, or otherwise serious violence against members of the general population or segments of it, or the taking of hostages; (ii) the intent, which is to cause fear among the population or the destruction of public order or to compel the Government or an international organization to do or refrain from doing something; and (iii) the aim, which is to further an underlying political or ideological goal. It is only when these three conditions are fulfilled that an act should be criminalized as terrorist; otherwise it loses its distinctive force in relation to ordinary crime."[7]

[32] The UN Special Rapporteur on Human Rights and Counterterrorism has argued that conduct must be defined which is "genuinely of a terrorist nature." He argued that terrorism includes only acts or attempted acts "intended to cause death or serious bodily injury" or "lethal or serious physical violence" against one or more members of the population, or that constitute "the intentional taking of hostages" for the purpose of "provoking a state of terror in the general public or a segment of it" or

[7] UN Doc. A/61/267, 16 August 2006, para. 44.

"compelling a Government or international organization to do or abstain from doing something."[8]

[33] The UN Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, in a 2006 report to the UN General Assembly argued that how 'terrorist act', and 'terrorist group' are defined are critical to determining whether the limitations on various rights in the law are permissible or not.[9]

[34] Legislation cannot be so wide so as to restrict ordinary activities that are usual in democracies. Such activities include legitimate democratic opposition affairs. A law that deals with terrorism must not be used to curb the democratic rights of political opponents, those belonging to civil society organsiations including trade unions, and very importantly human rights defenders.

[35] The UN Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism also has noted that crimes not specifically described in the relevant international treaties may be criminalised in the domestic context only where it "is strictly necessary and provided that the definition or proscription complies with the requirements of legality."[10]

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[8] "Report of the special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ten areas of best practices in countering Terrorism," UN Doc. A/HRC/16/51, December 22, 2010.
[9] UN Doc. A/61/267, 16 August 2006, paras.17-19, 23.
[10] UN Doc. A/61/267, para. 44.

[36] States that adopt counter-terrorism laws need to do so by striking the right balance between national security and human rights. While some argue that there are no worthy policy reasons that warrant a separate, parallel regime of counter-terrorism law,[11] it is clear that counter-terrorism regimes have become commonplace in many countries.

[37] The debate about whether a separate counter-terrorism regime is necessary, highlights the fact that the need for a separate set of laws to deal with terrorism should be for very specific purposes and means. The laws drafted for such purposes should be clearly and specifically focused to address terrorism rather than to be catchall pieces of legislation that can be used for many purposes that are not specifically defined in the law. This gives wide discretion to the executive that can be abused. Rather legislation should be couched in careful narrow ways to ensure that constitutional rights and international laws are not violated.

[38] Terrorism laws must be crafted in a way that balances the competing rights of state and citizen. In this regard, in 2008, then Prime Minister of Australia, Kevin Rudd, stated that: "Our national security interests must also be pursued in an accountable way which meets the government's responsibility to protect Australia, its people and its interests while preserving our civil liberties and the rule of law. This balance represents a continuing challenge for all modern democracies seeking to prepare for

[11] Palmer, Matthew. 2002. Counter-Terrorism Law. New Zealand Law Journal 456.

the complex national security challenges of the future. It is a balance that must remain a conscious part of the national security policy process. We must not silently allow any incremental erosion of our fundamental freedoms."[12]

[39] To obtain the correct balance between national security and democratic principles and human rights, a realistic assessment needs to be made about the extent to which terrorism is a real threat to the state, and the extent and nature of that threat.

[40] Governments like to overestimate the threat and claim that the threat is larger than it is, or to claim that the law should be widened to allow others to fall within in its ambit. However, States may not claim that the measures that limit the ordinary rights of people are being adopted to protect national security, when they are in fact much wider than what is necessary for the circumstances, and when the effect is to suppress political opponents or for other purposes outside of what is deemed terrorism. For this reason, the Special Representative of the Secretary-General on Human Rights Defenders has made clear that "any organization has the right to defend human rights; that it is the vocation of human rights defenders to examine Government action critically; and that criticism of Government action, and the freedom to express these criticisms, is an essential component of a democracy and must be

[12] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2008, 12551–2

legitimized in law and practice. States may not adopt laws or practices that would make activities for the defence of human rights unlawful."[13]

[41] Where states enact draconian, or extemely wide laws, it can have consequences of driving opposition groups underground. That is one of the dangers of trying to use terrorism laws for such purposes.

[42] In 2005 then United Nations Secretary General Kofi Annan noted that: …compromising human rights … facilitates achievement of the terrorist's objective - by ceding …. the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is most likely to find recruits. Upholding human rights is not merely compatible with successful counter-terrorism strategy. It is an essential element."[14]

[43] The danger therefore of severe restrictions on a society sometimes pushes those who believe that democratic oppositional means is impossible, to use violence rather than democratic options. An overreaction by a state to perceived threats can also alienate people and damage the legitimacy of the state.

[44] The STA at present is out of step with internationally applied standards because some of the measures in the law to counter terrorism are not

[13] A/59/401, paras. 49, 51.
[14] United Nations Secretary General Kofi Annan, Address to the closing plenary of the International Summit on Democracy, Terrorism and Security, delivered in Madrid, Spain, 10 March 2005.

proportionate, and not in line with the Constitution, international law and democratic principles.

[45] Swaziland is obliged to follow international law on these issues in that it has ratified various international treaties that give guidance on these issues. These treaties are the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child. Some rights have attained international customary law status including many of the rights contained in the ICCPR. Thus, compliance with these is obligatory.

[46] Amnesty International has argued that the STA "should be repealed or immediately amended, because it is an inherently flawed piece of legislation which is inconsistent with Swaziland's obligations under international and regional human rights law as well as of the Swaziland Constitution."[15]

[47] Terrorism has to be fought within the rule of law and human rights and humanitarian law framework.

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[15] Amnesty International Suppression of Terrorism Act Undermines Human Rights in Swaziland 2009.

[48] Since 2003, Security Council resolutions have informed states that counterterrorism measures must comply with international human rights law.

[49] In Resolution 1456 (2003) the Council stated that "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law."

[50] In September 2006 the UN General Assembly (UNGA) approved the Global Counter-Terrorism Strategy. This document, in which Swaziland participated and which was unanimously accepted recognized that "measures to ensure the respect for human rights for all and the rule of law [are] the fundamental basis for the fight against terrorism."[16]

[51] Also in 2006, in the report of the UNSG entitled "Uniting Against Terrorism: Recommendations for a Global Counter-Terrorism Strategy" (A/60/825), it was noted that human rights are essential to fulfiling all aspects of a counter-terrorism strategy and that effective counter-terrorism measures and the protection of human rights were not conflicting goals, but rather complementary and mutually reinforcing objectives.

[16] UN General Assembly resolution A/60/288, Annex, Plan of Action, part IV.

[52] The Director of Public Prosecution is correct when he states that terrorism legislation is necessary in a country. Ensuring national security, and ensuring the safety of people living in a particular country is a critical requirement of a state. While specific terrorism legislation may be needed, those needs need to be specifically evaluated and the laws adopted must not be beyond what is needed. The law must also conform to the Constitutional requirements as well as international law. The law must also not go beyond what is reasonable and necessary in a democratic society.

[53] With respect to the STA, it is the content and extent of the legislation that is problematic. The law, in the part impugned, violates the Constitution and international human rights law that Swaziland is bound to uphold. It goes beyond what is reasonable and necessary. It violates a slew of international law provisions as well as the Swaziland Constitution.

[54] The applicants do not seek the whole law to be determined to be unconstitutional, but rather those sections that do not pass constitutional muster and violate domestic and international law. In any case, the normal criminal code and the common law are available to tackle the bulk of the problems that Swaziland may face with respect to terrorism.

[55] The law must not limit the enjoyment of rights without proper justification. Whatever limitations placed in the law must be proportional

to the possible dangers. The limitations contained in the law need to be "reasonably justifiable in a democratic society". It is necessary to demonstrate that a law that contains limitations in the name of countering terrorism does not impair the democratic functioning of that society. This means in practice that the state must meet the test of necessity and the requirement of proportionality. So any limitation on the free enjoyment of rights and freedoms must be necessary in the quest of a pressing objective. At the same time its impact on those rights and freedoms must be strictly proportional to the nature of the objectives. In this regard the impugned sections cannot pass constitutional muster.

[56] Balancing the needs of national security with human rights is a critical aspect of a state's responsibilities. Effective national counter-terrorism strategies are ones that prevent acts of terrorism and prosecute those responsible for such acts, while at the same time promote and protect human rights and the rule of law.

[57] The International Commission of Jurists has noted that states must "adhere strictly to the rule of law, including the core principles of criminal and inter-national law and the specific standards and obligations of international human rights law, refugee law and, where applicable, humanitarian law. These principles, standards and obligations define the boundaries of permissible and legitimate state action against terrorism. The odious nature of terrorist acts cannot serve as a basis or pretext for

states to disregard their international obligations, in particular in the protection of fundamental human rights."[17]

[58] Counter-terrorism measures must be in conformity with international and domestic standards and must not be overbroad or too extensive to meet the challenges in that society.

[59] In the United Nations Secret Detention Study written by myself and three other Special Rapporteurs in 2010[18] we noted that the "qualification by States of certain acts as "terrorist acts" often aims at applying a special regime with limited legal and procedural safeguards in place."

[60] The Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has stated that "[i]t is essential to ensure that the term "terrorism" is confined in its use to conduct that is of a genuinely terrorist nature."[19]

[61] The Working Group on Arbitrary Detention has noted that using an extremely vague and broad definition of terrorism increases the risk of arbitrary detention and disproportionately reduces the level of guarantees enjoyed by ordinary persons in normal circumstances. The

[17] Assessing Damage, Urging Action, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights (Geneva: International Commission of Jurists, 2009).
[18] The Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment, the Working Group on Enforced or Involuntary Disappearances, and the Working Group on Arbitrary Detention "Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism."
[19] Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, E/CN.4/2006/98, para. 27.

Working Group has argued that legitimate democratic opposition, as distinct from violent opposition, becomes a victim in the application of such laws."[20]

[62] The Director of Public Prosecution in his affidavit states that interfering with the wording of the legislation will raise the real prospect that Swaziland will be seen to be a soft target and may see Swaziland becoming a base for those wanting to conduct terrorism. Whether Swaziland will be seen to be a soft target or become a safe haven for terrorism will not be affected by the striking down of the impugned sections. The removal of the sections impugned by the applicants will not have this affect as the other sections of the STA more than adequately provide the necessary protections to safeguard against such possibilities. Striking down the impugned sections will also not affect the ability of law enforcement agencies to deal with cases of terrorism as other provisions of the STA and other laws cover that. The rest of the STA is perfectly capable of dealing with all eventualities, as is the usual criminal law and criminal procedure of Swaziland.

[63] Making the STA compatible with Swaziland's Constitution and with international law will not have the effect of making the country a soft target or have other negative effect on the fight against terrorism. Striking down these sections will not affect the way that Swaziland will be viewed

[20] Working Group on Arbitrary Detention, E/CN.4/1995/31, page 8.

by those who may wish to carry out terrorism, or those who may wish to be based in Swaziland to conduct terrorist activities.

[64] Entrenching democratic principles, and allowing the opposition to operate freely within the bounds of democratic principles is a way of ensuring that there is less likelihood that people will resort to terrorism.

[65] Promoting and protecting human rights gives people less of a cause to look to non-democratic means as means to oppose a system. In any case, dealing with, and preventing, terrorism are matters for intelligence and investigation.

[66] The Director of Public Prosecution states in his affidavit that terrorism is a premeditated act. Because it is usually planned, law enforcement can take steps to investigate and curb such matters. It is not dependent on being so intrusive as to violate the rights of many in the quest to arrest the conduct of the few. While there are organisations that may plan terrorist operations those are few and far between. Even though they operate in secret, as do all criminals, it does mean that the state should be given absolute, wide powers that it can use against even law-abiding citizens.

[67] Terrorist organisations that are found in multiple countries need to communicate, and for that reason can be probed by state law enforcement agencies. The legal framework to investigate conduct that may be harmful

to the state exists. The law does not need to have such a wide scope as to allow those who should not fall within the definition of terrorists, to fall foul of its provisions.

[68] Terrorism laws should be aimed at disabling terrorist groups but not legitimate democratic organisations that may be simply in opposition to the state. Terrorism laws violate international law where they are used to pursue others who cannot usually be defined as terrorists. Terrorist organisations do not usually operate in the open and preventing lawful organisations from operating in the open violates international law. Hindering organisations from functioning by labelling them as terrorist organisations is widely viewed as problematic and illegitimate.

[69] The need for international cooperation to curb terrorism is not dependent, and will not occur by simply having a law that expands the definitions of terrorism beyond what is reasonable. Such international cooperation depends on agreements with other states and with international organisations.

[70] As the Director of Public Prosecution notes terrorist organisations can be infiltrated. This is therefore a matter of crime intelligence. However, such practices should not be used as a means to target oppositional organisations that are not engaged in terrorism.

[71] The Director of Public Prosecution also states that terrorism organisations are set up to avoid and evade law enforcement. However, because the way the law is drafted and the way various issues are defined, there are domestic organisations that can, and may fall foul of the STA, not because they have terrorist motives, but rather because they fall foul of the wide scope of the law. The law is so broad as to encompass what are usually lawful activities in democratic societies. While there may be organisations that have component parts in different countries, the organisations against which such provisions may be used are domestic in nature. The scope of the law should not have the result of preventing individuals and groups that should be allowed to operate lawfully in a democratic state, from doing so. The law must not be cast so wide as to capture those who in most democracies have a democratic right to organise and function lawfully. The legislation should be drafted so as to hinder and frustrate the work of terrorists and terrorist groups, not those who may simply be political opponents and who should be allowed to operate within the bounds of usual democratic oppositional frameworks.

[72] Terrorism laws can deal with the inadequacies of the ordinary criminal law, but that law must be narrowly drafted to ensure that only terrorism, narrowly defined, falls within the ambit of that law. The danger is that without careful definitions and safeguards against abuse, terrorism laws can be used for purposes unrelated to terrorism matters.

[73] While the Director of Public Prosecution states that the law aims to deal with the specific vulnerabilities of terrorist groups, the legislation goes too far in its provisions in supposedly trying to achieve this goal.

[74] The law is so widely drafted, to allow people who would elsewhere, not fall within the definition of terrorists or belong to terrorist groups. The problem therefore is the scope of the legislation and the extent to which others that should not be caught up within its provisions.

[75] Public safety must always be a concern of a state however the state in fighting terrorism must remain within the bounds of the Swaziland Constitution and international law that binds the country. It is critical that the correct balance must be found between national security and human rights.

[76] The STA, in the impugned parts, is vague, uncertain, overbroad, and strikes the wrong balance between national security and the human rights. It transgresses the Constitution of Swaziland and international law that Swaziland is bound to uphold.

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DEPONENT

I certify that the DEPONENT has acknowledged that he/she knows and understands the contents of this affidavit, that he/she does not have any objection to taking the oath, and that he/she considers it to be binding on his/her conscience, and which was sworn to and signed before me at

on this the day of 2015, and that the administering oath complied with the regulations contained in Government Gazette No. R 1258 of 21 July 1972, as amended.

Commissioner of Oaths