

**ICJ BRIEFING NOTE:
REGIONAL AND GLOBAL OBLIGATIONS AND COMMITMENTS OF
THE KINGDOM OF SWAZILAND REINFORCING THE NEED FOR URGENT ENACTMENT OF
THE SEXUAL OFFENCES AND DOMESTIC VIOLENCE BILL 2015**

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I. Introduction

1. The International Commission of Jurists (ICJ) is a global organization composed of some 60 eminent judges and lawyers from all regions of the world. It was established in 1952 and is active on five continents, including in Africa where it has regional offices in Harare and Johannesburg. The ICJ is an independent not-for-profit entity working to advance understanding and respect for the rule of law as well as the protection of human rights throughout the world.
2. During the course of a recent workshop held in Ezulwini on 28 February 2018, and discussions with high-level officials in the margins of the workshop, various stakeholders expressed to the ICJ that the incidence of sexual and gender-based violence (SGBV) in Swaziland is at crisis point. The UN Human Rights Committee has expressed concern at reports of widespread violence against women and children in Swaziland, in particular reports of pervasive sexual violence.¹ The UN Committee on the Elimination of Discrimination against Women has expressed similar concern, noting that Swaziland's National Surveillance System on Violence, Abuse and Exploitation reported a high prevalence of violence against women and girls, as well as a high rate of abduction of young girls, often perpetrated by persons known to the victims.²
3. Global estimates show that violence against women remains a devastating phenomenon of epidemic proportions. Across all regions of the world, there is a widespread understanding that SGBV has a "profound social and political impact" and acts as "a critical obstacle to achieving substantive equality between women and men as well as to women's enjoyment of human rights and fundamental freedoms".³
4. Cognizant of the consideration by the Senate of Swaziland of the Sexual Offences and Domestic Violence Bill 2015, the ICJ respectfully submits this briefing note to the Senate. Reinforcing the urgent need for enactment of the Bill, this briefing note focuses on the following key points:
 - a) Combatting SGBV as an integral feature of His Majesty's Vision 2022 and of the 2030 Agenda for Sustainable Development;
 - b) Swaziland's international law obligations, including those arising from the Africa region, to criminalize SGBV; and
 - c) Swaziland's international commitments to promptly enact the Sexual Offences and Domestic Violence Bill.

¹ Human Rights Committee, *Concluding Observations: Swaziland*, UN Doc CCPR/C/SWZ/CO/1 (2017), para. 26.

² Committee on the Elimination of Discrimination against Women, *Concluding Observations on the combined initial and second periodic reports of Swaziland*, UN Doc CEDAW/C/SWZ/CO/1-2 (2014), para. 20.

³ Committee on the Elimination of Discrimination against Women, *General Recommendation No 35 on gender-based violence against women, updating general recommendation No 19*, UN Doc CEDAW/C/GC/35 (2017), paras. 4 and 10.

II. Combatting SGBV as an integral feature of His Majesty's Vision 2022 and of the 2030 Agenda for Sustainable Development

5. The ICJ recalls the 'Vision 2022' for first world status of His Majesty King Mswati III.⁴ Informed by the Swaziland Development Index, the Government of Swaziland has identified a shared definition of first world status as "one where all citizens are able to sustainably pursue their life goals, and enjoy lives of value and dignity in a safe and secure environment".
6. To implement His Majesty's Vision 2022, the Deputy Prime Minister's Office has indicated that it aims to reduce the percentage of women that experience violence from 79 percent to 30 percent by 2022; and the percentage of children that experience violence from 59 percent to 20 percent.⁵ The curbing of domestic violence is identified as a priority target of the Deputy Prime Minister's Office.⁶
7. Swaziland's shared definition of first world status makes a direct link to the *sustainable* enjoyment of dignity, safety and security by the people of Swaziland. This approach invokes the commitment of the international community as a whole, including Swaziland, to the 2030 Agenda for Sustainable Development.⁷ Notably, in this regard, Sustainable Development Goals 5 and 16 aim to:

"Eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation";⁸

"Significantly reduce all forms of violence... everywhere";⁹ and

"End abuse, exploitation, trafficking and all forms of violence against... children".¹⁰

8. His Majesty's Vision 2022, the aims and targets of the Deputy Prime Minister's Office, and Swaziland's consensus in the adoption of the 2030 Agenda for Sustainable Development all reinforce the need for compliance with Swaziland's obligations under regional and universal human rights law to criminalize SGBV as well as to discharge its international commitments to promptly enact the Sexual Offences and Domestic Violence Bill.

III. Obligations under international human rights law to criminalize sexual and gender-based violence

9. The Kingdom of Swaziland is a State party to, among other treaties, the African Charter on Human and Peoples' Rights (African Charter), the Protocol to the African Charter on the Rights of Women in Africa (the Maputo Protocol), the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights; and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW); the Convention against Torture and other forms of Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; and the Optional Protocol to the Convention on the Rights of the child on the sale of children, child prostitution and pornography.

⁴ Kingdom of Swaziland, 'His Majesty's Vision 2022', at URL <http://thekingofswaziland.com/his-majestty-vision/>.

⁵ Kingdom of Swaziland, 'His Majesty's Government Programme of Action 2013-2018: Ministries' Action Plans to 2018 and 2022', pp. 61-62 (available at www.gov.sz - under tab entitled 'Government Documents').

⁶ Ibid, pp. 69-70.

⁷ United Nations, 'Transforming our world: the 2030 Agenda for Sustainable Development', adopted under General Assembly resolution 70/1 (2015).

⁸ Ibid, Goal 5.2.

⁹ Ibid, Goal 16.1.

¹⁰ Ibid, Goal 16.2.

10. The legal obligations under these regional and universal instruments are predicated on the overarching principle that States must not only respect the human rights of all persons within their jurisdiction; they must also ensure the protection of all persons from impairment of their rights by third parties, including private actors.¹¹
11. The CEDAW Committee (the body charged with supervising States' compliance with, and interpreting the provisions of, CEDAW) explains that gender-based violence "constitutes discrimination against women under Article 1 and therefore engages all of the obligations in the Convention".¹² Recognizing that various rights are affected by SGBV, it has described gender-based violence as including "acts or omissions intended or likely to cause or result in death or physical, sexual, psychological or economic harm or suffering to women, threats of such acts, harassment, coercion and arbitrary deprivation of liberty".¹³ The CEDAW Committee has likewise said that gender-based violence may "amount to torture or cruel, inhuman or degrading treatment in certain circumstances", including in cases of rape and domestic violence.¹⁴ State practice and *opinio juris* also suggest that the prohibition of gender-based violence has evolved into a principle of customary international law.¹⁵
12. While the State itself will only be directly responsible for acts of gender-based violence that are committed by State agents, the State remains responsible for ensuring that persons under its jurisdiction are protected from the impairment of their rights.¹⁶ Article 2 of the CEDAW Convention establishes an overarching obligation "to pursue by all appropriate means and without delay a policy of eliminating discrimination against women, including gender-based violence against women".¹⁷ The CEDAW Committee explains that, as an essential component of improving women's access to justice, States are required to: "Improve their criminal justice response to domestic violence".¹⁸ These obligations are of an immediate nature and the Committee has emphasized that "delays cannot be justified on any grounds".¹⁹
13. The Maputo Protocol has a strong focus on the elimination of SGBV and requires States to "enact and enforce laws to prohibit all forms of violence against women... whether the violence takes place in private or public".²⁰ The Declaration on Gender Equality in Africa calls on States to: "Galvanize national legislative processes to promulgate and enforce specific laws relating to violence against women in all its forms".²¹ The 2017 Guidelines on Combating Sexual Violence and its Consequences in Africa further provides that "States must adopt and apply specific legislation that criminalizes all forms of sexual violence".²²
14. In practical terms, this means that States are obligated to take a range of preventive and protective measures, including through the enactment of legislation that provides for

¹¹ See International Commission of Jurists, *Women's Access to Justice for Gender-Based Violence* (Practitioners' Guide No 12, 2016), especially pp. 50 and 64-65 (available at URL <https://www.icj.org/womens-access-to-justice-for-gender-based-violence-icj-practitioners-guide-n-12-launched/>).

¹² CEDAW Committee, General Recommendation No 35, above note 3, para. 21.

¹³ Ibid, para. 14.

¹⁴ Ibid, para. 18.

¹⁵ Ibid, para. 2.

¹⁶ *Women's Access to Justice for Gender-Based Violence*, above note 11, pp. 20-21.

¹⁷ CEDAW Committee, General Recommendation No 35, above note 3, para. 21.

¹⁸ Committee on the Elimination of Discrimination against Women, General Recommendation No 33 on women's access to justice, UN Doc CEDAW/C/GC/33 (2015), para. 51(i).

¹⁹ CEDAW Committee, General Recommendation No 35, above note 3, para. 21.

²⁰ Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol), Article 4(a).

²¹ African Commission on Human and Peoples' Rights, *Declaration on Gender Equality in Africa*, adopted by the Heads of State and Government of Member States of the African Union, July 2004, para. 7.

²² African Commission on Human and Peoples' Rights, *Guidelines on Combating Sexual Violence and its Consequences in Africa*, adopted by the ACHPR, May 2017, para. 66(1).

the criminalization and sanctioning of the perpetrators of all forms of SGBV.²³ It is in this context that the UN Human Rights Committee and the CEDAW Committee have both recommended to the Kingdom of Swaziland to enact the Sexual Offences and Domestic Violence Bill as a matter of priority.

15. In its 2014 Concluding Observations on Swaziland's implementation of its obligations under CEDAW, the CEDAW Committee expressed deep concern that the Sexual Offences and Domestic Violence Bill had not been enacted.²⁴ The CEDAW Committee called on Swaziland to:

"...urgently adopt the laws and policies that are pending, such as the bills on... sexual offences and domestic violence..." (emphasis added);²⁵ and

"...enact into law the bill on sexual offences and domestic violence without further delay and ensure that it is comprehensive, covering all forms of violence against women..." (emphasis added).²⁶

16. In its 2017 Concluding Observations on Swaziland's implementation of the Kingdom's obligations under the ICCPR, the Human Rights Committee expressed concern at the lack of adequate legislation to protect women against violence and noted the delays in enacting the Sexual Offences and Domestic Violence Bill.²⁷ The Committee called on Swaziland to:

"...promptly adopt legislation to effectively criminalize and combat sexual offences and domestic violence" (emphasis added).²⁸

17. The need to adopt such legislation was identified by the Human Rights Committee as requiring Swaziland's immediate attention, in respect of which the Kingdom must report back to the United Nations by no later than 25 July 2018.²⁹

IV. Swaziland's commitments to promptly enact the Sexual Offences and Domestic Violence Bill

18. During the 2016 Universal Periodic Review (UPR) of the Kingdom of Swaziland, numerous States expressed concern about the prevalence of violence in Swaziland, including SGBV and its consequences, and/or emphasized the need for urgent efforts to combat gender-based violence, including through legislation.³⁰

19. The Government of Swaziland reported to the UN Human Rights Council's UPR Working Group that the Sexual Offences and Domestic Violence Bill seeks to address all forms of sexual violence against women and children and that the Government was "making all efforts necessary to accelerate its enactment by Parliament".³¹ In its September 2016 replies to the report of the UPR Working Group, His Majesty's Government stated that it

²³ *Women's Access to Justice for Gender-Based Violence*, above note 11, p. 65. See also the specific recommendations of the CEDAW Committee on violence against women, above note 3, especially para. 29.

²⁴ CEDAW Committee, *Concluding Observations on Swaziland*, above note 2, para. 20.

²⁵ *Ibid*, para. 9.

²⁶ *Ibid*, para. 21(a).

²⁷ Human Rights Committee, *Concluding Observations: Swaziland*, above note 1, para. 26.

²⁸ *Ibid*, para. 27(a).

²⁹ *Ibid*, para. 55, read in conjunction with UN Doc CCPR/C/108/2 (2013), para. 6(b).

³⁰ UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Swaziland', UN Doc A/HRC/33/14 (2016). This included interventions by: the Bolivarian Republic of Venezuela (para. 25); Armenia (para. 30); Australia (para. 31); Botswana (para. 32); Cyprus (para. 43); Montenegro (para. 79); and Ukraine (para. 101).

³¹ Report of the UPR Working Group, *ibid*, para. 10.

would “adopt without further delay the Sexual Offences and Domestic Violence Bill and take measures to abolish practices that are harmful to women and girls”.³²

20. The 2016 UPR of Swaziland included nine recommendations specifically pertaining to the need for enactment of the Sexual Offences and Domestic Violence Bill, including from States within the Africa region.³³ The Government of Swaziland accepted all nine recommendations, almost all of which emphasized the need for enactment of the Bill as a matter of urgency:

“Enact into law the ‘Sexual Offences and Domestic Violence Bill’ without further delay” (emphasis added);³⁴

“Take the measures necessary to accelerate the enactment of the bill on sexual offences and domestic violence” (emphasis added);³⁵

“Urgently enact the Sexual Offences and Domestic Violence Bill...” (emphasis added);³⁶

“Accelerate the Parliamentary adoption procedure of the reform Sexual Offences and Domestic Violence Bill” (emphasis added);³⁷

“Quickly pass pending legislation related to the protection of women and children including the Sexual Offences and Domestic Violence Bill...” (emphasis added);³⁸

“Adopt the Sexual Offences and Domestic Violence Bill especially to protect women from gender-based violence”;³⁹

“Enact and implement laws on sexual offences and violence to address high rates of sexual and gender-based violence”;⁴⁰

“Adopt a new comprehensive legislation to prevent and combat all forms of discrimination and violence against women”;⁴¹

“...adopt without further delay the Bill on Sexual Offences and Domestic violence...” (emphasis added).⁴²

21. The Government of Swaziland also accepted UPR recommendations to:

Combat and prevent all forms of SGBV;⁴³

Strengthen laws on SGBV;⁴⁴ and

Abolish laws and practices that encourage violence against women.⁴⁵

³² UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review: Swaziland. Addendum. Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review’, UN Doc A/HRC/33/14/Add.1 (2016), para. 20.

³³ Togo, Namibia and Botswana: see Report of the UPR Working Group, above note 30, paras. 107.39, 107.41 and 107.42.

³⁴ Report of the UPR Working Group, above note 30, para. 107.36.

³⁵ Ibid, para. 107.37.

³⁶ Ibid, para. 107.38.

³⁷ Ibid, para. 107.39.

³⁸ Ibid, para. 107.40.

³⁹ Ibid, para. 107.41.

⁴⁰ Ibid, para. 107.42.

⁴¹ Ibid, para. 107.44.

⁴² Ibid, para. 109.49, accepted by Swaziland in its September 2016 replies to the report of the UPR Working Group, above note 32, para. 20.

⁴³ Report of the UPR Working Group, above note 30, paras. 107.20, 107.21, 107.32, 107.35, 107.43 and 107.48. See also para. 109.50, accepted by Swaziland in its September 2016 replies to the report of the UPR Working Group, above note 32, para. 20.

⁴⁴ Report of the UPR Working Group, above note 30, para. 107.32.

⁴⁵ Ibid, para. 107.25.

V. Recommendation

22. The ICJ respectfully recommends that the Senate of Swaziland urgently pass, and send to the King for his Royal Assent, the Sexual Offences and Domestic Violence Bill.

23. Enactment of the Bill is a matter required of the Kingdom of Swaziland pursuant to its international human rights law obligations, including those arising from the Africa region, to criminalize and sanction the perpetrators of SGBV. Compliance with those obligations is reinforced by His Majesty's Vision 2022, the aims and targets of the Deputy Prime Minister's Office and Swaziland's consensus in the adoption of the 2030 Agenda for Sustainable Development.

24. Enactment of the Bill *during the current session of Parliament* will act as an essential step in complying with the recommendations of the UN Human Rights Committee and CEDAW Committee identified in this briefing note; and as a means of discharging the commitments made by His Majesty's Government during the 2016 Universal Periodic Review.