

Access to Justice Challenges Faced by Victims and Survivors of Sexual and Gender-Based Violence in Eswatini

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I. Background and context:

1. In June 2018, the Sexual Offences and Domestic Violence (SODV) Act was passed into law after years of advocacy from civil society and women's human rights organizations in Eswatini. It is a landmark piece of legislation aimed at ending sexual and gender-based violence (SGBV) in the country. The SODV Act changes certain definitions of sexual crimes and creates a range of new criminal offences in Eswatini. It seeks to address all forms of sexual and domestic violence against men, women and girls, such as rape and sexual harassment, as well as various forms of domestic violence including, for example, verbal, economical and psychological abuse. Importantly, it includes express provisions that are aimed at eliminating harmful gender stereotypes that usually emerge in rules of evidence applicable to court proceedings and court judgments. These include gender stereotyping often associated with the evidentiary rule known as the "the cautionary rule" in criminal proceedings; delays in reporting; and the relevance of the victim's sexual history or reputation.
2. Since the SODV Act was enacted, there has been fierce resistance by some actors in Eswatini to the SODV Act.¹ In addition, there is also a lack of publicly available accurate information about what the Act provides, a problem compounded by the local media's sometimes confusing and misleading descriptions of the legislation and its content.
3. Moreover, the investigation and prosecution of SGBV continues to present complex challenges to the justice system in Eswatini, and it is evident that will take more than the passage of a new law to protect women in Eswatini from experiencing SGBV. The SODV Act cannot on its own eliminate SGBV and enhance access to justice for women and girls in the country. Gender stereotypes and gender bias, sometimes based on traditional, religious and cultural norms continue to pervade the justice system in Eswatini, thereby preventing women and girls from effectively accessing justice for abuses committed against them.
4. Sexual and gender-based violence has been a persistent problem in Eswatini, affecting most women in the country, well before the passage of the SODV Act. In 2009, a group of researchers from the United States' Centers for Disease Control and Prevention (CDC) conducted a cluster survey study on sexual violence and its health consequences for female children in Eswatini. The study revealed that "sexual violence against girls younger than 18 years of age affected one in three women aged 13-24 years" in Eswatini, and that "about 5% of girls had forced intercourse and 9% had coerced intercourse before 18 years of age." Furthermore, the study revealed that about three-quarters of the perpetrators of sexual violence against girls were the victims' boyfriends or husbands, male relatives, or men or boys from the same community.²
5. In 2016, when Swaziland (Eswatini's former name under the official change in 2018) underwent the Universal Periodic Review (UPR) by the UN Human Rights Council, various States expressed concern over the high incidence of sexual and gender-based violence in the country. In addition, there were nine recommendations from States addressed to the authorities in Eswatini during

¹ In this connection, the International Commission of Jurists has been informed that various groups within Eswatini are considering mounting a constitutional challenge to the Act.

² A. Reza, et. al, 'Sexual violence and its health consequences for female children in Swaziland: a cluster survey study' (2009), *Lancet* 373, 1966-1972, p. 1970.

the UPR that emphasized the need for a measure directly addressing sexual and gender-based violence. The nine recommendations were as follows: :

- "Enact into law the 'Sexual Offences and Domestic Violence Bill' without further delay" (emphasis added);³
- "Take the measures necessary to accelerate the enactment of the bill on sexual offences and domestic violence" (emphasis added);⁴
- "Urgently enact the Sexual Offences and Domestic Violence Bill..." (emphasis added);⁵
- "Accelerate the Parliamentary adoption procedure of the reform Sexual Offences and Domestic Violence Bill" (emphasis added);⁶
- "Quickly pass pending legislation related to the protection of women and children including the Sexual Offences and Domestic Violence Bill..." (emphasis added);⁷
- "Adopt the Sexual Offences and Domestic Violence Bill especially to protect women from gender-based violence";⁸
- "Enact and implement laws on sexual offences and violence to address high rates of sexual and gender-based violence";⁹
- "Adopt a new comprehensive legislation to prevent and combat all forms of discrimination and violence against women";¹⁰
- "...Urgently enact the Sexual Offences and Domestic Violence Bill, and ensure that all domestic legislation is brought into conformity with the country's commitments under the Convention on the Elimination of All Forms of Discrimination against Women" (emphasis added).¹¹

At the time, the Government of Eswatini accepted these recommendations.

6. In 2017, the UN Human Rights Committee, conducting its periodic review of the performance of the State's obligations under the International Covenant on Civil and Political Rights (ICCPR) noted the widespread violence against children and women in Eswatini, including rape and marital rape. It also observed that responsible officials lacked specific training on gender-based violence.¹² The same concerns were echoed by the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee), which cited data from the National Surveillance System on Violence, Abuse, and Exploitation.¹³ The data showed that "the prevalence of violence against women and girls is high, as is

³ Report of the UPR Working Group on the Periodic Review of Swaziland, UN Doc A/HRC/33/14 (13 July 2016), para. 107.36

⁴ Ibid, para. 107.37.

⁵ Ibid, para. 107.38.

⁶ Ibid, para. 107.39.

⁷ Ibid, para. 107.40.

⁸ Ibid, para. 107.41.

⁹ Ibid, para. 107.42.

¹⁰ Ibid, para. 107.44.

¹¹ Ibid, para. 109.49,

¹² UN Human Rights Committee, *Concluding observations on Swaziland in the absence of a report*, UN Doc. CCPR/C/SWZ/CO/1 (2017), para. 26.

¹³ The National Surveillance System on Violence, Abuse and Exploitation was established by the UNICEF, supported by its partners, in order to coordinate multi-sector collation, analysis and dissemination of reported cases of violence, including against children. See UNICEF, *Swaziland Annual Report 2017*, https://www.unicef.org/about/annualreport/files/Swaziland_2017_COAR.pdf p25

the rate of abduction of young girls, often perpetrated by persons known to the victims.”¹⁴

7. Furthermore, the CEDAW Committee also expressed concerned about the “low level of reporting of violence against women, owing to a culture of silence and impunity, and at the lack of data on the number of reported cases involving violence against women that have been investigated and prosecuted and on the nature of sanctions imposed on perpetrators.”¹⁵
8. When the International Commission of Jurists (ICJ) held a workshop in Eswatini in 2018 with high-level government officials and various stakeholders, many participants described the incidence of SGBV in the country as “at crisis point”.¹⁶ Following the workshop, the ICJ recommended that the Senate of Eswatini “urgently pass, and send to the King for his Royal Assent, the Sexual Offences and Domestic Violence Bill.”¹⁷ The ICJ stressed that the adoption and implementation of this measure would “act as an essential step in complying with the recommendations of the UN Human Rights Committee and the CEDAW”, and would be a “means of discharging the commitments made by His Majesty’s Government during the 2016 Universal Periodic Review”.¹⁸
9. The ICJ noted that combating SGBV is an essential element in the “Vision 2022” for the first world status of His Majesty Ngwenyama Mswati III.¹⁹ 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”.
10. To implement His Majesty’s Vision 2022, the Deputy Prime Minister’s Office aims to reduce the percentage of women that experience violence from 79% to 30% by 2022; and the percentage of children that experience violence from 59% to 20%.²⁰ The curbing of domestic violence is identified as a priority target of the Deputy Prime Minister’s Office.²¹ Achieving this will be highly unlikely without the expeditious, effective and comprehensive implementation of the SODV Act.
11. 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.²² Notably, in this regard, Sustainable Development Goals 5 and 16 aim to:

¹⁴ UN Committee on the Elimination of Discrimination against Women (CEDAW Committee), *Concluding observations on the combined initial and second periodic reports of Swaziland*, UN Doc. CEDAW/C/SWZ/CO/1-2 (24 July 2014), para. 20.

¹⁵ Ibid

¹⁶ International Commission of Jurists (ICJ), *Briefing Note: Kingdom of Swaziland International Obligations and Commitments Reinforcing the Need for Enactment of the Sexual Offences and Domestic Violence Bill*, March 2018, para. 2, available at <https://www.icj.org/wp-content/uploads/2018/03/Swaziland-SOADVBill-Advocacy-ParliamentaryBriefingNote-2018-ENG.pdf>

¹⁷ Ibid., para. 22.

¹⁸ Ibid., para. 24.

¹⁹ Kingdom of Swaziland, ‘His Majesty’s Vision 2022’, at URL <http://thekingofswaziland.com/his-majestt-vision/>.

²⁰ 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’).

²¹ Ibid, pp. 69-70.

²² United Nations, ‘Transforming our world: the 2030 Agenda for Sustainable Development’, adopted under General Assembly resolution 70/1 (2015).

"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";²³

"Significantly reduce all forms of violence... everywhere";²⁴ and

"End abuse, exploitation, trafficking and all forms of violence against... children".²⁵

12. Finally, it is important to note that the enactment and implementation of the SODV Act is an important means to fulfill Eswatini's international human rights obligations and the rights guaranteed in Eswatini's Constitution. Article 20 of the Constitution provides for "equality before the law" for "all persons" in "all spheres of political, economic, social and cultural life" and prohibits discrimination based on "gender" explicitly. It also specifically empowers the state to enact policies and programmes "aimed at redressing social ... or other imbalances in society".²⁶
13. Moreover, Article 28 of the Constitution speaks to the "rights and freedoms of women" who are entitled to equal treatment and Government provided "facilities and opportunities necessary to enhance the welfare of women". It also protects all woman against compulsion to participate in or "undergo or uphold any custom to which she is in conscience opposed".²⁷

II. Challenges faced by SGBV Survivors in Eswatini when accessing justice for abuses committed against them

²³ Ibid, Goal 5.2.

²⁴ Ibid, Goal 16.1.

²⁵ Ibid, Goal 16.2.

²⁶ The section reads in full:

"20. Equality before the law

(1) 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.

(2) 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.

(3) For the purposes of this section, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by gender, race, colour, ethnic origin, birth, tribe, creed or religion, or social or economic standing, political opinion, age or disability.

(4) Subject to the provisions of subsection (5) Parliament shall not be competent to enact a law that is discriminatory either of itself or in its effect.

(5) Nothing in this section shall prevent Parliament from enacting laws that are necessary for implementing policies and programmes aimed at redressing social, economic or educational or other imbalances in society."

²⁷ The section reads in full:

28. Rights and freedoms of women

(1) Women have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.

(2) Subject to the availability of resources, the Government shall provide facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement.

(3) A woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed.

14. Gender-based violence against women is often founded on gender stereotypes, which are manifestations of traditional, religious or cultural beliefs about men and women. Gender stereotyping is the belief that men and women are different and unequal, and such stereotypical views become the basis upon which human beings organize society. This results in inequality between men and women in access to material resources, power and status. According to the CEDAW Committee:

“Stereotyping and gender bias in the justice system have far-reaching consequences on women’s full enjoyment of their human rights. They impede women’s access to justice in all areas of law, and may particularly impact on women victims and survivors of violence.”²⁸

15. In order to understand the specific obstacles to implementation of the SODV Act immediately following its enactment into law, the ICJ collaborated with the Swaziland Action Group Against Abuse (SWAGAA) to conduct a study of key challenges that survivors of SGBV continue to face when trying to access justice for the abuses committed against them. The prevalence of gender stereotypes and gender bias that persist in the mindset of frontline justice actors are among the significant challenges that the study identified. Gender stereotyping and gender bias compromise the impartiality and integrity of the justice system, and may lead to a failure to ensure justice and effective remedies for survivors of SGBV, as well as to their re-victimization. Gender stereotypes and gender bias also become the basis for the lack of – or reduced public expenditure of – resources allocated for the protection of survivors and the investigation of SGBV cases.
16. From interviews that SWAGAA conducted especially with women who have experienced and continue to experience SGBV in Eswatini, it emerged that gender stereotyping and gender bias in the Eswatini justice system continue to hinder or prevent women from accessing justice. In fact, women encounter these stereotypes and gender bias even at the very first step of the formal process of their accessing justice, namely, when they report the abuses committed against them to the law enforcement authorities.
17. One of the most common gender stereotypes is that a woman, upon her marriage, becomes the ‘first-born child’ of her husband. In Swazi culture, women never attain majority and are “perpetual minors” such that, upon their marriage, guardianship over them is thought to have merely transferred from their fathers to their husbands. Until recently, the position has been that, traditionally, the wife is regarded as having no standing in legal procedures and her husband’s permission is usually required before she can appear or participate in any kind of legal procedure. Swazi women, therefore, have historically often been voiceless in the justice system in Eswatini. Recent jurisprudential developments abolishing marital power may help to change this reality.
18. In recent landmark decision,²⁹ the Swazi High Court decisively abolished the Marital Power rule, which provided that marital power is granted to men, thereby preventing married women from having full rights to be a legal person with the ability to buy or sell property or land and enter into contracts or conduct legal proceedings without their husband’s consent. The Court held that such rules are

²⁸ Committee on the Elimination of Discrimination against Women (CEDAW Committee), *General recommendation No. 33*, UN Doc. CEDAW/C/GC/33 (3 August 2015), paras. 26-27.

²⁹ *Sacolo and Another v Sacolo and Others* (1403/2016) [2019] SZHC 166 (30 August 2019) <https://swazilii.org/sz/judgment/high-court/2019/166-0>

violative of the Constitution of the Kingdom of Eswatini relating to equality of men and women before the law. The court therefore declared marital power unconstitutional. This judgment illustrates the potential of the Eswatini judiciary to intervene meaningfully for the full realization of women's rights.³⁰

19. This decision, which is also consistent with the international law governing non-discrimination of women, is emblematic of the important role of the Eswatini judiciary in the protection of the rights of women and girls' in Eswatini. It is crucial that it continues to do so both in respect to gendered social norms emanating from cultural, religious and traditional practices as well in the day-to-day implementation of the SODV Act.
20. Nevertheless, gender stereotypes persist in Eswatini and many still hold the belief that it is acceptable in Swazi culture for a husband to chastize his wife for any perceived wrongdoings or if she is believed to be "wayward". Chastisement also includes beating, and physical and emotional abuse. Thus, it is common for police officers to first ask women who report violence against them committed by their partners whether they have done something to "provoke" or "deserve" such violence. Furthermore, because of the long-standing prevalence of such stereotypes and the widespread belief in their rightfulness in Swazi culture, women often blame themselves when they suffer abuse at the hands of their partners. According to SWAGAA, women who experienced violence from their partners sometimes believe that their partners were right in physically abusing them, and that they should always be at their partners' beck and call, ready to satisfy their every need – whether social, emotional or sexual.
21. Another common gender stereotype that continues to pervade the justice system in Eswatini is that women do not have rights over the matrimonial home. Interviews conducted by SWAGAA revealed that when women report domestic abuse by their husbands to law enforcement authorities, police usually advise women to leave the matrimonial home immediately. Part of this advice comes from genuine concern around the safety of women, but it is also rooted in the cultural belief that the matrimonial home, especially if constructed on land belonging to the husband's family, belongs to the husband. Thus, most women who experience SGBV are forced to remain in abusive relationships because they have nowhere else to go. There are very few safe houses or hostels to provide temporary shelters for women experiencing SGBV.
22. This set of circumstances may engender impairments to the rights to adequate housing protected under the International Covenant on Economic, Social and Cultural Rights, to which Eswatini is a party, including the components relating to safety and security in the home and security of tenure.³¹ Moreover, UN Special Rapporteurs on the Right to Adequate Housing have affirmed the "clear link between violence against women and the human right to adequate housing"³² and encouraged a "gender-sensitive understanding of the elements of the right to adequate housing".³³ States are therefore required to ensure that

³⁰ See <https://www.southernafricalitigationcentre.org/2019/08/30/press-statement-eswatini-high-court-declares-doctrine-of-marital-power-unconstitutional/> for more information.

³¹ See CESCR General Comment 4: The Right to Adequate Housing (Article 11(1) of the Covenant), UN Doc E/1992/23, para 7.

³² *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, adopted by the United Nations Human Rights Council at its Seventh session, February 2008. UN Doc A/HRC/7/16, para 40.

³³ *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, adopted

their approaches to SGBV take into account women's rights to housing because "far from being a place of safety and security, the home is too often permeated by violence".³⁴

23. It is also of concern that men dominate the justice system in Eswatini. Most of the judges, principal magistrates, senior prosecutors, police officers and lawyers are male and, thus, women who attempt to access justice for SGBV crimes committed against them would necessarily need to rely on men in moving their case along the entire process and assist them in navigating the justice system. As women in Eswatini seek justice in connection with SGBV, within the justice system they encounter numerous harmful gender stereotypes. These include the notion that women are "sexually passive" or assumed to be "sexually available", which often lead to their being further victimized or subjected to sexual harassment.³⁵ For example, one woman recounted her experience with a male judicial officer who was then presiding over her application for a peace binding order within divorce proceedings, and actually propositioned her. This kind of behavior from male frontline justice actors in Eswatini – whether police officers, prosecutors, judicial officers, lawyers – is so common that when women raise this with other justice actors, they are told to just dismiss these propositions or ignore them.
24. It is clear therefore that while the SODV Act is a first and hopeful step towards beginning to seriously address SGBV in Eswatini, it would take more than just passing this law to effectively address SGBV in the country. As noted by the CEDAW Committee, gender-based violence against women is:

"rooted in gender-related factors such as the ideology of men's entitlement and privilege over women, social norms regarding masculinity, the need to assert male control or power, enforce gender roles, or prevent, discourage or punish what is considered to be unacceptable female behavior."³⁶

A. The "cautionary" and "corroboration" rules in criminal proceedings

25. Prior to the passage of the SODV Act, judges relied on rules of evidence known to as the "cautionary rule and the "corroboration rules" to assess evidence and testimony, including witness testimony in SGBV cases. The premise of these rules was that certain witnesses – mostly women and girls – are inherently unreliable. The "cautionary rule" and the "corroboration rule" were based upon the stereotypical belief that women are "lying, deceptive, and irrational creatures driven by neuroses and hormones."³⁷ As a result, the law used to

by the UN Human Rights Council at its 19th Session in December 2011. UN Doc. A/HRC/19/53, para 70.

³⁴ Id para 7.

³⁵ See the recently adopted ILO Convention C190 - Violence and Harassment Convention, 2019 (No. 190) available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190 and the. See Also ILO Recommendation R206 - Violence and Harassment Recommendation, 2019 (No. 206) available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R206.

³⁶ Committee on the Elimination of Discrimination against Women (CEDAW Committee), *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, UN Doc. CEDAW/C/GC/35 (14 July 2017), para. 19.

³⁷ UN Women, *Gender Stereotypes in Laws and Court Decisions in Southeast Asia: A Reference for Justice Actors* (2016), p. 56. Wigmore, in his book on evidence, said, "No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental make-up have been examined and testified to by a qualified physician", J. Wigmore, *Evidence* §924a. at 737 (J. Chadbourne rev. 1970), cited in UN

impose an evidentiary corroboration requirement – the corroboration rule – and there was a disproportionate emphasis on the need for physical evidence of the sexual assault.³⁸

26. The cautionary rule was the basis for the corroboration rule, which required corroborative testimony or other evidence for a rape case to proceed. Since under the cautionary rule, the testimonies of women and girls are considered “inherently potentially unreliable”, corroboration was required, regardless of the quality of the victim’s testimony. The corroboration rule dictated that another testimony or some other evidence was necessary to support the testimony of the woman or the girl. “Corroboration rules discriminate against women because they require them to discharge a higher burden of proof than men in order to establish an offense or to seek a remedy.”³⁹ The corroboration rule was not compliant with human rights law because by requiring corroborative testimony, “the courts deny victims protection and redress, not for their failure to present adequate evidence, but solely because the evidence they presented was without any corroboration.”⁴⁰
27. Based on wrongful and harmful gender stereotype, the “cautionary rule” and the “corroboration rule” were relied on purportedly to ensure a fair trial and protect the rights of the accused.
28. In reality, the application of the rules in the above-mentioned circumstances violated the non-discrimination principle, as well as women’s and girls’ right to equality before the law and equal protection of the law without discrimination. It also violated their right to effective remedies, including in SGBV cases, thus preventing them from accessing justice on an equal basis with men and boys. The application of these rules therefore harmed women and prevented them from accessing justice. The gender stereotypes inherent in the imposition of the rules in the above-mentioned circumstances discouraged victims from filing complaints of sexual and gender-based violence. It contributed to the fear of victims that they would not be believed, resulting in their deciding to just keep silent and not pursuing any complaint.
29. As mentioned above, the SODV Act, under Section 49, now prohibits the use of the “cautionary rules” when its use would violate human rights and perpetuate harmful gender stereotypes:

“49. Notwithstanding the provisions of the common law, any other law or rule of practice, a Court shall not treat the evidence of a witness in criminal proceedings before that Court with caution and shall not call for corroboration of evidence solely on account of the fact that the witness is –

- (a) the complainant of a sexual offense; or
- (b) a child.”

Women, Gender Stereotypes in Laws and Court Decisions in Southeast Asia: A Reference for Justice Actors (2016), p. 56.

³⁸ UN Women, *Gender Stereotypes in Laws and Court Decisions in Southeast Asia: A Reference for Justice Actors* (2016), p. 61.

³⁹ UN Women, *Gender Stereotypes in Laws and Court Decisions in Southeast Asia: A Reference for Justice Actors* (2016), p. 57.

⁴⁰ UN Women, *Gender Stereotypes in Laws and Court Decisions in Southeast Asia: A Reference for Justice Actors* (2016), p. 58.

30. The information gathered by SWAGAA however revealed that these evidentiary “rules” continue to be invoked in support of defendants facing criminal charges, especially in cases where children are the victims. SWAGAA examined several cases where children are wrongly accused by the defense of lying.
31. The belief that women who complain of rape or sexual assault are mostly likely lying continues to be common, despite the lack of any credible study to support it.⁴¹ Women in Eswatini are typically accused of lying about the violence they experienced because they are perceived to be “more vocal” or are able to “scream the loudest”, rendering men “speechless”. In addition, in cases of abduction of young girls, the victims are often accused of voluntarily making themselves “available” to young boys.

B. Responses of frontline justice actors to women attempting to access justice for gender-based violence

32. As mentioned above, one of the key obstacles faced by women in Eswatini when they attempt to access justice emerges at the very start of the process of reporting the abuses committed against them. For example, in one case, the woman who reported to the police the abuse she had suffered at the hands of her husband recounted how many actors in the justice system – including female justice actors – still held patriarchal and stereotypical beliefs about the nature and roles of men and women. She described how female police officers repeatedly advised her to first speak to her husband or in-laws about the abuse and seek an “amicable solution”.
33. This type of response by law enforcement officers is based on several stereotypes and gender bias, for example that women are “wards” of their husbands and consequently, their husband’s family. Thus, when a woman suffers abuse at the hands of the husband, it is commonly believed that the woman may have done something to deserve such abuse. This, in turn, is the basis for the police officers’ response that these types of “situations” or “conflict” should first be resolved within the family.
34. Indeed, social stigma and pressure to keep families together as well as women’s lack of economic empowerment and awareness of their rights heavily influence their decision on whether or not to report the abuse perpetrated against them and pursue justice. In addition, law enforcement officers have been prone to minimize SGBV offences in the belief that domestic violence is a private matter, discouraging victims from pursuing cases and promoting conciliation.⁴²

In light of the above, it is entirely understandable why victims would refrain from reporting the abuses they experience when they have strong reasons for believing that the authorities receiving their complaints harbor stereotypes, bias, and discriminatory notions about women.

35. SWAGAA told the ICJ that they have also had experience of cases where the language used by authorities would cause victims to hesitate or discontinue pursuing cases against perpetrators. For instance, when sex workers attempt to report SGBV crimes committed against them, authorities would refer to them as “prostitutes”. There have also been cases where when women reported that they were raped in bars, police officers would speak to them in a way that implied that they considered that it was their fault as they had “compromised” themselves by being in such places.

⁴¹ K. J. Lonsway & D. Lisak, ‘False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault’ (2009), p. 2, cited in UN Women, *Gender Stereotypes in Laws and Court Decisions in Southeast Asia: A Reference for Justice Actors* (2016), p. 61.

⁴² See UN Doc. A/HRC/17/26/Add. 2, para. 59 (El Salvador).

36. There appears to be a common perception among justice actors in Eswatini that young women (i.e. female teenagers) and older female adults are always ready to have sex. Hence, when these women report being victims of sexual violence, the common response of justice actors, including police and judicial officers, is to blame them for “enticing” the perpetrators, for example, by wearing their “skimpy” clothing. In these instances, women are told that “they were asking for it”. This bias against female teenagers and older female adults when combined with the socio-cultural belief that men are normally “sexually aggressive” has devastating consequences on these women when they file cases for rape or sexual abuse.
37. The CEDAW Committee has emphasized that ensuring victims’ effective access to justice for SGBV crimes includes ensuring that the authorities, especially frontline justice actors, be able to adequately respond to these cases.⁴³ Article 5(a) of the Convention on the Elimination of All Forms of Discrimination against Women provides that States Parties must take all appropriate measures to modify social and cultural patterns of conduct with a view to eliminating prejudices as well as customary and all other practices that are based on the idea of the inferiority or the superiority of either of the sexes. Eswatini, as a State Party to the CEDAW, has the duty to eliminate all types of harmful gender stereotypes, including those prevalent throughout the justice system, as part of its obligation to eliminate all forms of discrimination against women.
38. Prosecutors, other law enforcement officials, and other frontline justice actors play very significant roles in enabling women to access justice in SGBV cases. It prevents victims from pursuing justice if frontline justice actors allow harmful gender stereotypes to influence how they respond to complaints of SGBV brought by victims. Justice actors’ responses redolent of harmful gender stereotypes also affect the willingness of complainants to participate in the subsequent investigations and trials of SGBV offences in the very few cases that proceed beyond the initial complaint stage. Moreover, the manner by which prosecutors, other law enforcement officials and other frontline actors handle these cases has a significant impact on shaping an eventual judgment in such cases,⁴⁴ and whether these cases are actually successful in bringing perpetrators to justice.
39. Many of the frontline justice actors SWAGAA interviewed responded that they had limited knowledge and capacity to handle SGBV cases. They acknowledge that there is a need for them to undergo capacity-building to acquire a stronger gender perspective when receiving complaints from victims of gender-based violence.
40. The CEDAW Committee emphasized the need for positive measures including:
- “awareness-raising and capacity-building for all actors of justice systems and for law students to eliminate gender stereotyping and incorporate a gender perspective in all aspects of the justice system.”⁴⁵
41. The CEDAW Committee also calls on States Parties to “consider promoting a dialogue on the negative impact of stereotyping and gender bias in the justice system and the need for improved justice outcomes for women victims and

⁴³ CEDAW Committee, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, UN Doc. CEDAW/C/GC/35 (14 July 2017), para. 44.

⁴⁴ CEDAW Committee, *General recommendation No. 33 on women’s access to justice*, UN Doc. CEDAW/C/GC/33 (23 July 2015), para. 27.

⁴⁵ CEDAW Committee, *General recommendation No. 33 on women’s access to justice*, UN Doc. CEDAW/C/GC/33 (23 July 2015), para. 29 (a).

survivors of violence.”⁴⁶ Furthermore, States Parties should “raise awareness on the negative impact of stereotyping and gender bias and encourage advocacy related to stereotyping and gender bias in justice systems, especially in gender-based violence cases”.⁴⁷

C. Inadequacy in services to protect victims or potential victims of SGBV

42. From several cases documented by SWAGAA, it emerges that victims of gender-based violence are often economically dependent upon the perpetrator. This is a significant factor that victims of SGBV in Eswatini have to consider before initiating complaints against perpetrators. When they do decide to file complaints and pursue cases against perpetrators, they would often have to depend on personal assistance from individuals because of the absence of resources from the authorities to assist them. There have even been cases where prosecutors and staff of SWAGAA who assist victims in this type of cases have ended up paying for the victims’ transportation and food expenses during trial.
43. Furthermore, in most instances, SGBV victims in Eswatini do not have access to health professionals or social workers who may be able to provide them with professional counseling as they pursue their cases through the justice system, and when they move on to recover from their trauma.
44. In its 2009 study on the health consequences of sexual violence on female children in Eswatini, the United States’ Centers for Disease Control and Prevention (CDC) found that sexual violence is directly linked to “feelings of depression, suicidal thoughts, unwanted pregnancy, complications of miscarriages, sexually transmitted diseases, difficulty in sleeping, and alcohol consumption.”⁴⁸ The CDC also noted that “early childhood exposure to violence can affect brain development and subsequently increase vulnerability to a broad range of mental and physical health problems ranging from anxiety disorders and depression to cardiovascular disease and diabetes.”⁴⁹ The data collected by SWAGAA in its study included a case where a young girl who was a victim of SGBV committed suicide after testifying in court.
45. SWAGAA also reported that there is a shortage of safe houses or hostel houses where women and children may seek shelter during the trial. The tendency is to rely on NGO-operated homes, which are not necessarily meant to be safe shelters and lack the necessary facilities to accommodate SGBV victims. Thus, more often than not, perpetrators are able to access victims and/or witnesses to harass, intimidate, or threaten them.
46. Furthermore, Peace Binding Orders in SGBV cases are not given priority by Court Clerks in Magistrates Courts. SWAGAA pointed out that in fact, Court Clerks appear to hesitate in issuing Peace Binding Orders because they expect police authorities to take down the details of the case before bringing them before the court.

⁴⁶ CEDAW Committee, *General recommendation No. 33 on women’s access to justice*, UN Doc. CEDAW/C/GC/33 (23 July 2015), para. 29 (d).

⁴⁷ CEDAW Committee, *General recommendation No. 33 on women’s access to justice*, UN Doc. CEDAW/C/GC/33 (23 July 2015), para. 29 (e).

⁴⁸ A. Reza, et. al, ‘Sexual violence and its health consequences for female children in Swaziland: a cluster survey study’ (2009), *Lancet* 373, 1966-1972, p. 1970.

⁴⁹ *Ibid.*

47. The United Nations Special Rapporteur on violence against women, its causes and consequences, has emphasized that the obligation of States to combat all forms of discrimination against women include:

“the obligation to protect women against gender-based violence – particularly in the context of domestic violence or intimate partner violence – by ensuring their safety and human rights through access to shelters/refuges and access to protection orders.”⁵⁰

48. In addition, in its General Recommendation No. 33 on women’s access to justice, the CEDAW Committee, recognized the financial constraints faced by women who are victims of violence. The Committee indicates that States must guarantee access to financial aid, crisis centers, shelters, hotline, and medical, psychosocial, and counseling services.⁵¹ Furthermore, the Committee has said that SGBV victims should not be subjected to “undue delays in applications for protection orders and that all cases of gender-based discrimination under criminal law, including violence, are heard in a timely and impartial manner.”⁵² The Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (Maputo Protocol) also requires that States Parties establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women.⁵³
49. According to the Special Rapporteur on violence against women, its causes and consequences, many States often have the misconception that the establishment of shelters or support for non-governmental organizations running shelters are voluntary commitments, and not part of their human rights obligations under international human rights law.⁵⁴ Women in many countries raise this common area of concern of a lack of or an insufficient number of shelters or alternative safe houses for SGBV victims. There is also often a lack of equitable geographical allocation of shelters, where there may be many shelters existing in the urban areas, but none in the rural areas.⁵⁵
50. The Special Rapporteur also noted that often the establishment and support of shelters or safe houses involve consideration of the State’s economic constraints. She observed that in recent years, social services, such as public housing and access to shelters, have been undermined by austerity policies and budgetary cuts.⁵⁶ She emphasized, however, that “the State’s obligation to protect women from violence has to be reflected also in the allocation of adequate financial resources for shelters and protection measures.” She concludes that “[g]ood practice shows that State funding needs to be secure, sustained and adequate and that shelters should be jointly funded from central government budgets and from regional or provincial budgets.”⁵⁷

⁵⁰ UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc. A/HRC/35/30 (13 June 2017), para. 19.

⁵¹ CEDAW Committee, *General recommendation No. 33 on women’s access to justice*, UN Doc. CEDAW/C/GC/33 (23 July 2015), para. 16(b).

⁵² CEDAW Committee, *General recommendation No. 33 on women’s access to justice*, UN Doc. CEDAW/C/GC/33 (23 July 2015), para. 51(j).

⁵³ Article 4 (2)(f) of the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (Maputo Protocol).

⁵⁴ UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc. A/HRC/35/30 (13 June 2017), para. 68.

⁵⁵ UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc. A/HRC/35/30 (13 June 2017), para. 71.

⁵⁶ UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc. A/HRC/35/30 (13 June 2017), para. 57.

⁵⁷ UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc. A/HRC/35/30 (13 June 2017), para. 72.

D. Legal assistance and representation to SGBV complainants in SGBV criminal cases

51. SWAGAA also reported the lack of competent legal assistance and representation for SGBV victims. Some of the victims find themselves in the dark about the intricacies of the judicial proceedings.
52. One teenage girl whose boyfriend attempted to cut off her clitoris said that the trial of her abuses was brief, and she was not asked to be present at court, nor even to give evidence. It appeared that the perpetrator had entered a guilty plea and the prosecutor, without explaining adequately to the victim why, asked that she delete some parts of the statement she had initially recorded, which significantly altered it. The perpetrator was subsequently sentenced to eight years in prison, but was given an option to pay a fine, which he paid immediately. The victim said that she felt cheated by the justice system since she was not given the opportunity to relate her side of the story in open court.
53. There is also a serious backlog right now in Eswatini on SGBV cases, especially cases involving rape. This is allegedly due to an earlier directive that all rape cases are to be tried only at the High Court, which has unlimited jurisdiction and the ability to mete out stiffer sentences. This means that prosecutors at the High Court would have to handle these cases along with the other criminal cases that are already in their workload including those involving murder, theft, and armed robbery. This heavy workload further means that prosecutors no longer have adequate time to prepare SGBV victims for trial or conduct pre-trial consultations with them. Most of the time, they meet the victims for the first time in the morning of the hearing itself or thirty minutes before the case gets called.

E. Lack of resources and coordination among State actors to investigate SGBV cases

54. The lack of coordinated approaches to assist and protect SGBV victims among various stakeholders and frontline justice actors also prominently emerged when SWAGAA conducted its study. To illustrate this, SWAGAA informed ICJ of the case of a teenaged girl who was drugged, abducted, and then raped. The girl reported the incident to police authorities, and then went to the hospital for a physical examination. It was alleged that the hospital refused to take blood samples because it claimed that it did not receive a "memo" from the police officers, instructing them to do so. The complainant's blood samples could have led to the identification of the type of substance she was drugged with, which, in turn could have then been used in the investigation.
55. According to the study of SWAGAA, there is also a severe lack of capacity to use and deploy forensic evidence, to the point where medical kits including swabs are not available. Police authorities also said that they do not have adequate facilities to pursue investigations of SGBV cases. To illustrate this, they pointed out that there is only one vehicle available for the entire region of Manzini, which comprises eight police stations. Police authorities point out that they cannot immediately respond to or investigate reports with only one vehicle. They claim that because of the sensitivity of SGBV cases, the investigation process for each case would take at least three to four hours per case per day. This means that with only one vehicle, they can only undertake investigation of two cases per day.
56. The CEDAW Committee noted that "States should encourage cooperation among all levels and branches of the justice system and the organizations that work to

protect and support women victims/survivors of gender-based violence, taking into account their views and expertise.” The Committee also emphasized the need for States to work together with human rights and women’s non-governmental organizations in dealing with SGBV cases.⁵⁸

57. Furthermore, the State’s obligation to protect women from violence should be reflected in the allocation of adequate financial resources for the investigation of SGBV cases. States have the obligation to provide adequate technical and financial resources to ensure the justiciability, availability, accessibility, good quality, and accountability of justice systems and provision of remedies for victims.⁵⁹
58. If national resources are limited, States should seek support from external sources, such as UN specialized agencies, the international community and civil society, while ensuring that in the medium and long term, adequate State resources are allocated to the justice systems to ensure their sustainability.⁶⁰

III. Conclusion and Recommendations

59. Under the CEDAW, discrimination against women includes gender-based violence, that is, “violence which is directed against a woman because she is a woman or that affects women disproportionately”, and as such, is a violation of their human rights.⁶¹ With the adoption and implementation of the SODV Act, Eswatini is taking a hopeful step towards beginning to more effectively address gender-based violence in the country.
60. However, passing this legislation alone will not eradicate SGBV and enhance access to justice and effective remedies for women in Eswatini. In order to fully protect women’s human rights, including to freedom from discrimination and their right to equality, it is necessary for Eswatini to implement programmes that build the capacity of justice actors – especially those on the frontlines – to ensure that women are able to effectively access justice for crimes committed against them. It is also very important to enhance the capacity of justice actors – judges, magistrates, prosecutors, police officers and others – to deal with such cases, including by ensuring that they do not engage in gender stereotyping when supporting women as they access justice.
61. Based on the above findings and observations, the ICJ makes the following recommendations to the Government of Eswatini:
 - (a) Establish and implement **capacity building programmes** for justice actors (e.g. police authorities, prosecutors, judges, court staff) on the SODV Act and the application of international legal instruments related to human rights, including the CEDAW Convention and the jurisprudence of the CEDAW Committee, with a view to eliminating gender stereotyping and gender discriminatory practices in their work. These capacity building programmes should also include specifically addressing the issue of the credibility and weight given to women’s voices, arguments and testimonies, as parties and witnesses. Other

⁵⁸ CEDAW Committee, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, UN Doc. CEDAW/C/GC/35 (14 July 2017), para. 48.

⁵⁹ CEDAW Committee, *General recommendation No. 33 on women’s access to justice*, UN Doc. CEDAW/C/GC/33 (23 July 2015), para. 38.

⁶⁰ CEDAW Committee, *General recommendation No. 33 on women’s access to justice*, UN Doc. CEDAW/C/GC/33 (23 July 2015), para. 39 (b).

⁶¹ CEDAW Committee, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, UN Doc. CEDAW/C/GC/35 (14 July 2017), para. 1.

professionals involved in assisting SGBV victims navigate the justice system (e.g. mental health professionals, social workers, etc.) should be included in these capacity building programmes.

- (b) Conduct **awareness-raising programmes and dialogues** among members of the general public on the content of the SODV Act as well as on the negative impact of stereotyping and gender bias in the justice system.
- (c) Provide all parts of the justice system an **adequate budget and technical assistance** so that they are able to ensure justiciability, availability, accessibility, good quality, accountability of justice systems and provision of remedies for victims. Specifically:
 - (i.) Justice actors should work together with the public health sector to develop strategies to address gender-based violence. There should be a recognition of the detrimental impact of sexual violence on both mental health and reproductive health.
 - (ii.) There should also be a recognition that providing shelters and safe houses for SGBV victims is part of the State's obligation under international human rights law, and that public spending and budgeting should reflect the commitment of the State to end sexual and gender based violence against women.
- (d) **Legal assistance and representation to SGBV complainants in SGBV criminal cases** that is accessible, sustainable, and responsive to the needs of women should be institutionalized.
- (e) **Encourage cooperation among all levels of branches of the justice system** and the organizations that work to protect and support women victims/survivors of gender-based violence. The Government should also encourage all of its agencies to work with human rights and women's non-governmental organizations.