



Legal Opinion on the State Obligation to Protect & Legislate :

**Implications for the South Africa
National Council on Gender Based
Violence and Femicide Act 9 of 2024**

Developed by ISLA for the
#Notfitforpurpose Campaign
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1. Introduction

On May 24th 2024, President Ramaphosa signed the National Council on Gender Based Violence and Femicide (NCGBVF) Bill into law. The purpose of this law is to set up an institutional framework for responding to the gender-based violence and femicide crisis in South Africa. While some have considered the NCGBVF Act a step in the right direction, there are fundamental weaknesses in the law which render the institutional mechanism established by this law ineffective and not fit for purpose. The Act is the outcome of a protracted six-year long consultative process involving civil society and multiple stakeholders, led jointly by the office of presidency and CSOs, following the 2018 #TotalShutDown movement demanding an end to gender-based violence and femicide (GBVF) in South Africa.

This legal opinion considers whether, and on what basis, the South African government can be held accountable for enacting a weak and watered down version of the Act. The central argument in this opinion is that the gaps in the NCGBVF Act constitute significant deviation by the State from its commitments made under the National Strategic Plan on GBVF adopted in 2020, and agreements made under the first 2018 Summit Declaration and subsequent 2022 Summit Resolution. This deviation constitutes a failure by the State to fulfill its obligation to protect all women from GBVF

by enacting legislation that is incapable of ensuring an effective institutional framework to strengthen the response to and prevention of GBVF. This opinion provides an analysis of the state obligation to protect all women and gender non-conforming people from GBVF as the legal basis for holding the state accountable. Reference is made to national, regional, and international human rights standards and jurisprudence in this regard.

More specifically, South Africa can be held accountable for a failure to protect women from GBVF on three main grounds: first is the state's disregard for participatory democracy through lack of meaningful engagement and public participation in the legislative processes; second is the failure to ensure adequate resources which is a deviation from commitments to establish a GBVF Fund; and third is the failure of the State to protect by legislating a weak institutional structure that is disempowered and incapable of ensuring accountability at all levels of government. This legal opinion concludes with thoughts on two possible legal strategies.

2. Background and Contextual Analysis

For many years civil society in various formations have worked tirelessly to end gender-based violence in South Africa using diverse means. Following a series of particularly brutal cases of femicide and rape in the nation sparked the #TotalShutdown movement in 2018. This movement quickly gained momentum on social media, leading to nationwide protests and demands for concrete government action. This movement was a significant mark of history when women marched in all nine provinces demanding an end to GBVF. The movement was critical in drawing inextricable linkages to all acts of violence in society that occur between the powerful and the powerless, the dominant and the dominated.

#TotalShutDown culminated in a Presidential Summit against GBVF in November 2018 anchored on the movement's memorandum of 24 demands which were presented to the President.¹

These demands called for strengthened state accountability, improved responsiveness from the justice system, prevention, better services for survivors, and increased public awareness.² The Summit was a turning point because it provided an opportunity for government, civil society and social movements to work together constructively with a common goal of eradicating gender-based violence and femicide in South Africa. The 2018 Summit Declaration against GBVF was adopted by the state as an affirmation of firm intent, setting a clear roadmap to a South Africa free from GBVF, as envisioned by the National Development Plan 2030.³ The Declaration immediately established an Interim GBVF Steering Committee (ISC) with the aim to establish a permanent national coordinating body to implement actions agreed upon in the Declaration, as agreed on by the said Interim Committee.

Following the first presidential summit, there were discussions on the need for a National Strategic Plan (NSP) on GBVF.⁴ The development of the NSP was facilitated by the ISC, informed by a series of consultations with Civil Society

1 The Report of the Presidential Summit against Gender-based Violence and Femicide, 2018 accessed at <https://www.justice.gov.za/vg/gbv/GBV-Summit-Report-2018.pdf>

2 <http://thetotalshutdown.org.za/2018/07/26/summary-memorandum-of-demands/>

3 2018 Presidential Summit Declaration against Gender-based Violence and Femicide accessed at <https://www.justice.gov.za/vg/gbv/201903-GBV-SummitDeclarationBooklet.pdf>

4 Government of South Africa, 'National Strategic Plan on Gender-Based Violence and Femicide' (2020).

role players in all 9 provinces.⁵ In April 2020 the NSP was signed into effect by the president. The NSP provides a multi-sectoral, coherent strategic policy and programming framework to ensure a coordinated national response to the crisis of GBVF by the government of South Africa with a focus on six pillars consolidated from the #TotalShutDown 24 demands namely: Accountability, Coordination and Leadership; Prevention and Rebuilding Social Cohesion; Justice, Safety and Protection; Response, care, support and healing; Economic Power, Research & Information Systems.

Two years after the NSP was launched, the 2022 Presidential Summit GBVF was held with a focus on accountability, feedback on issues raised in the first Summit and an assessment of the progress and impact of the NSP.⁶ The 2022 Summit resolutions noted that some progress had been made including demonstrated high-level political commitment, keeping GBVF on the national agenda as a priority issue, establishment of the Inter-ministerial Committee on GBVF, private sector led GBVF fund, and the multisectoral End GBV Collective, amendments to GBVF related legislation and ongoing research on GBVF.

⁷ However, several significant gaps and challenges remained including the failure of the state to, failure to develop legislative and institutional framework for leading and coordinating the strategy within the timelines indicated in the NSP, arbitrary deviations from the commitments made in the NSP, lack of proper coordination leading to fragmented response, the continued disconnect not seeing GBVF as discrimination, rampant impunity, lack of accountability and consequence management and lack of gender-responsive budgeting.

As these developments and deliberations were ongoing, a draft of the National Council on Gender-Based Violence and Femicide (NCGBVF) Bill was under development.⁸ It was first introduced in 2021 after which it disappeared and resurfaced in 2022 just before the second Presidential Summit. It was opened up for public submissions in May and June of 2023, deliberated and passed by the National Assembly in September and October 2023 respectively. Most of the feedback from the public submissions highlighted the lack of adequate and clear funding for the Council being established to enable effective functioning, that the Council was not being

5 Special Summit Edition , Accountability, Acceleration And Amplification Now accessed at https://drive.google.com/file/d/1gqZR_mUE_0cRxtplgUiec3ZRSI-xCYcR/view

6 GBVF Summit 2022 website accessed at <https://gbvf.org.za/summit-updates/>

7 Presidential Summit on GBVF 2 Summit Resolutions November 2022 accessed at <https://gbvf.org.za/wp-content/uploads/2023/09/Presidential-Summit-on-GBVF-II-Resolutons.pdf>

8 Parliamentary Monitoring Group National Council on Gender-Based Violence and Femicide Bill (B31-2022) accessed at <https://pmg.org.za/bill/1119/>

given power to ensure accountability and that the proposed structure and mandate of the Council, as it stood, was insufficient to effectively tackle the systemic, deeply-rooted issues that underpinned GBVF in the country.⁹

Gaps were also identified in the public participation process itself including the limited time being given to the public to respond to the bill, lack of awareness on the public participation process by the Department of Women, Youth and Persons with Disabilities (DWYPD) and that the call for submissions was not disseminated widely to allow different stakeholders such as CSOs, experts and academics engage in making submissions. In addition, many stakeholders felt that the tagging of the Bill as a s75 bill should be reviewed and re-considered. Instead, the bill should have been tagged as a s76 bill which would enable the National Council of Provinces (NCOP) to open up the public participation process at the provincial level. The bill was deliberated on and passed in March 2024 and was signed into law by the president in May 2024.

2.1. Critical Gaps in the NCGBVF Act

While the NCGBVF Act was intended to provide a robust framework to combat GBVF, several critical elements from the NSP were omitted, weakening the Council's capacity to achieve its intended goals. The following were the key omissions noted in the Act:

1. Exclusion of a Funding

Framework for the NSP on GBVF Fund:

A major element of the NSP was the establishment of a dedicated National Fund for GBVF, intended to provide financial resources for GBVF prevention and support initiatives. However, the final Act omits any mention of this fund. While it was argued that establishing a fund would require separate legislation, this omission leaves the Council without a clear process for allocating resources, severely hampering its ability to implement the NSP and support GBVF-related programs.

2. Lack of Empowered Accountability Mechanisms with Integrated Government Performance Indicators and Consequence Management:

The NSP on GBVF envisioned an institutional framework that would hold all role-players and stakeholders accountable, empowered to demand accountability across government departments. It was

9 Parliamentary Monitoring Group National Council on Gender-Based Violence & Femicide Bill: Public Hearings accessed at <https://pmg.org.za/committee-meeting/37227/>

not supposed to be tied to the mandate of any single department but rather encourage collaboration and coordination across sectors. However, the final NCGBVF Act lacks these empowered structures, significantly weakening its ability to ensure government accountability and institutional readiness.

3. Diminished Political leadership and Exclusion of Presidency as the Champion:

The NSP had proposed that the the Council should have political priority at the highest-level of the presidency, with the President playing a central role as the champion of the NCGBVF to elevate its authority. This crucial aspect was removed from the Act, resulting in a weaker leadership structure. The NCGBVF now lacks the symbolic and practical leadership that could have come with direct Presidential oversight.

4. Deviation from NSP by reducing CSO Representation in the Council :

The NSP and initial NSPGBVF Bill outlined an executive board consisting of 13 members, with seven representatives from civil society and six from government departments at a ministerial level. This balance was intended to ensure strong civil society representation and oversight. However, the final version of the Act increased government representation to eight seats, leaving civil society with only five contrary to the NSP. This shift significantly reduces the influence of civil society organizations, which are crucial in

holding the government accountable and ensuring that the voices of those most affected by GBVF are heard.

Lack of Local and Provincial Roles and Structures: The NSP highlighted the need for including obligations for local and provincial levels of government as part of the structures in the implementation of GBVF strategies, stressing that provinces and municipalities should be actively involved in budgeting, planning, and monitoring GBVF interventions. By tagging the NCGBVF Act as a national-level (Section 75) bill, as opposed to a section 76 bill will substantive impact on provinces, the involvement of provinces and municipalities was significantly diminished. This omission leaves out the grassroots level of government that is essential for effective, localized GBVF interventions.

Removal of the Inter-Ministerial Committee (IMC): The NSP proposed the inclusion of an Inter-Ministerial Committee (IMC) to play a key role in facilitating political coordination, financial support, and policy inputs for the NCGBVF. The IMC was also tasked with overseeing the implementation of GBVF programs across departments, ensuring the Council has the requisite environment to operate without undue influence or manipulation. However, the IMC was removed from the final Act, limiting the Council's ability to engage government departments in coordinated action, and diminishing its oversight capacity.

5. Weak Regulatory Framework and Absence of Timelines:

The NSP called for clear regulations that would establish norms and standards for accountability and coordination across all levels of government. However, the NCGBVF Act does not specify timelines for drafting and implementing these regulations, leading to concerns about delays and the risk of the Council becoming dormant or ineffective. The Act also fails to provide strong mandates for local and provincial structures, limiting their ability to act effectively in implementing the NSP.

These critical omissions from the NCGBVF Act have resulted in a framework that appears underpowered and incapable of meeting the comprehensive goals laid out in the NSPGBVF. Without strong accountability mechanisms, provincial and local involvement, adequate funding, and high-level political leadership, the NCGBVF risks falling short of its mandate to effectively combat GBVF in South Africa.

3. Applicable Law: State Accountability for GBVF

The gaps in the NCGBVF Act discussed above constitute significant deviation by the state from what established under the NSP on GBVF and agreed upon under the first 2018 Summit Declaration and subsequent 2022 Summit Resolution. This section considers what is the legal basis for holding South Africa accountable for the failure to enact a legislation that is effective and fit for purpose to protect women from GBVF.

South Africa has a robust legal framework which collectively establish state obligations to protect all women and gender non-conforming people from GBVF. In addition to national laws, South Africa is party to various regional and international human rights instruments which further reinforce the normative legal framework. These national and international standards are discussed below.

3.1. National Laws

a. State obligation to protect all women from GBVF

Section 12 of the South Africa Constitution provides that everyone has a right to be 'free from all forms of violence from either public or private sources'.¹⁰ Freedom from violence is a right which is framed within the ambit of positive state obligations in the Bill of Rights under Chapter 2 of the Constitution. It provides in peremptory terms that 'the state must respect, protect, promote and fulfill the rights in the Bill of Rights'.¹¹

The law thus imposes a duty on the state to take positive actions to respect (not infringe), protect (guard against violations), promote (create awareness and supportive structures), and fulfill (take steps to achieve) the right to be free from violence. This constitutional duty requires the State to take reasonable measures to combat GBVF which directly infringe upon the rights to life, dignity, and security of the person enshrined in the Constitution.¹² This duty extends beyond passive obligations and includes a positive duty to enact legislation that would create effective mechanisms to protect these rights.

The state has an obligation to protect all women, gender non-conforming people from GBVF as a form of discrimination. The NSP makes the connection between GBVF and discrimination, acknowledging that GBVF is rooted in intersecting gendered inequalities and social attitudes and perceptions that normalise and tolerate violence against women.¹³ In this way the NSP aligns with a number of global, regional and national policy frameworks which recognise that GBVF is a form of discrimination, it is overwhelmingly gender specific and it happens to women because they are women.¹⁴

The Constitution provides in section 9(1), the equality clause, that "Everyone is equal before the law and has the right to equal protection and benefit of the law." Section 9(4), mandates the State to enact legislation to prevent or prohibit unfair discrimination and states that "No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination."

10 Constitution of the Republic of South Africa, 1996 s 12.

11 Constitution of South Africa, s7.

12 Constitution of South Africa sections 10, 11 and 12.

13 National Strategic Plan On Gender-Based Violence & Femicide: Human Dignity And Healing, Safety, Freedom & Equality In Our Lifetime, 2020.

14 UN General Assembly, Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104, arts 1, 2; UN Committee on the Elimination of Discrimination Against Women: General Recommendation No. 12, Violence Against Women, 1989; UN Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19: Violence against women, 1992; CEDAW General Recommendation No. 35, 2017

Together, these constitutional provisions form a comprehensive legal framework that address gender equality, protects all women, gender non-conforming people and vulnerable groups such as children from GBVF.

The Constitutional Court has established precedent on state accountability for GBVF. In *Carmichele v Minister of Safety and Security*¹⁵ the court upheld an application by a woman to have the Minister of Justice and the Minister of Safety and Security held liable for her brutal attack by a man, who at the time, was awaiting trial for having attempted to rape another woman and who had been released on the recommendation of the investigation. The court held that Section 7(2) of the Constitution requires proactive measures and reasonable enforcement, setting a precedent for ensuring that laws addressing GBVF are implemented effectively and provide adequate protection.

It also held that the courts had the duty to develop the common law to make provision for holding the state accountable. In developing common law with regards to the 'wrongfulness' element of delictual liability, the court found that the argument by the state that public officers have immunity from delictual claims by the public is inconsistent with constitutional values and principles. When assessing proportionality,

to determine state accountability, the court displaced the requirements of proximity and foreseeability of harm, and argued that this assessment exercise should be done in a way that is consistent with the spirit and purpose of the Bill of Rights in the context of a constitutional state founded on dignity, equality. This means that public officials could be held liable for failing to act against risks of violence, particularly when preventive measures are absent. The Court therefore found that the state is obliged by the Constitution and international law to protect women from violence which is a form of gender discrimination and to protect the dignity, freedom and security of women. The judgment in this case emphasized that laws addressing gender-based violence and femicide (GBVF) must be not only enacted but also effectively enforced to provide meaningful protection. The state's failure to take reasonable steps to prevent the violence, despite the known risk, highlighted the importance of proactive enforcement of laws to protect individuals from harm.

Similarly in *Van Eeden v Minister of Safety and Security*,¹⁶ the Supreme Court of Appeal upheld an appeal by a woman who sought damages from the state. Her action was based on the state's breach of its duty of care towards her, following her sexual assault, rape and robbery by

15 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC).

16 *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust as Amicus Curiae)* 2003 (1) SA 389(SCA).

a known dangerous criminal who had escaped from police custody. The court held that it was the duty of the state to protect people against violent crime and that the police had a duty of care towards the victim. The court further held that the state was obliged to protect individuals by taking active steps to prevent violations of the constitutional right to freedom and security of the person. The court also held that the state was obliged by international law to protect women against violent crime and that the conduct of the police was wrongful and the state was liable.

b. State obligation to enact laws as part of fulfilling the state obligation to protect

As part of the state fulfilling its obligation to protect women from GBVF states have an obligation to enact laws to ensure protection from and prevention of GBV. South Africa has enacted several substantive national laws are in place which create obligations on the state to to protect individuals from GBVF. These include the Domestic Violence Act (Act No. 116 of 1998), which imposes a duty on the state to protect individuals from a broad range of domestic violence, including physical, sexual, emotional, psychological, and economic abuse. Additionally, the Sexual Offences Act of 2007 expands protections against sexual offences, such as rape and sexual abuse and mandates the creation of specialized mechanisms, including sexual

offences courts and dedicated police units, to handle cases of sexual violence.¹⁷ Additionally, the Prevention and Combating of Torture of Persons Act of 2013 (Act No. 13 of 2013) fulfills South Africa's international obligations under the UN Convention Against Torture by mandating the state to prevent, investigate, and punish acts of torture. Similarly, the Children's Act of 2005 (Act No. 38 of 2005) focuses on protecting children from abuse, neglect, and violence. The Prevention and Combating of Trafficking in Persons Act of 2013 (Act No. 7 of 2013) further obliges the state to enact measures to prevent trafficking, prosecute traffickers, and provide victims with shelter and rehabilitation services. Similarly, the Protection from Harassment Act of 2011 (Act No. 17 of 2011) offers protection against various forms of harassment, including stalking and online harassment. The Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (Act No. 4 of 2000), also known as PEPUA, promotes equality and aims to prevent discrimination, including gender-based violence. Other legislations that also offer specialised protection to the citizenry of SA from GBVF include the Prevention of Organised Crime Act of 1998 (Act No. 121 of 1998), the Older Persons Act of 2006 (Act No. 13 of 2006), the Cybercrimes Act of 2020 (Act No. 19 of 2020). In recent years, the Cybercrimes Act of 2020 (Act No. 19 of 2020) has addressed emerging forms of violence, such as online harassment and threats of violence.

17 Section 55A (1) Sexual Offences Act of 2007 (Act No. 32 of 2007)

The NSP on GBVF underscores the reality that despite the existence of these substantive laws, the crisis of GBVF persists for many reasons key among them being inadequate response due to lack of effective institutional mechanisms to coordinate GBVF response, lack of adequate resourcing and the absence of leadership and political support which also influences the allocation of resources for appropriate response. Thus, the NCGBVF Act is the legal framework through which the state fulfils its obligation to establish effective institutional mechanisms to address GBVF, in line with these substantive obligations to protect all women and gender non-conforming persons from GBVF.

c. State obligation to ensure meaningful engagement in public participation in legislative processes

Part of state accountability in enacting laws is ensuring that the legislative process is inclusive and consultative including a wide range of stakeholders including civil society organisations. South African law has established clear jurisprudence that participation should be meaningful and not be tokenistic thereby ensuring laws and policies are reflective of the needs and experiences of those impacted.¹⁸

The right to meaningful participation is enshrined in by South Africa's Constitution. Sections 59(1)(a) and 72(1)(a) mandate that Parliament and provincial legislatures facilitate public involvement in the legislative processes. Section 195(1)(e) extends this obligation to public administration, ensuring transparency and public engagement in decision-making. Public participation is integral to the democratic legitimacy of laws and is mandated under South African law.

In *Doctors for Life International v Speaker of the National Assembly* (2006), the Constitutional Court emphasized the need for meaningful public involvement in the legislative process. Public participation ensures that those most affected by issues have their voices heard. The Court ruled that "Parliament and the provincial legislatures must provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Similarly, in *Matatiele Municipality v President of the Republic of South Africa*¹⁹, the Constitutional Court reaffirmed that meaningful participation requires that people affected by legislative decisions be given an opportunity to voice their opinions, and that this engagement must not be superficial but real and substantive. More recently in *Mogale and Others*

18 Ndima, Zenzo M. "Approaches to meaningful citizen engagement in the local government of South Africa." (2020).

19 *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (1) (CCT73/05) [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC) (27 February 2006).

v Speaker of the National Assembly and Others,²⁰ the Constitutional Court considered whether the National Assembly, the National Council of Provinces (NCOP) and the provincial legislatures failed to fulfil their constitutional obligations to facilitate reasonable public involvement in the passing of the Traditional and Khoi-San Leadership Act 3 of 2019. In this case the applicants challenged the adequacy of the public hearings held by the National Assembly and eight of the nine provincial legislatures due to deficiencies including short and inadequate notice of the hearings; lack of pre-hearing education; that attendees were not provided copies of the Bill or were provided with insufficient copies; translation issues; that the content of the Bill was misrepresented; and that members of traditional communities were side-lined in favour of traditional leaders.

In considering whether Parliament and the provincial legislatures fell short of their constitutional obligation, the Court had regard to the following factors: the significance of the Act and its impact on communities. The Court held that Parliament and the provincial legislatures overwhelmingly failed to fulfil their constitutional obligations to facilitate a reasonable public participation process.

3.2. Africa's regional legal standards ratified by South Africa

Article 18(3) of the African Charter on Human and Peoples' Rights binds South Africa to eliminate all forms of discrimination against women and ensure that women's rights are protected in accordance with international conventions and declarations. Further Article 4 and Article 5, guarantee the right to life, integrity, and dignity, and emphasizes the protection of individuals from violence and inhumane treatment, and prohibits exploitation and degradation.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, places various obligations on member states, particularly with regard to combating discrimination and violence against women through appropriate legal, institutional, and social measures. Article 4(2) of the Protocol requires states to enact and enforce laws that prohibit all forms of violence against women, including forced or unwanted sexual acts, whether in private or public settings.

In addition, **the African Commission's Guidelines on Combating Sexual and Gender-Based Violence (SGBV) in Africa**, elaborates that South Africa has an obligation to protect all persons from

20 Mogale and Others v Speaker of the National Assembly and Others (CCT 73/22) [2023] ZACC 14; 2023 (9) BCLR 1099 (CC); 2023 (6) SA 58 (CC) (30 May 2023).

gender-based violence, ensure prevention, prosecution, punishment of perpetrators and provision of adequate remedies for victims. These guidelines place a significant emphasis on the state's obligation to legislate effectively against GBV as part of the obligation to protect. In Section 3.2 of the Guidelines, the duty to legislate is clearly outlined, requiring states to enact comprehensive and enforceable laws addressing all forms of SGBV. Moreover, Section 3.4 emphasizes that these legislative measures must be aligned with international human rights obligations, including those under the African Charter and the Maputo Protocol. This ensures that national legal frameworks are harmonized with regional and international standards, enhancing their effectiveness. The Guidelines also reference in Section 4.1 that states must ensure accountability mechanisms are embedded within the legislation, The Guidelines also emphasize in Section 5.2 the need for states to take legislative action alongside comprehensive social measures to ensure the prevention and eradication of SGBV. This includes adopting legislation that not only criminalizes acts of violence but also supports broader systemic reforms such as institutional capacity building and societal awareness programs. The emphasis is on a holistic approach, integrating legislative reform with administrative, social, and economic measures to ensure a sustainable impact on the eradication of gender-based violence.

The African Commission's jurisprudence has further elaborated on state accountability for GBV. In *Interights and Others v. Egypt*²¹ the Commission considered a case arising from mass sexual assaults that occurred during a political protest in Cairo in May 2005. Women demonstrators were sexually assaulted, including by security forces, while the state failed to intervene. The petitioners alleged that Egypt had violated several provisions of the African Charter related to the right to be free from gender-based violence. The Commission found that GBV constitutes discrimination and impedes women's right to participate fully in public life. Egypt was held accountable for violating the state obligation to recognize the rights, duties, and freedoms in the Charter, the right to freedom from discrimination and the right to health. The Commission found that Egypt failed to prevent, investigate, and prosecute the GBV perpetrated against the protesters. In its decision, Egypt was also held accountable for a failure to legislate and enforce laws addressing GBV which violated its obligation under the Charter to protect women from violence. The Commission emphasized that, "Egypt must not only legislate against SGBV but also ensure the enforcement of these laws through adequate state action." This case reinforced the principle that laws must be backed by effective enforcement mechanisms and financial and institutional resources to ensure state accountability and protection of women from violence.

21 African Commission on Human and Peoples' Rights Communication No. 323/06

In addition, in *Equality Now and Ethiopian Women Lawyers Association (EWLA) v. Ethiopia*,²² the case involved multiple instances of rape against a 13-year-old girl who was abducted and forced into child marriage by several men. The attackers were released on bail despite risks to the victim. In addition, the prosecutor and the court relied on rape myths and stereotypes arguing for example that it was impossible to rape somebody who was not a virgin. Accordingly, convictions against the accused were overturned. The African Commission found that the state of Ethiopia blatantly failed to fulfil several of its state obligations, most notably: the obligation to protect the girl from rape, the obligation to prevent further harm against her and other girls similarly situated, and the obligation to effectively investigate, prosecute and punish the perpetrators.

a. The African Commission's Concluding Observations to South Africa - as relevant to this case

The ACHPR has actively monitored South Africa's adherence to the Maputo Protocol, particularly in the context of women's rights and the country's response to gender-based violence (GBV). In terms of institutional arrangements and accountability, the ACHPR observed the need for stronger

systems to combat GBV.) in 2020, the Commission noted persistent challenges in coordinating efforts to address and respond to GBVF. It emphasized that "the Commission encourages the State Party to strengthen its institutional frameworks for the prevention and response to gender-based violence, ensuring that accountability mechanisms are fully operational and adequately resourced to address the needs of survivors"²³ The ACHPR also acknowledged the IMC's role in coordinating South Africa's response to GBV but emphasized the need for enhancing its effectiveness. The Commission highlighted the importance of political oversight and collaboration across government departments, noting that "the Commission urges the State to enhance the operational capacity of the Inter-Ministerial Committee to ensure seamless coordination across different government ministries, with a focus on improving gender-based violence prevention strategies."²⁴

Finally, the ACHPR commended South Africa's efforts to decentralize GBV responsibilities but raised concerns about resource limitations at the local level. These limitations hamper the ability of local structures to implement GBV prevention and response programs effectively. The

22 African Commission on Human and Peoples' Rights Communication 341/2007

23 African Commission on Human and Peoples' Rights, 'Concluding Observations on the Combined 2nd - 4th Periodic Report of the Republic of South Africa on the Implementation of the Maputo Protocol' (ACHPR, 2020).

24 African Commission on Human and Peoples' Rights, '2018 Report on the Implementation of the Maputo Protocol by the Republic of South Africa' (ACHPR, 2018).

ACHPR stated, “while the State Party has made strides in devolving GBV-related responsibilities to provincial and municipal levels, the Commission remains concerned about the lack of resources allocated to these structures, which impacts the delivery of services to survivors at the local level.”²⁵ These insights from the ACHPR underscore the need for South Africa to address institutional challenges, improve coordination through the IMC, and ensure the devolution of responsibilities is supported by adequate resources in the fight against gender-based violence.

3.3. International/ global human rights standards ratified by South Africa

a. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Article 2 of CEDAW establishes the core legislative obligations of States Parties to pursue a policy of eliminating discrimination against women through legislative and other measures. The CEDAW Committee through General Recommendations 12, 19 and most recently 35 have emphasised that the definition of discrimination includes protection from all forms of violence.²⁶

The state has a due diligence obligation to proactively protect from and prevent GBVF as a human rights violation by ensuring that laws are adequately enforced, resourced, and provide meaningful avenues for justice.²⁷ In essence, the state has an obligation to ensure comprehensive legal frameworks are created that prevent discrimination and pro-actively promote gender equality,²⁸ providing support health and legal services²⁹ and adopting

25 African Commission on Human and Peoples’ Rights, ‘Concluding Observations on the Periodic Report of South Africa on the Implementation of the Maputo Protocol’ (ACHPR, 2019).

26 CEDAW General Recommendation 12, 19 and 35.

27 CEDAW Committee, ‘General Recommendation 35.

28 CEDAW Committee General Recommendation 19.

29 CEDAW Committee, ‘General Recommendation No. 28 on the Core Obligations of States Parties under Article

special measures where needed.³⁰ This standard is a positive obligation because it requires states to actively engage in the protection of human rights through the enactment and enforcement of legislation.³¹ In addressing GBVF, laws must focus on achieving substantive equality³² by ensuring that these laws are enforceable and monitored requiring states to report regularly to designated bodies. Legislative frameworks should also prioritize gender-sensitive policies³³ protect and prevent re-victimization³⁴ and offer pathways for victims to seek redress if their state fails to protect their rights.³⁵

The CEDAW Committee has expounded on the notion of state accountability for GBVF through its cases. For instance, in *In A.T. v. Hungary*,³⁶ the Committee addressed a case of severe domestic violence where the Hungarian state was held accountable for failure to provide adequate protection for GBV. The complainant was subjected to ongoing physical abuse by her partner,

and despite seeking assistance from the authorities, Hungary did not offer effective measures such as restraining orders, shelters, or legal protections. The CEDAW Committee found Hungary in violation of its obligations under the CEDAW, specifically under Article 2 (duty to enact legislation) and Article 5 (obligation to eliminate gender-based discrimination) stating that Hungary has failed to provide immediate and effective protection for A.T. and her children, which constitutes a breach of the state's obligations under the CEDAW Convention to take all appropriate measures to protect women from violence." This case underscored the need for Hungary to strengthen its legal framework to provide practical protections for victims of GBV including shelters, restraining orders, and immediate assistance. The Committee also recommended broader legislative reforms to prevent domestic violence and ensure access to justice for survivors.

30 (Shelton, D. (2006). Positive Obligations in Human Rights Law. In R. G. Lawson & M. de Blois (Eds.)

31 Coomans, F., & Kamminga, M. T. (2004). Extraterritorial Application of Human Rights Treaties. Intersentia.

32 CEDAW Committee, 'General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28' (n 28).

33 CEDAW Committee, 'General Recommendation No. 37 on the Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change, CEDAW/C/GC/37, 2018.' 37.

34 Meyer, S. (2016). Still blaming the victim of intimate partner violence? Women's narratives of victim desistance and redemption when seeking support. *Theoretical Criminology*, 20(1), 75-9

35 'Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Adopted by General Assembly Resolution A/RES/54/4, 6 October 1999.'

36 *A.T. v. Hungary* (Communication No. 2/2003)

**b. CEDAW's Concluding
Observations to South Africa – as
relevant to this case**

While the CEDAW Committee has acknowledged South Africa's legal framework for addressing GBV, it expressed concerns about the enforcement and effectiveness of these laws, the Committee observed that having substantive legal frameworks alone is insufficient without robust enforcement, institutions and implementation mechanisms.³⁷

The CEDAW Committee emphasized the need for South Africa to have a more comprehensive and centralized database on all forms of violence against women, disaggregated by age, ethnicity, and disability, to enable targeted policy interventions. This gap in data collection, as pointed out in the 2019 Concluding Observations (CEDAW/C/ZAF/CO/6),³⁸ weakens the effectiveness of policy responses to GBV. The process of establishing the NCGBVF was also reported as a significant institutional reform, with the Council being responsible for coordinating the implementation of the National Strategic Plan on Gender-

Based Violence and Femicide (NSPGBVF). However, the CEDAW Committee raised concerns about the Council's operational limitations, particularly its lack of sufficient funding and a clear mandate to ensure coordination across different levels of government.³⁹ The CEDAW Committee has emphasized the urgent need for the establishment and operationalization of this fund to support prevention initiatives and services for survivors.⁴⁰

Additionally, South Africa has previously reported the challenges it faces in involving local and provincial structures in implementing the NSPGBVF. The CEDAW Committee criticized the lack of clarity regarding the roles and responsibilities of provincial and municipal governments. It emphasized that these local structures need clear mandates and adequate resources to contribute effectively to the national GBVF response. The Committee also noted that the existing legal framework for addressing GBV in South Africa was fragmented and recommended more effective coordination between national and provincial departments to ensure a cohesive and comprehensive

37 Committee on the Elimination of Discrimination against Women, 'Concluding observations on the fifth periodic report of South Africa' (18 October 2011) CEDAW/C/ZAF/CO/5 https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=CEDAW%2fC%2fZAF%2fCO%2f5&Lang=en accessed 8 October 2024.

38 Committee on the Elimination of Discrimination against Women, 'Concluding observations on the sixth periodic report of South Africa' (10 March 2021) CEDAW/C/ZAF/CO/6 https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=CEDAW%2fC%2fZAF%2fCO%2f6&Lang=en accessed 8 October 2024.

39 *ibid*

40 *ibid*

approach to GBV, noting as follows, “The Committee urges the State party to ensure effective coordination between national and provincial departments, in line with the National Strategic Plan on Gender-Based Violence and Femicide, to avoid fragmentation of services and policies.”⁴¹

The CEDAW Committee has consistently stressed South Africa’s obligation under international law to legislate effectively against GBV, ensuring that laws are enforceable and adequately resourced, with accountability mechanisms in place noting that, “The Committee remains concerned that the legal framework addressing gender-based violence is not adequately enforced, resulting in weak accountability mechanisms. The State party must ensure that perpetrators are systematically prosecuted, and victims have full access to reparations.” As noted in CEDAW General Recommendation No. 35, laws addressing gender-based violence must provide effective remedies for survivors and hold perpetrators accountable. South Africa’s legislative framework, while robust on paper, requires significant improvements in implementation and enforcement to meet its obligations under CEDAW. These are the practical implementation gaps that the NSP on GBVF was developed to respond to.

Therefore, while South Africa has made considerable progress in legislative reforms and institutional mechanisms to combat GBV, the CEDAW Committee has highlighted gaps in the enforcement of laws, data collection, funding, and coordination between national and local governments. While, The NCGBVF and NSPGBVF are commendable steps, but without sufficient resources, clearer mandates, and robust accountability mechanisms, South Africa risks falling short of its international obligations.

c. Other key international normative standards

The 1966 International Covenant on Civil and Political Rights (ICCPR):

Article 26 reinforces equality before the law and prohibits discrimination, compelling states to protect women and other vulnerable groups from violence. The ICCPR obliges states to adopt laws and ensure legal systems align with human rights standards. States must legislate and enforce protections for GBVF victims to fulfil their international obligations. The Covenant mandates comprehensive legislation to address both prevention and protection, ensuring states safeguard women and other vulnerable groups from violence, whether by state or private actors. Domestic laws or governmental structures are therefore required by this Covenant

41 CEDAW Committee Concluding Observations on South Africa (2019) UN Doc CEDAW/C/ZAF/CO/6, para 21, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbol-no=CEDAW%2fC%2fZAF%2fCO%2f6&Lang=en accessed 8 October 2024.

to provide enforceable remedies for victims including public participation in legislative reform.⁴² This responsibility is especially relevant to the issue of GBVF, as states must create legislative frameworks that are not only in place but are also effectively enforced. General Comment No. 31 (2004) of the ICCPR emphasizes the necessity of providing resources to ensure the enforcement of laws that protect individuals from violence and other rights violations.

The 1966 International Covenant on Economic Social and Cultural Rights (ICESCR). The ICESCR requires states to take deliberate steps to progressively realize citizenry rights such as including adopting legislative measures to ensure the protection of socio-economic rights.⁴³ This is a recognition which is in line with the NSP on GBVF, that economic justice is important as apart of addressing the structural barriers that make it difficult for GBVF victims to break cycles of violence. The General Comment No. 3 (1990) of the ICESCR further clarifies that the obligation to provide resources is fundamental to realizing rights, especially in

addressing systemic issues like GBVF.

The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT):

Article 2 of CAT obligates States to adopt effective legislative, administrative, judicial, or other necessary measures to prevent torture, ensuring that both state and private actors are held accountable. The CAT Committee has recognised GBV as a form of torture and found that a failure to enforce effective legislative, administrative, and judicial measures to prevent acts of torture within their jurisdiction,⁴⁴ particularly regarding GBVF, constitutes a violation of this obligation.⁴⁵ In cases of GBVF, this means ensuring thorough investigations, particularly when public officials or state actors are implicated.⁴⁶ States must create accessible mechanisms for reporting GBVF and ensure protection from reprisals for survivors.⁴⁷ Ensuring that victims receive redress, including compensation and rehabilitation, is essential.⁴⁸ States are responsible for ensuring that GBVF survivors have access to comprehensive remedies and long-term support.⁴⁹

42 Human Rights Committee, “General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004” (n 4).

43 Committee on Economic, Social and Cultural Rights, “General Comment No. 3: The Nature of States Parties”

44 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), Article 2.

45 *ibid.* Article 4.

46 *ibid.* Article 12.

47 *ibid.* Article 13.

48 *ibid.* Article 14.

49 Committee against Torture, ‘General Comment No. 3: Implementation of Article 14 by States Parties, CAT/C/GC/3, 13 December 2012.’

The 1989 Convention on the Rights of the Child (UNCRC):

Article 19 of CRC obligates states to protect children from violence, abuse, and exploitation, ensuring legislative, social, and educational measures are in place to safeguard children's physical and mental well-being. This comprehensive protection highlights the state's duty to create a secure environment for children's development. The obligation to criminalize sexual violence against children, including activities like FGM, early marriage,⁵⁰ prostitution and pornography, calls for robust laws that not only punish perpetrators but also protect survivors.⁵¹ Guaranteeing non-discrimination in the legal system ensures that all rights apply to children equally, irrespective of gender.⁵² This is achieved by ensuring that victims have access to healthcare services safeguarding the health and safety of girls who are most vulnerable to these practices.⁵³ Article 4 places a duty on States parties to undertake legislative, administrative, and other measures to realize children's rights. This article is further supported by General Comment No. 19 (2016) on public budgeting for

the realization of children's rights, the UNCRC underscores the importance of public budgets to ensure that the rights of children to be free from violence is well-resourced by the state.⁵⁴

The 2006 Convention on the Rights of Persons with Disabilities (UNCRPD): Article 4 of the 2006 Convention on the Rights of Persons with Disabilities (UNCRPD) establishes the general obligations of States to adopt appropriate legislative, administrative, and other measures to implement the rights on PWDs. Importantly, the article requires that in developing and implementing legislation and policies related to persons with disabilities, States must engage in close consultation with and involve persons with disabilities, including children, through their representative organizations. States are obligated to adopt comprehensive legislative measures to prevent such violence against persons with disabilities.⁵⁵

50 UN Women. (2018). Global database on violence against women: Africa.

51 Committee on the Rights of the Child, 'General Comment No. 13: "The Right of the Child to Freedom from All Forms of Violence," CRC/C/GC/13, 18 April 2011' (n 79).

52 Committee on the Rights of the Child, 'General Comment No. 5: "General Measures of Implementation of the Convention on the Rights of the Child," CRC/GC/2003/5, 27 November 2003.'

53 Committee on the Rights of the Child, 'General Comment No. 15: "The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art. 24)," CRC/C/GC/15, 17 April 2013.'

54 Committee on the Rights of the Child, 'General Comment No. 19 (2016) on "Public Budgeting for the Realization of Children's Rights (Art. 4)," CRC/C/GC/19, 20 July 2016.'

55 *ibid* 3.

3.4. Comparative human rights standards

The European⁵⁶ and the Inter- American⁵⁷ Human Rights systems have similarly developed standards on state accountability for GBV which provides comparative value in light of existing binding obligations on South Africa discussed above.

For example, in *González et al. v. Mexico* Case, which involved the femicide of of several women in Ciudad Juárez, Mexico, the court considered the question of systemic and rampant GBV. The victims were abducted, tortured, and killed, and the state failed to take reasonable measures to prevent these crimes or properly investigate and punish the perpetrators. The Inter-American Court found Mexico in violation of several rights enshrined in the American Convention on Human Rights, particularly regarding the state's duty to protect women from violence and to ensure effective legal and investigative processes. The court emphasized that, "The Mexican State is responsible for the lack of due diligence in preventing these murders and for failing to take reasonable steps to protect the victims, which led to a pattern of impunity and continued violence against women." The ruling was landmark for its emphasis on femicide and the duty of states to adopt comprehensive measures

to combat GBV. The court ordered Mexico to reform its legal framework to better protect women, investigate GBV cases more rigorously, and address systemic discrimination that facilitated these crimes. This case is important in providing a comparative analysis in the context of South Africa because it highlights how rampant and systemic femicide is in similarly in other parts of the world, and how inadequate response by the state can result in a state being held accountable under international human rights law.

In *Opuz v. Turkey*, the European Court of Human Rights (ECHR) examined Turkey's failure to protect a woman, Ms. Opuz, and her mother from severe domestic violence. Despite numerous complaints and requests for protection, the authorities failed to act decisively, ultimately leading to the murder of Ms. Opuz's mother. The court found Turkey in violation of Article 2 (right to life), Article 3 (prohibition of inhuman or degrading treatment), and Article 14 (prohibition of discrimination) of the European Convention on Human Rights concluding that, "The state's failure to protect the applicants from domestic violence and prevent further violence was discriminatory and violated their rights under the Convention. The authorities' inaction demonstrated a failure to address the widespread problem of

56 See Council of Europe, *The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, November 2014;

57 See Organization of American States (OAS), *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para")*, 9 June 1994.

domestic violence in Turkey.” This ruling is significant to consider in this context because it highlights that states have a positive obligation to protect individuals from GBV and it reinforces the importance of legislating in ways that ensure concrete and well-resourced actions to safeguard victims.

4. Applying law to facts: In what ways does the NCGBVF Act constitute a failure of the state obligations to protect from GBVF and enact effective laws?

The NSP on GBVF underscores the reality that despite the existence of substantive GBVF laws, the crisis of GBVF persists for many reasons key among them being inadequate response due to lack of effective institutional mechanisms to coordinate GBVF response, lack of adequate resourcing and the absence of leadership and political support which also influences the allocation of resources for appropriate response.⁵⁸ As a result, impunity for GBVF in South Africa persists.

The NCGBVF Act is the legal framework through which the state fulfils its obligation to establish effective institutional mechanisms to address GBVF, in line with these substantive obligations to protect all women and gender non-conforming

58 NSP on GBVF, 2020 (n 13).

persons from GBVF. The NCGBVF should have been enacted in line with the NSP on GBVF, which provides a comprehensive multi-sectoral, coherent strategic policy and programming framework to guide the substantive provisions of the establishment of such effective institutional mechanisms. The NSP is aligned to the national, regional and international human rights standards that have been discussed above.

The weaknesses in the Act (described in part 2 above) of this legal opinion, are a deviation by the state of South Africa from the commitments made in the NSP on GBVF and agreed upon in the Summit Declaration and Resolutions adopted following Presidential Summits.

Therefore, South Africa can be held accountable for a failure to protect women from GBVF (as discussed under part 3 above) on the following three grounds:

4.1. Disregarding Participatory Democracy: The State's failure to protect through lack of meaningful engagement and public participation in the legislative processes

The state's duty to legislate involves meaningful public participation and engagement with relevant stakeholders in the legislative process. As emphasized in Doctors for Life and Matatiele cases discussed above, this engagement must not be superficial but substantive. These cases highlight that public participation should not be tokenistic and parliament should genuinely consider public input, as neglecting this could render the legislative process invalid. For participation to be genuine, it must be inclusive and accessible to all, including marginalized groups such as women and victims of violence.

Effective public involvement in drafting the NCGBVF Act would ensure that the voices of those affected by GBVF, particularly women and marginalized groups, are included. However, if public participation is lacking or superficial, the NCGBVF Act may be argued to fall short of meeting the standard of meaningful engagement required under the Constitution.

In this case, CSOs and other stakeholders

have been engaging consultatively with the government for over six years since 2018, resulting in the development of the NSP on GBV as a consensus document which provided a clear road map to guide the substantive content of the NCGBVF Act. However, the state deviated from these substantive commitments by enacting a law that significantly falls short of the standards set in the NSP.

The analysis of public hearings conducted by parliament discussed under part 2 above show that concerns raised by CSOs questioning why the Bill was deviating from agreed commitments were disregarded by the state. This analysis also showed that major substantive changes were made to the Bill such as reducing CSOs representation in the Council, without subjecting the Bill to further public participation. Additionally, the removal of an Inter-Ministerial Committee (IMC), which was initially included in earlier drafts of the Bill, was a material change in the Bill which limits cross-departmental coordination. The IMC was envisioned as a key facilitator, ensuring the proper allocation of resources and political support, but it was removed without explanation, and without submitting the Bill to further public consultation. This failure to seek further public participation after making material changes to the bill,

In *South African Iron and Steel Institute and Others v Speaker of the National Assembly and Others* (CCT 240/22), the Constitutional Court examined the issue of whether Parliament fulfilled its constitutional duty to facilitate public participation during the legislative process of amending the National Environmental Management Laws Amendment Bill. Initially, the Bill was published in 2015 for public comment, introducing amendments to the National Environmental Management: Waste Act, particularly defining “waste.” Public hearings and consultations followed, and the Bill underwent numerous amendments. However, after several changes, including a substantial redefinition of “waste” in later versions of the Bill, no further public participation occurred. The applicants, including the South African Iron and Steel Institute, argued that the amended definition introduced material changes, fundamentally affecting industries, and that these amendments were not subjected to further public consultation. The Court concluded that Parliament had failed to meet its constitutional obligations by not facilitating public participation on the material amendments to the Bill, especially since these changes had significant regulatory and cost implications. The ruling underscored the importance of reasonable and fair public participation throughout the legislative process, particularly when amendments have far-reaching consequences.

Further, the incorrect tagging as a Section 75 Bill (which doesn't affect provinces), undermines the NSP's intent for decentralizing responsibilities, and limited wider public participation at the provincial and local levels. Yet, the NSP highlighted the need for involvement at all levels of government. The Act focuses primarily on national level involvement and competence, yet the state had committed to developing a law to eliminate GBVF which ensures that all stakeholders, particularly those at local and provincial levels, are meaningfully engaged in its implementation, since the failure to do so results in ineffective and fragmented policy execution.

The South African government's obligation to engage meaningfully in the legislative process is also underpinned by its international commitments. International law emphasizes that laws addressing GBVF must be developed in consultation with CSOs, community stakeholders, and survivors of violence to ensure their effectiveness. The failure to incorporate the perspectives of these key stakeholders undermines the law's ability to meet its objectives.

CEDAW General Recommendation No. 19 stresses the importance of involving women in decision-making processes.⁵⁹ The African Charter on Human and Peoples' Rights (ACHPR), guarantee the right to participate freely in governance, as stated in Article 13(1). The Maputo Protocol further emphasizes consultation with women's groups in drafting laws related to women's rights.⁶⁰ This reinforces that public participation in the legislative process must enable citizens, especially vulnerable groups like women, to influence the laws that impact their rights. Meaningful public engagement in the legislative process is not just a procedural formality but a substantive right.

The ICCPR General Comment No. 25 (1996) also affirms that public participation must be meaningful and not merely symbolic. The Committee noted, "Governments must ensure that laws and policies reflect the will of the people and take into account their concerns, especially in areas directly affecting fundamental rights, like protection from violence."⁶¹

CSOs play a pivotal role in facilitating this public engagement, especially in the context of GBVF. They represent vulnerable communities and ensure their voices are heard in legislative discussions, advocating for the needs and experiences of those

59 CEDAW General Recommendation 19.

60 Maputo Protocol, art 9.

61 UN Human Rights Committee (HRC), CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, CCPR/C/21/Rev.1/Add.7, 12 July 1996.

affected by violence. The need for public engagement in law-making is also reflected in the UN Sustainable Development Goals (SDGs), which highlight the importance of inclusive institutions (Goal 16) and civil society engagement in achieving gender equality (Goal 5). These international commitments, along with South Africa's constitutional and legislative frameworks, establish that public participation is not only essential for legitimacy but is a legal and moral imperative in the fight against GBVF. By ensuring that laws addressing GBVF are shaped by meaningful public participation, the state fulfills its obligation under Section 7(2) of the Constitution and international law to respect, protect, and promote the rights of all women and vulnerable populations including children.

4.2. Lack of a Resourcing Strategy: The State's failure to protect by deviating from commitments to ensure adequate resources to address GBVF

To fulfil its obligation to protect against GBVF, any legislative, institutional, administrative measures adopted by the state must be sufficiently resourced. Without sufficient resources, laws risk becoming unenforceable.

The NCGBVF Act's lack of clarity on a funding framework for GBVF response deviates from the NSPs categorical requirement for the establishment of a GBVF Fund. The NSP outlined that resources—including financial, human, and technical—must align with the Council's mandate. However, the NCGBVF Act remains silent on creating a GBVF fund. The exclusion of this fund from the Act leaves the Council without a direct financial mechanism to ensure the implementation of its strategies. Without ring-fenced funding for GBVF-related initiatives, the Council's activities may be severely constrained, leading to inefficiencies and delays in service delivery. The NSP foresaw a comprehensive resource allocation strategy across all levels of government. Through the NCGBVF Act the state deviates from its commitments by failing to address the critical need for resources at national level as well as resource distribution at local and provincial levels.

This lack of a framework to ensure adequate resources to GBVF response can be argued as a violation of South Africa's obligations under national and international frameworks.

The CEDAW Committee emphasizes this in General Recommendation No. 28 on state obligations that states should allocate adequate financial, human, and technical resources for enforcement. At a national level, South Africa has experienced significant challenges in enforcing GBVF

laws. As a result, the CEDAW Committee has noted that this compromises South Africa's ability to meet its obligations under CEDAW and other international treaties.⁶² The CEDAW Committee has clarified in GR 28 that the obligation for states to adequately resource implementation of laws and mechanisms to address VAW should be linked to mainstream governmental budgetary processes in order to ensure they are adequately funded.

At the regional level, the Maputo Protocol further obliges states to ensure adequate funding to ensure there are training programs, legal aid, and shelters for victims of violence. Article 4(2)(i) calls on states to provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating GBV. This is an imperative obligation without which none of the state obligations to protect or prevent GBV can be realised. The Niamey Guidelines also requires state parties to prioritise establishment of national funds for reparations of sexual violence victims. In 2021, the CEDAW Committee noted South Africa's inability to effectively enforce existing GBVF laws resulted in women continuing to face violence without adequate recourse to justice. The

Committee concluded that legislation alone is insufficient without proper structures and resources for enforcement.⁶³

In *Glenister vs President of South Africa & Others*,⁶⁴ the Constitutional Court of South Africa stressed the state's obligation to ensure that institutions tasked with protecting constitutional rights are sufficiently resourced. The court noted that a failure to provide adequate resources undermines the state's ability to protect fundamental rights under section 7(2) of the Constitution. The Court emphasized that independence, particularly financial autonomy, is essential for any institution responsible for overseeing critical issues. In this case the Constitutional Court emphasized that adequate financial and operational independence is crucial for institutions addressing corruption. The Court highlighted that insufficient resources would render such institutions ineffective by stating that, "The appearance or perception of independence plays an important role in evaluating whether independence in fact exists...Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features is important to determining whether it has the requisite degree of independence."⁶⁵

62 Committee on the Elimination of Discrimination against Women, "Concluding Observations on the Fifth Periodic Report of South Africa", CEDAW/C/ZAF/CO/5, 15 March 2021.'

63 Committee on the Elimination of Discrimination against Women, "Concluding Observations on the Fifth Periodic Report of South Africa", CEDAW/C/ZAF/CO/5, 15 March 2021.'

64 *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011]

65 *Ibid* para 122.

The NCGBVF, to be effective, must have a guaranteed budget that allows it to operate independently of the departments it monitors. However, the Act currently leaves the Council dependent on discretionary funding, creating potential conflicts of interest and undermining its operational capacity.

In *Sonke Gender Justice NPC v President of the Republic of South Africa and Others*⁶⁶, the Constitutional Court examined the state's obligation to ensure the independence and resourcing of the Judicial Inspectorate for Correctional Services. The Court emphasized that financial and operational independence is critical for effective oversight. The same principle applies to the NCGBVF: without sufficient resources, the Council cannot function effectively, rendering the state's legislative measures inadequate.

The importance of resource allocation was also evident in the *New National Party case*,⁶⁷ where the Court ruled that institutions must have access to sufficient funds to discharge their constitutional mandates. In this case, the Constitutional Court emphasized that financial independence is essential for any institution tasked with safeguarding

rights. The Court was cognisant of the close relationship between financial and operational independence. This Court said that operational independence "implies that there will be control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act. The [E]xecutive must provide the assistance that the Commission requires 'to ensure [its] independence, impartiality, dignity and effectiveness'.⁶⁸ The Department cannot tell the Commission how to conduct registration, whom to employ, and so on; but if the Commission asks the government for assistance to provide personnel to take part in the registration process, government must provide such assistance if it is able to do so. If not, the Commission must be put in funds to enable it to do what is necessary."⁶⁹

Similar principles can apply for an institutional framework being established to respond to GBVF. Without financial autonomy, bodies like the National Council on GBVF cannot fulfill their mandates effectively. Without financial autonomy, the GBVF Council cannot effectively fulfill its mandate. In the context of the NCGBVF Act, the issue of independence is critical.

66 *Sonke Gender Justice NPC v President of the Republic of South Africa and Others* (CCT307/19) [2020] ZACC 26; 2021 (3) BCLR 269 (CC) (4 December 2020).

67 *New National Party of South Africa v Government of Republic of South Africa* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC).

68 *Ibid* at para 98.

69 *Ibid* at para 99.

4.3. Weak Institutional Mechanisms: Failure of the State to protect by establishing a weak structure, that is disempowered and incapable of ensuring accountability

The NCGBVF Act lacks the necessary provisions to create a mechanism that is independent and capable of ensuring accountability as envisioned in the NSP. The NSP on GBVF envisioned an institutional framework that would hold all role-players and stakeholders accountable, empowered to demand accountability across government departments. The NSP recommended that the Council should not be tied to any single department's mandate, but rather encourage collaboration and coordination across sectors. However, the NCGBVF Act removed the IMC, a key entity designed to oversee government coordination and ensure compliance with GBVF policies. As a result, the NCGBVF Act establishes a disempowered Council with weak institutional structures, significantly weakening the Council's ability to ensure government accountability.

The NSP also emphasized the need for local and provincial structures to implement GBVF strategies and monitor accountability effectively. By excluding these structures, the NCGBVF Act fails to ensure that government entities at all levels are held accountable for their actions (or

inactions) in combating GBVF. Moreover, the reliance on a discretionary process by the Minister to engage the provincial and local structures, instead of creating a binding framework, undermines the sense of urgency and accountability.

Provinces and municipalities, according to the NSP, were expected to be part of the institutional framework. Their exclusion from the NCGBVF Bill, and the incorrect tagging as a Section 75 Bill (which doesn't affect provinces), undermines the NSP's intent for decentralizing responsibilities. The NSP highlighted the need for involvement at all levels of government, yet the Act focuses primarily on national competence. A law intended to eliminate GBVF must ensure that all stakeholders, particularly those at local and provincial levels, are meaningfully engaged in its implementation, as failure to do so results in ineffective and fragmented policy execution.

Additionally, the absence of an Inter-Ministerial Committee (IMC), which was initially included in earlier drafts of the Bill, limits cross-departmental coordination. The IMC was envisioned as a key facilitator, ensuring the proper allocation of resources and political support, but it was removed without explanation. The failure to establish the IMC impedes government coordination and weakens the state's ability to enforce GBVF-related policies comprehensively.

These weaknesses in the Act contradict international human rights standards on state responsibility to protect from GBVF. Both CEDAW and the Maputo Protocol create binding obligations on South Africa to establish institutional mechanisms and measures as part of combating all forms of discrimination against women, including GBVF.⁷⁰

In General Recommendation No. 6, the CEDAW Committee elaborates on state responsibility to establish and/or strengthen effective national machinery, institutions and procedures, at a high level of Government, and with adequate resources, commitment and authority to carry out strategies and measures to eliminate discrimination which includes GBVF.⁷¹ The Beijing Platform for Action significantly developed on CEDAW General recommendation No 6 and included “Institutional mechanisms for the advancement of women” as one of its twelve critical areas of concern for states to achieve gender equality.

Although typically national machinery include State Departments for Gender/ Women or Commissions for Gender Equality, the CEDAW Committee notes that specialised or thematic Councils or Committees dealing with specific issues that are of a particular relevance such as GBV may need to be established to

strengthen coordination and effective response. The South Africa NCGBVF is an example of such a specialised Council. Therefore, there should be no competition or obfuscation of roles between the NCGBVF and other existing national machinery such as the South African Human Rights Council (SAHRC), the CGE or the Department of Women, Youth and Persons with Disabilities. Those national machinery have broader mandates and varied genealogies, and should operate in complementary to the independent NCGBVF Council.

The CEDAW Committee has established a framework for determining whether such an institutional mechanism is effective. Factors to consider include: “the status, structure and location, scope of mandate and functions, legal basis, financial and human resources, political legitimacy, power, visibility and authority of these mechanisms, both at central and decentralised level in executive and legislative branches of Government.” The current Council significantly fails to meet this criteria in a number of ways including : lack of a funding/resourcing framework, diminished political legitimacy and leadership by removing the Council from the highest political leadership level at the presidency as envisioned by the NSP, absence of decentralised structures at provincial and local levels and curtailing the power and independence of the Council to ensure accountability.

70 Maputo Protocol Art 2, CEDAW article 2(c).

71 CEDAW General Recommendation No. 6: Effective National Machinery and Publicity

The NCGBVF Act also deviates from earlier state commitments by reducing CSO representation and participation in the Council Board. The CEDAW Committee has elaborated that the involvement civil society is essential and the success of the institutional machinery depends largely on the support of civil society.⁷²

The CEDAW Committee has previously raised concern about South Africa's failure to implement comprehensive measures to address GBVF, identifying the absence of fully functioning institutions which has led to failures in accountability.⁷³ The Convention on the Rights of the Child (CRC) in Article 19(1) also emphasizes the establishment of administrative, legal, and social structures to ensure accountability, as underscored in General Comment No. 13 (2011). South Africa's legal framework reinforces this need for accountability. Section 1(c) of the Constitution of South Africa establishes the rule of law and the principle of accountability as foundational values.

These legal standards collectively demonstrate that for institutional standards to effectively address GBVF, they must establish institutional structures empowered to ensure accountability. Weakened institutional mechanisms are ineffective and thus

incapable of addressing GBVF in a meaningful and systemic way, resulting in fragmented approaches which lead to a denial of women's rights to dignity, security, freedom from violence and equality.

The NSP specifically outlined the need for a structure that holds stakeholders accountable and empowers the Council to demand accountability across government departments. This was to ensure that the NCGBVF operates with sufficient authority to enforce compliance and collaboration. The NCGBVF Act, however, failed to include clear regulations prescribing norms and standards for accountability and performance indicators for state accountability. The Act also does not specify when regulations must be drafted or enacted, leaving the law vulnerable to delays and inefficiencies in its rollout. The NSP recommended that the Council's work must be supported by robust monitoring and evaluation systems at all levels of government, ensuring that the necessary infrastructure is in place to implement the law.

The NSPGBVF proposed a structure where the Presidency would oversee the public nomination process for the Council, ensuring impartiality and transparency. However, this provision was replaced,

72 UNFPA, National machineries for gender equality: a CEDAW perspective, accessed at https://belarus.unfpa.org/sites/default/files/pub-pdf/Pramila_Patten_National_machineries_for_gender_equality_a_CEDAW_perspective-en.pdf

73 Committee on the Elimination of Discrimination Against Women, 'Concluding Observations on the Fifth Periodic Report of South Africa' (2021) CEDAW/C/ZAF/CO/5.

leaving the Ministry of Women, Youth, and Persons with Disabilities to lead the process without sufficient checks and balances, diluting the Council's independence. Therefore, these weaknesses in the current institutional framework under the NCGBVF Act may be argued to constitute a failure in South Africa's obligations on the basis of the standards discussed herein.

5. Legal Strategies

5.1. Advocacy to engage in a post-legislative scrutiny process

CSOs can engage in advocacy prompting the state and all stakeholders involved to engage in post-legislative scrutiny of the NCGBVF Act. This is a participatory process through which an Act of parliament is assessed to determine whether, and to what extent it meets the intended objectives and outcomes. This process, when conducted properly, can reveal errors in the design of legislation, gaps likely to emerge in implementation and enforcement, and broader positive and negative impacts of the legislation.⁷⁴

Examples of post-legislative scrutiny in the context of GBVF include one done on the Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015 conducted in 2016 by the Equality, Local Government and Communities Committee of the Welsh Parliament.⁷⁵ This process identified gaps in the pace and consistency of implementation of the Act, low awareness of obligations among public authorities, limited possibility to fulfil demand for services and lapses in the publication of statutory guidance.

Similarly, a review of Lebanon's law 293/2014 that aims to protect women and family members from domestic violence revealed gaps resulting from the non-explicit criminalisation of domestic violence, its non-application to domestic workers, and its being secondary to existing customs.⁷⁶ Another example is the scrutiny of Cabo Verde's Law Against Gender-Based Violence in 2014 which found that implementing rules to enforce the law had not been enacted thus hindering the required budget allocations and funding.⁷⁷ An inquiry of the Standing Committee on Legal and Constitutional Affairs of the Australian

74 Mousmouti, Maria. Case study 3: Data and gender-sensitive post-legislative scrutiny. (2020).

75 <https://business.senedd.wales/mgIssueHistoryHome.aspx?IId=15768>

76 Dina Melhem, Post-Legislative Scrutiny of Gender Based Violence Laws in MENA region, Presentation at Expert's seminar on ex-post impact assessment of legislation and Post-Legislative Scrutiny, in cooperation with University of Hull and Wroxton workshop; 26 April 2019, London; <https://www.wfd.org/2019/02/13/gender-equality-laws-morocco/>

77 Elisabete Azevedo-Harman & Ricardo Godinho Gomes, Post-Legislative Scrutiny of the Law against Gender-Based Violence. The Successful Story of the Cabo Verde Parliament (2019) 21: 2 European Journal of Law Reform 175-180.

Senate in 2008 into the Commonwealth Sex Discrimination Act 1984 proposed several ways to improve its effectiveness.⁷⁸

In these comparative contexts, it is clear that for such a post-legislative scrutiny process to be successful, engagement by CSOs and other stakeholders must be met by political goodwill from the state. The state must be willing to engage in an honest and authentic reflection process on the gaps in the law, and perhaps even lead the process of scrutiny as in the case of Wales and Australia. Without political will, it is difficult to say whether such engagement will be fruitful.

5.2. Litigation

The Constitution provides clear separation of powers for the different arms of government – legislature, executive and judiciary. Legislative authority is vested in parliament,⁷⁹ and executive authority is vested in the president who together with other members of cabinet have the power to develop and implement national policy as they see fit, preparing and initiating legislation and implementing such legislation as well as coordinating

the functions of state departments in this regard.⁸⁰ Judicial authority is vested in the courts which they must apply impartially and without fear, favour or prejudice.

Although the separation of powers underlies the important principle of non-intrusion with affairs another arm of government, the courts come in to intervene when there is a need to protect rights, the violation of which may result from a deviation of the other arms of government to fulfil their obligation. In such instances, the principle of non-intrusion with the affairs of another branch of government, must give way to the need to provide protection for rights which lie at the heart of South Africa's democratic order.⁸¹

In *Speaker of the National Assembly v De Lille*,⁸² the case involved a parliamentarian who went to court to challenge a resolution of the South African National Assembly. Cape High Court upheld the member's challenge and set aside the Assembly resolution. The Speaker of the Assembly then appealed to the Supreme Court of Appeal (SCA). Although the Speaker

78 https://www.aph.gov.au/binaries/senate/committee/legcon_ctte/sex_discrim/report/report.pdf

79 Art 43, 44 and 55 of Constitution of the Republic of South Africa. At the provincial sphere this power is vested with provincial legislatures and with Municipal Councils at the local spheres.

80 Art 85 of the Constitution

81 O'Regan, K. 2005, Checks and balances reflections on the development of the doctrine of separation of powers under the South African constitution. *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, 8(1).

82 *Speaker of National Assembly v De Lille MP and Another* (297/98) [1999] ZASCA 50; [1999] 4 All SA 241 (A) (26 August 1999).

argued that parliament has the power to determine and control its proceedings, the SCA found that suspending a member of the Assembly for something they said in the assembly is contrary the constitutional rights that guarantee of freedom of expression. Therefore, the separation of powers should not be interpreted in a way to derogate from the court's role in enforcing constitutional guarantees.

If litigation is selected as the strategy, it will be an opportunity to develop on existing jurisprudence on state accountability for GBVF and build on the case law on participatory democracy and meaningful participation by asking courts to consider the question of state accountability based on its deviation from commitments made in the NSP on GBVF following years of public consultations. This litigation will also contribute to existing jurisprudence on meaningful engagement of the public in legislative processes as a constitutional principle. In addition, the case will be an opportunity to develop jurisprudence on the need to establish effective and well-resourced institutional mechanisms for coordinating GBVF response as a fundamental part of fulfilling the state obligation to protect all women and gender non-conforming people from GBVF.

