

THE UNIVERSITY OF THE WESTERN CAPE

**PROTECTING WOMEN FROM INTIMATE PARTNER
VIOLENCE IN SOUTH AFRICA: EVALUATING
WHETHER THE STATE FULFILLED ITS LEGAL
OBLIGATIONS DURING THE COVID-19
LOCKDOWN**

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STUDENT: MAAJIDAH GAMIET

STUDENT NUMBER: 3549695

MODE: LLM (STRUCTURED)

SUPERVISOR: DR KARIN CHINNIAN

Declaration

I declare that this work: **Protecting Women from Intimate Partner Violence in South Africa: Evaluating Whether the State Fulfilled its Legal Obligations During the COVID-19 Lockdown** is my work, that it has not been submitted for any degree or examination in any university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Full name: Maajidah Gamiet

Date: 01 December 2022

Signed: Maajidah Gamiet



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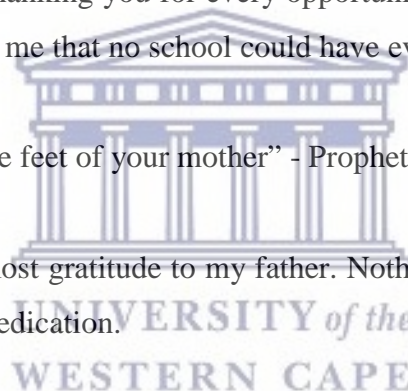
Dedications

All the praises and thanks be to Allah, Who has guided us to this, and never could we have found guidance, were it not that Allah had guided us.

I wish to express my deepest and most sincere gratitude to my mother, you have gone above and beyond to support me, always. I recognise and appreciate your immense contribution to my success. I will never stop thanking you for every opportunity you have given me, and for the valuable lessons you taught me that no school could have ever provided. I am honoured to be your daughter.

“Heaven lies beneath the feet of your mother” - Prophet Muhammad (PBUH)

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To my cats, I love you.

Abstract

The COVID-19 lockdown regulations in South Africa were put in place to protect its citizens from the spread of the virus, however certain restrictions consequently endangered women. Comparing gender-based violence statistics from 2019 and 2020, this thesis considers whether the protection of women from intimate partner violence and intimate partner femicide in South Africa was a priority in the design of control measures against the spread of COVID-19. It makes use of an interpretation of the international law standard of due diligence that places a duty on the state to protect individuals from violations committed by non-state actors to ensure that human rights provisions (specifically women's rights) are executed in accordance with the principles of equality and non-discrimination. This thesis concludes that while South Africa has comprehensive legislative measure in place to protect women, its continuous failure to protect women was brought into sharp focus during the COVID-19 lockdown.

Key Words

COVID-19

Due diligence

Gender-based violence

Human rights

Intimate partner femicide

Intimate partner violence

National lockdown

Negligent

Patriarchy

Protection of women

International law



Abbreviations and Acronyms

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CGE	Commission on Gender Equality
COVID-19	Coronavirus disease
DEVAW	United Nations Declaration on the Elimination of Violence against Women
DSD	Department of Social Development
DVA	Domestic Violence Act
ECCJ	Court of Justice of the Economic Community of West African States
ERAP	Emergency Response Action Plan on Gender-based Violence and Femicide
GBV	Gender-based violence
ICCPR	International Covenant on Civil and Political Rights
IPF	Intimate partner femicide
IPV	Intimate partner violence
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
NGO	Non-Governmental Organisations
RNR	Risk-Need-Responsivity
SAHRC	South African Human Rights Commission
SAPS	South African Police Services



SOA	Criminal Law (Sexual Offences and Related Matters) Amendment Act
SOC	Sexual Offences Court
TCC	Thuthuzela Care Centres
UN	United Nations Organisation
UDHR	Universal Declaration of Human Rights
VAW	Violence against Women
WHO	World Health Organisation



CHAPTER ONE

INTRODUCTION AND CONCEPTUAL FRAMEWORK

1.1. INTRODUCTION

Amid the global pandemic caused by the COVID-19 outbreak, the South African government declared a state of disaster and implemented a nationwide hard lockdown.¹ Lockdown is used as a measure to break the chain of transmission and reduce cases of infection by extreme social distancing.² The lockdown regulations were heavily restrictive, limiting certain freedoms including movement being limited to only necessary grocery shopping and medical visits. Generally, stores, restaurants, and non-essential businesses were closed, and no social activities were allowed. In addition, a total ban on alcohol and cigarettes was imposed.³

Since the imposition of the national lockdown, an increase in intimate partner femicide and gender-based violence cases has been noticed, due to pre-existent social norms and gender inequalities, socio-economic strain triggered by the pandemic, together with the restrictive measures placed on movement and social interaction.⁴ Even in circumstances that limit various freedoms, there are no exceptions where the right to freedom from violence should be abandoned, as this is a basic human right.⁵ In terms of South Africa's due diligence to protect women, this thesis examines certain factors which potentially violated women's constitutional rights regarding equality, human dignity, and life. This thesis will also touch on intersectional feminism and how its theory can be used to create a better intimate partner violence (IPV) prevention plan for South Africa.

¹Msomi, N & Pilane, P '#LockdownSA: Ramaphosa Announces SA Lockdown to Curb Covid-19 Spread' available at <https://health-e.org.za/2020/03/23/lockdownsa-ramaphosa-announces-sa-lockdown-to-curb-covid-19-spread/> *Health-e News* 23 March 2020 (accessed 20 September 2020).

²Sault, S 'Why Lockdowns can Halt the Spread of COVID-19' available at <https://www.weforum.org/agenda/2020/03/why-lockdowns-work-epidemics-coronavirus-covid19/> *World Economic Forum* 21 March 2020 (accessed 20 September 2020).

³Stiegler, N & Bouchard, JP (2020) 'South Africa: Challenges and Successes of the COVID-19 Lockdown' *Annales Méthodico-Psychologiques* pg. 696.

⁴Zondi, S & Zondi, S 'Gender-Based Violence During Covid-19: A Human Rights Violation' available at <https://www.probono.org.za/gender-based-violence-during-covid-19-a-human-rights-violation/> *Probono.org* 01 October 2020 (accessed 15 June 2021).

⁵UN Women Africa 'Fighting the Shadow Pandemic of Violence Against Women and Children during COVID19' available at <https://africa.unwomen.org/en/news-and-events/stories/2020/05/fighting-the-shadow-pandemic-of-violence-against-women-and-children-during-covid19> *UN Women* 21 May 2020 (accessed 11 October 2020).

1.2. BACKGROUND TO THE STUDY

Gender-based violence (GBV), regardless of the gender of the person perpetuating it, is defined as “violence perpetrated against somebody based on their gender as a result of historical and cultural dimensions which inform and perpetuate stereotypical attitudes and behaviours within our society”.⁶ GBV takes various forms, however, to not overextend its scope, this paper focuses on IPV by a current or former intimate partner or spouse. This thesis critically analyses whether South Africa is complying with its international legal obligations regarding the protection of women against IPV during the COVID-19 lockdown.

1.3. PROBLEM STATEMENT AND RATIONALE FOR THE RESEARCH

GBV is undoubtedly a problem globally and particularly in South Africa. Within GBV, IPV is a common occurrence in South Africa and intimate partner femicide (IPF) is the leading cause of female murder in South Africa.⁷ The most recent statistics provide that when considering women murdered by intimate partners, it reflects one murder every eight hours.⁸ While women can perpetrate violence against men and violence does occur in same-sex relationships as well, violence against women (VAW) is most commonly committed in heterosexual relationships, by male intimate partners and ex-partners.⁹ Crime is not gender specific but women are disproportionately affected by violence in South Africa and are targeted due to their gender.¹⁰ Women are more vulnerable to violence during various emergencies, including pandemics.¹¹

Worldwide, the consequences of lockdown provides evidence of exacerbating the risk of IPV for different reasons.¹² One can link the global COVID-19 pandemic and IPV by considering different variables. Limited movement increases isolation and decreases the opportunity for

⁶Sanger, C (2020) ‘S v Mthethwa: Justice for Sex Workers in the Face of Criminalisation?’ *Agenda* pg. 6.

⁷Mathews, S; Jewkes, R & Abrahams, N (2015) “So Now I’m the Man’: Intimate Partner Femicide and its Interconnections with Expressions of Masculinities in South Africa’ *British Journal of Criminology* Vol. 55(1) pg. 107.

⁸Makou, G ‘Femicide in South Africa: 3 Numbers about the Murdering of Women Investigated’ available at <https://africacheck.org/reports/femicide-sa-3-numbers-murdering-women-investigated/> *AfricaCheck* 13 July 2017 (accessed 08 October 2020).

⁹World Health Organization (2012) ‘Understanding and Addressing Violence Against Women: Intimate Partner Violence’ (No. WHO/RHR/12.36) *World Health Organization* pg. 1.

¹⁰Chinnian, K & Petersen, A (2020) ‘Gender Construction in Sexual Offences Cases: A Case for Fully Reviving the Sexual Offences Courts’ *Acta Juridica* (Special Edition: Violence Against Women - Law, Policy and Practice) Vol. 1 pg. 138.

¹¹World Health Organization (2020) ‘COVID-19 And Violence Against Women: What the Health Sector/System Can Do’ *Human Reproduction Programme* pg. 1.

¹²World Health Organization (2020) pg. 1.

victims of violence to leave their abusers and seek support services and are thus trapped with their perpetrator.¹³ This leads to related additional socioeconomic problems such as a loss of income from the victim or the perpetrator, and the resultant loss of control, and lowered economic status can potentially lead to domestic violence.¹⁴

1.4. RESEARCH QUESTIONS

1. The South African government has obligations to protect women under international, regional, and national law. What obligations to due diligence does the South African government have in protecting women against IPV?
2. How has the South Africa government executed its due diligence obligations to protect women from IVP during the COVID-19 lockdown?
3. If these legal obligations have not been addressed adequately, what proactive measures can the South African government take in combatting IPV, to meet legislative standards for the protection of women during national lockdown and thereafter?

1.5. LITERATURE REVIEW

Dr. Phumzile Mlambo-Ngucka, Executive Director of UN Women and former Deputy President of South Africa aptly named the issue of VAW a shadow pandemic.¹⁵ In times of emergencies, for example pandemics, women become further marginalised. They face harmful gender and social norms and suffer intensified inequality.¹⁶ Statistics provide that 35.9% of employed women in South Africa are informally employed, meaning that the COVID-19 lockdown affects women in a unique way; the loss of any financial independence reduces their resources to escape a violent environment and limits freedom from abusive partners.¹⁷

¹³Hall, BJ & Tucker, JD (2020) 'Surviving in Place: The Coronavirus Domestic Violence Syndemic' *Asian Journal of Psychiatry* pg. 1.

¹⁴Taylor, K 'Why Does Violence Against Women and Girls Increase During Disasters?' available at <https://www.worldvisionadvocacy.org/2020/06/24/why-does-disaster-increase-the-risk-of-violence-against-women-and-girls/> *World Vision Advocacy* 24 June 2020 (accessed 11 October 2020).

¹⁵Udo, F 'COVID-19 Lockdown: South Africa Battles the Deadly Epidemic of Gender-Based Violence' available at <https://www.africanwomeninlaw.com/post/covid-19-lockdown-south-africa-battles-the-deadly-epidemic-of-gender-based-violence> *Institute for African Women in Law* (accessed 11 October 2020).

¹⁶Taylor, K *World Vision Advocacy* 24 June 2020.

¹⁷Anna 'Domestic Violence in South Africa' available at <https://thecircle.ngo/domestic-violence-south-africa/> *The Circle* 1 July 2020 (accessed 16 January 2021).

Despite South Africa having one of the most comprehensive and progressive Constitution and Bill of Rights in the world, the occurrence of violence against women continues at disturbing proportions.¹⁸ In 2016, the World Health Organisation (WHO) listed South Africa as fourth of 183 countries for its interpersonal violence death rates for women, with 12.5 deaths per 100,000, amounting to 4.8 times the global average rate of 2.6.¹⁹ The framework of international human rights protection traditionally protects individuals from violations executed by state actors and does not extend protection against violations occurring within the private sphere by non-state actors.²⁰ This position is changing as the state duty of the protection of individuals from violations by non-state actors is progressively being covered by the concept of due diligence.²¹ The doctrine of due diligence holds the state responsible under international law if it fails to exercise various positive obligations such as observing, upholding, and ensuring human rights provisions are executed in accordance with the principles of equality and non-discrimination.²²

There exists authority providing that states have a duty to protect individuals from harm acted upon them by private parties: the *Velasquez Rodriguez*²³ case concluded that even though one incident of domestic violence may not be afforded international law protection, an omission by states to act in response to a widespread domestic violence problem and failing to afford appropriate resources to combatting domestic violence breaches its international duties.²⁴ Moreover, it needs to be recognised that a great deal of GBV is due to the lack of protection given to women by the state, and this omission can be categorised by the international community within the traditional theory of human rights abuses.²⁵ The following instruments describe international and regional law treaties, declarations, conventions that South Africa has ratified and thus has a duty to execute due diligence in accordance with the principles of equality and non-discrimination.

¹⁸People Opposing Women Abuse (2010) 'Criminal Injustice: Violence against Women in South Africa' *Raising Her Voice Program* pg. 5.

¹⁹Wilkinson, W 'Five Facts: Femicide in South Africa' available at <https://africacheck.org/reports/five-facts-femicide-in-south-africa/> (accessed 04 October 2020).

²⁰Marshall, J (2008) 'Positive Obligations and Gender-based Violence: Judicial Developments' *International Community Law Review* Vol.10(2) pg. 143.

²¹Marshall, J (2008) pg. 143.

²²Marshall, J (2008) pg. 147.

²³Inter-American Court of Human Rights, Ser. C, No. 4, Judgment of 29 July 1988, 1989 28 ILM 291.

²⁴Stop Violence Against Women 'The International Legal Framework' available at <http://hrlibrary.um.edu/svaw/domestic/laws/international.htm> *Minnesota Advocates for Human Rights* (accessed 11 October 2020).

²⁵Ulrich, JL (2000) 'Confronting Gender-Based Violence with International Instruments: Is a Solution to the Pandemic Within Reach?' *Indiana Journal of Global Legal Studies* pg. 636.

The Universal Declaration of Human Rights (UDHR) establishes the central international foundation for preventing VAW by providing the rights and principles of equality, security, liberty, integrity and dignity of all people, including women.²⁶ The International Covenant on Civil and Political Rights (ICCPR) prohibits discrimination on the basis of sex.²⁷ Furthermore, the prohibition against inhuman or degrading treatment can be interpreted to encompass a prohibition of VAW.²⁸ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) places an obligation on state members to abolish any existing laws, regulations, customs and practices that are considered discriminatory towards women.²⁹ The Declaration on the Elimination of Violence Against Women (DEVAW) is not a binding legal authority but it does uphold the state's dedication to women's rights and a universal framework for countries to satisfy their duties.³⁰

Realistically, international laws and treaties seldom reach into the private sphere where the greater population of women experience violence, thus leaving these women without real protection or help.³¹ While non-binding recommendations recognise when human rights have been infringed, it is ineffective at tackling the underlying factors rooted behind GBV such as gender inequality and patriarchal systems.³²

Regionally, the Protocol to the African Charter on Human and Peoples' Rights, on the Rights of Women in Africa (Maputo Protocol) encompasses its prohibition on GBV in women's rights to life, integrity and security of the person, and dignity, furthermore, it establishes legal obligations for state parties.³³ The Maputo Protocol provides liberal and extensive rights for African women, but the onus to actualise these lies with the state parties. For this to happen,

²⁶UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) (ratified 10 December 1996).

²⁷UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, Vol. 999, pg. 17 (ratified 10 December 1998).

²⁸Klugman, J (2017) 'Gender-based Violence and the Law' *World Development Report – Governance and the Law* pg. 7.

²⁹UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, Vol. 1249, pg. 13 (ratified 18 October 2005).

³⁰Bethal, M 'Violence Against Women and the Responsibility of the State' available at <http://www.tribune242.com/news/2014/apr/22/violence-against-women-and-responsibility-state/> *The Tribune* 22 April 2014 (accessed 11 October 2020).

³¹Ulrich, JL (2000) pg. 636.

³²Chinkin, C & Neenan, J 'International Law and the Continuum of Gender-Based Violence' available at <https://blogs.lse.ac.uk/wps/2017/04/06/international-law-and-the-continuum-of-gbv/> *Women, Peace and Security Forum* 06 April 2017 (accessed 15 June 2021).

³³African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003 (ratified 17 December 2004).

state parties need to perform with due diligence to promote women's rights, prevent abuse of women's right and protect women from abusers. 'Due diligence' as a term does not appear in the Maputo Protocol but as mentioned before, this standard has already been filtered into dialogues regarding VAW particularly concerning the relationship between the state and violence committed by private actors.³⁴

Nationally, all rights are protected within the Bill of Rights in the Constitution of South Africa including but not limited to the right to equality, dignity, and freedom from all forms of violence, maltreatment, abuse, and exploitation while having access to justice and fair treatment.³⁵ The Domestic Violence Act (DVA) seeks to protect victims of domestic violence against abuse. It takes account of both opposite and same sex relationships wherein violence may exist.³⁶ In an effort to combat the police's longstanding notoriety of negligence towards domestic violence, the DVA introduced statutory checking and supervision of police application of the law, placing specific duties upon the police.³⁷ In a few words, section 2 requires police to inform complainants that they are there to facilitate the appropriate assistance the situation calls for, which could include finding adequate shelter or get proper medical treatment for the complainant.³⁸ Section 4 and section 8 requires the police to notify the complainant on her right to request for a protection order and lay criminal charges, and where necessary, inform the complainant of this information by way of a notice.³⁹ **The case of *AK v Minister of Police*⁴⁰ reinforces the constitutional "heightened duty" on police to investigate and combat crimes against women.**⁴¹ The Domestic Violence Amendment Act⁴² introduces new definitions such as "coercive behaviour", and most importantly, it introduces online applications for protection order against acts of domestic violence.⁴³

³⁴Addadzi-Koom, ME (2020) 'Of the Women's Rights Jurisprudence of the ECOWAS Court: The Role of the Maputo Protocol and the Due Diligence Standard' *Feminist Legal Studies* Vol. 28(2) pg. 161.

³⁵Constitution of the Republic of South Africa, 1996 (The Constitution)

³⁶Domestic Violence Act 116 of 1998 pg. 3.

³⁷Vetten, L (2005) 'Addressing Domestic Violence in South Africa: Reflections on Strategy and Practice' *Centre for the Study of Violence and Reconciliation South Africa* pg. 5.

³⁸Domestic Violence Act 116 of 1998 pg. 6.

³⁹Domestic Violence Act 116 of 1998 pg. 13.

⁴⁰*AK v Minister of Police* (CCT 94/20) [2022] ZACC 14; 2022 (11) BCLR 1307 (CC); 2023 (1) SACR 113 (CC) (5 April 2022).

⁴¹*AK v Minister of Police* para 162-175 pg. 66-71

⁴²Domestic Violence Amendment Act 14 of 2021.

⁴³Insertion of section 6A in Act 116 of 1998.

The implementation of the DVA has been challenged by factors such as understaffing, the refusal of the police to interfere in household disputes, and the lack of information available for complainants. The juxtaposition of progressive legislation and regressive behaviours of the police does not create a positive environment for complainants which results in secondary victimisation of survivors of abuse and the failure of state actors to perform in accordance with their duties as provided in legislation.⁴⁴ The Sexual Offences and Related Matters Act prohibits all non-consensual sexual activity including marital rape and any form of non-consensual sexual penetration.⁴⁵ The Promotion of Equality and Prevention of Unfair Discrimination Act aims to promote equality in both public and private spheres of life by prohibiting VAW and providing a framework for addressing unfair discrimination, harassment and hate speech.⁴⁶ The Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2021⁴⁷ aims to address GBV and offences committed against vulnerable persons, and provides for additional procedures to reduce secondary victimisation of vulnerable persons in court proceedings.⁴⁸ This legislation also tightens bail and minimum sentencing provisions in the context of GBV.⁴⁹

The due diligence principle does not only exist within international human rights instruments and cases but extends into South African national legislation as well.⁵⁰ In fact, the jurisprudence on the due diligence principle in South Africa is one of the most developed. Courts have held the state accountable to the victims and survivors of violence in instances where there has been a failure in its duty to enact legislation or execute measures to protect women from violence.⁵¹ *Carmichele v Minister of Safety and Security*⁵² provides that under its international law duty, South Africa must proscribe all gender-based discrimination that effectively impairs women of the enjoyment of basic rights and freedoms and take affirmative steps to better protect women and ensure these discriminations do not recur.⁵³

⁴⁴Vetten, L (2005) pg. 7.

⁴⁵The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁴⁶Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

⁴⁷Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 13 of 2021.

⁴⁸Amendment of section 158 of Act 51 of 1977, as substituted by section 7 of Act 86 of 1996 and amended by section 68 of Act 32 of 2007.

⁴⁹Substitution of section 68 of Act 51 of 1977, as substituted by section 10 of Act 75 of 1995 and section 6 of Act 85 of 1997.

⁵⁰Abdul Aziz, Z & Moussa, J (2019) 'Due Diligence Framework: State Accountability Framework for Eliminating Violence against Women' *Due Diligence Project* pg. 12.

⁵¹Abdul Aziz, Z & Moussa, J (2019) *Due Diligence Project* pg. 12.

⁵²*Carmichele v Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (16 August 2001).

⁵³*Carmichele v Minister of Safety and Security* para. 62.

The court held in *S v Baloyi*⁵⁴ that the state had various explicit constitutional duties to manage domestic violence and protect the individual right to be free from domestic violence.⁵⁵ Nevertheless, in reality there exists a massive break between cultural attitudes towards women that is driven by a unique type of South African masculinity giving rise to this violence, and the optimistic rulings of the court. The fixing of the aforementioned break thus involves accrediting the operational and attitudinal obstacles to the right to be free from violence and the solution lies in a multi-faceted governmental and private program including education, access to resources, and constant surveillance of the degree and perpetuation of violence.⁵⁶

This thesis will explore and analyse the relationship between IPV, patriarchy in South Africa, and various socioeconomic factors (for example, unemployment, lack of resources, and social support due to lockdown) and how these factors affect the possibility of women becoming victims of violence and the prospect of her seeking and receiving proper relief. This thesis will critically analyse how the measures to eliminate IPV were implemented in South Africa during lockdown. The elimination of IPV is not a quick or easy task, but emphasis on prevention is of paramount importance.⁵⁷ The prevention of IPV lies with the coordinated effort of various parties to improve the status of women⁵⁸ by educational interventions directed at persons with low socioeconomic status first.⁵⁹

During lockdown, the Minister of Police stated that around 2,230 GBV cases were reported in the first week of the lockdown, a 30% increase from the same dates in 2019.⁶⁰ Data collected from support call centres provided that the government GBV and femicide command centre alone reported more than 120,000 victims in the first three weeks of lockdown.⁶¹ Furthermore, a survey by the Foundation for Human Rights reported a 54% increase in GBV during

⁵⁴*S v Baloyi and Others* (CCT29/99) [1999] ZACC 19; 2000 (1) BCLR 86 ; 2000 (2) SA 425 (CC) (3 December 1999).

⁵⁵Abdul Aziz, Z & Moussa, J (2019) pg. 13.

⁵⁶Andrews, P (2000) 'The Constitutional Court Provides Succour for Victims of Domestic Violence - *S v Baloyi*' *SAJHR* pg. 333-334.

⁵⁷Moreno, CG; Zimmerman, C; Gehring, AM; Heise, L; Amin, A; Abrahams, N; Montoya, O; Deosthali, PB; Kilonzo, N & Watts, C (2014) 'Addressing Violence Against Women: A Call to Action' *Lancet* pg. 1685.

⁵⁸Jewkes, R (2002) 'Intimate Partner Violence: Causes and Prevention' *The Lancet* pg. 1427-1428.

⁵⁹Jewkes, R (2002) pg. 1427-1428.

⁶⁰Doctors Without Borders 'South Africa: Sexual and Gender-Based Violence, a Concern During COVID-19 Lockdown' available at <https://www.msf.org.za/news-and-resources/latest-news/south-africa-sexual-and-gender-based-violence-concern-during-covid> 07 April 2020 (accessed 26 June 2021).

⁶¹Farber, T 'Shocking Stats on Gender-Based Violence During Lockdown Revealed' available at <https://www.timeslive.co.za/news/south-africa/2020-09-01-shocking-stats-on-gender-based-violence-during-lockdown-revealed/> *Times Live* 01 September 2020 (accessed 16 April 2021).

lockdown across all provinces. Caution should be taken when viewing these statistics, however underreporting occurs due to limitations on movement caused by the lockdown.⁶² A study reported that out of 5 countries where GBV was studied, South Africa noticeably stood out as one of the countries where support services for women exposed and subjected to violence were not factored into the design for control measures against the spread of COVID-19.⁶³ There have always been socioeconomic and institutional attitudes which creates barriers for women seeking justice from competent authorities, especially in South Africa, and these barriers are particularly highlighted during the COVID-19 lockdown.⁶⁴

While IPV is not an issue unique to South Africa, the COVID-19 lockdown has introduced new difficulties to an already exacerbated problem, especially in poorer areas. The lockdown was implemented as a measure to reduce the spread of the virus, but concerns arise regarding certain restrictions and its disproportionate effect on marginalised parties, such as women.⁶⁵ These effects need to be explored. GBV is a pandemic in of itself in South Africa and the COVID-19 lockdown regulations introduced aggravating and unique factors affecting the duty to protect women against violence which need to be addressed. It is important to address the needs of the vulnerable, even more so during lockdown as vulnerable people tend to bear a disproportionately higher risk of abuse.⁶⁶

Many dependant women in rural parts do not report their abusers for various reasons, including but not limited to: lack of awareness of about IPV, lack of organisational support and care, lack of knowledge or faith in the legal system, reliance on partners for financial support, and finally many abusers threaten and intimidate their victims into not reporting or withdrawing cases.⁶⁷ These reasons can mirror the reasons as to why victims do not remove themselves from their abusive environment.⁶⁸ Due to this, government needs to focus close care on rural women in

⁶²‘Gender-based Violence’ available at <https://mg.co.za/special-reports/2020-12-04-gender-based-violence/> *Mail & Guardian* 04 December 2020 (accessed 16 April 2021).

⁶³Amnesty International (2021) ‘Treated like Furniture: Gender-based Violence and COVID-19 Response in Southern Africa’ pg. 25.

⁶⁴Amnesty International (2021) pg. 33.

⁶⁵Pillay, AL & Barnes, BR (2020) ‘Psychology and COVID-19: Impacts, Themes and Way Forward’ *South African Journal of Psychology* pg. 148.

⁶⁶Arndt, C & Robinson, S ‘Who Has Been Hit Hardest by South Africa’s Lockdown? We Found Some Answers’ available at <https://theconversation.com/who-has-been-hit-hardest-by-south-africas-lockdown-we-found-some-answers-138481> *The Conversation* (accessed 27 January 2021).

⁶⁷Gordon, C (2016) ‘Intimate Partner Violence is Everyone’s Problem, but how Should We Approach it in a Clinical Setting?’ *South African Medical Journal* Vol. 106 pg. 963.

⁶⁸Gordon, C (2016) *South African Medical Journal* pg. 963.

any efforts to eliminate GBV during lockdown and beyond.⁶⁹ This is because the violence that exists in our society is deeply rooted in patriarchal norms and views regarding the position of women, particularly in rural areas, making violence, homophobia, sexism, and unequal gender relations a normal social occurrence.⁷⁰ It is evidenced that short term programs aimed at eradicating patriarchy have no effect since gender norms are already established by early adolescence. Therefore, an extended intergenerational program that aims to shape new identities for the youth needs to be implemented to strengthen the intolerance of GBV⁷¹ and break the barriers of a society that is patriarchal.

1.6. RESEARCH METHODOLOGY

This thesis will be desktop research with a collection of data from international, national, and regional legal framework. This thesis will not contain empirical study. It will be document and policy analysis.

1.7. DELIMITATION OF THE THESIS

While all forms of GBV is problematic, this thesis does not focus on same sex relationships, violence against men, children, or teenagers in relationships. While three new GBV laws were recently signed, a lot of the discussion will be related to prior to its introduction since they were not enforced during hard lockdown.

1.8. OVERVIEW OF CHAPTERS

Chapter 1: Introduction - This chapter describes and examines South Africa's due diligence to protect women and how certain factors could have violated women's constitutional rights regarding equality, human dignity, and life during the COVID-19 lockdown. Chapter 2: Due Diligence and the Protection of Women in Terms of International, Regional, and National Law During the Covid-19 Lockdown - This chapter describe the legal duties South Africa has in terms of legal international law to protect women and outlines South African legislation and case law relating to IPV. Chapter 3: South African Measures to Protect Women from Intimate

⁶⁹Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences on Her Mission to South Africa (Advance Unedited Version) [2016] Human Rights Council, 32nd Session pg. 3.

⁷⁰Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences on Her Mission to South Africa pg. 3.

⁷¹Harrison, D 'Alcohol is the Petrol on the GBV Fire' available at <https://www.dailymaverick.co.za/opinionista/2019-10-02-alcohol-is-the-petrol-on-the-gbv-fire/> Daily Maverick 02 October 2019 (accessed 01 April 2021).

Partner Violence during Lockdown - This chapter outlines how South Africa addressed IPV during the COVID-19 lockdown and the policies and measures executed to protect women from violence. Chapter 4: COVID-19 and the Due Diligence Obligation to Protect Women in South Africa - This chapter critically analyses whether South Africa is complying with its international legal obligations regarding the protection of women against IPV during the COVID-19 lockdown. Chapter 5: Conclusion and Recommendations - The final chapter identifies the conclusion on whether legal obligations were met and provides recommendations to meet legislative standards for the protection of women during national lockdown and thereafter.

1.9. CONCLUSION

This chapter provides a brief overview of the entire thesis, chapter two will now comprehensively describe due diligence and the protection of women in terms of international, regional, and national law during the COVID-19 lockdown.



CHAPTER TWO

DUE DILIGENCE AND THE PROTECTION OF WOMEN IN TERMS OF INTERNATIONAL, REGIONAL, AND NATIONAL LAW DURING THE COVID-19 LOCKDOWN

2.1. INTRODUCTION

South Africa has a tragic history and an ongoing problem of GBV against women in intimate relationships and in public spheres due to the intricacies of patriarchy.¹ Focusing on only the consequence of violence has clear flaws because the causes of violence will go ignored and this is why understanding laws and legal reforms can help to change norms.²

On the one hand, implementing laws that prohibit VAW play a crucial part in society, signifying that the prohibited action is unacceptable, and it could work to minimise the violence itself. It can help victims of violence by providing protection and support services.³ On the other hand, it needs to be acknowledged that laws are not the only social structure that can change society to eradicate GBV. Legal protection is present in most countries, but enforcement is inadequate and violence persists.⁴ While formal laws can be developed to bring about change, it is far more challenging to develop informal social norms rooted in culture that have been internalised by people; thus, implementing laws and policy does not by design create changes in culture.⁵ In order to fully address the problem of IPV, targeting it through the lens of intersectional feminism may be a powerful tool.

Despite the need for all social structure to be involved with eradicating GBV, it is necessary, as a starting point, to analyse the international, regional, and domestic legal frameworks.⁶ International conventions and declarations are vital because it has provided definitions for what constitutes GBV, which helps provide for standards globally and in national legislation. However, ratification of international treaties does not equate implementation and compliance

¹Petersen, E (2016) 'Working with Religious Leaders and Faith Communities to Advance Culturally Informed Strategies to Address Violence Against Women' *Agenda* pg. 50.

²Klugman, J (2017) pg. 3.

³Klugman, J (2017) pg. 2.

⁴Klugman, J (2017) pg. 3.

⁵Klugman, J (2017) pg. 3.

⁶Klugman, J (2017) pg. 6.

with conventions such as CEDAW; it must be determined whether international frameworks allow for sufficient investigation/communication with state parties to improve compliance.⁷

2.2. THE FEMINIST INTERPRETATION OF IPV AND THE DUE DILIGENCE STANDARD

Feminist intersectionality was originated by black feminist authors in the 1980s, who held that discriminated groups and individuals reside at the margins of society with inequitable access to resources resulting in societal inequities and social injustice. The adverse consequences on health from belonging to more than one discriminated group are multiplicative and distinctive.⁸ Intersectionality provides that the intersection of gender, race, ethnicity, and cultural differences experienced by women, are factors that exacerbate one another and turn into important measures for the social understanding of identity and marginalisation.⁹ Therefore, the collective components of gender and race/ethnicity, act as part of the multiple grounds of identities shaping the woman's experience of lockdown. It is critical to understand these different facets of marginalisation and the compounding effect it has on the experience women have of IPV and the forces working against her.¹⁰

Feminist intersectionality follows the theory that every community has distinctive characteristics. It purports that people are positioned within social structures that affect power relationships and that there are relationships between different social identities, for example, race, gender, and class, that have various negative effects on health and well-being.¹¹

Feminist intersectionality is motivated by the need for social justice and explains why people in many marginalised positions have a lack of access to resources. It works at two levels: (1) as a mechanism to critique structural oppression, and (2) as an outline to recognise the way a person's intersectional identity shape their lives. These levels operate separately but they are still connected and interrelated with one another.¹² The use of intersectionality to IPV requires: (1) analysing how structural inequalities act as a catalyst and stimulate IPV, and (2) analysing the effect of marginalised social identities on women's responses to IPV; these are related to

⁷Klugman, J (2017) pg. 6.

⁸Adams, ME & Campbell, J (2012) 'Being Undocumented & Intimate Partner Violence (IPV): Multiple Vulnerabilities Through the Lens of Feminist Intersectionality' pg. 18.

⁹Adams, ME & Campbell, J (2012) pg. 18-19.

¹⁰Adams, ME & Campbell, J (2012) pg. 18-19.

¹¹Kelly, UA (2011) 'Theories of Intimate Partner Violence: From Blaming the Victim to Acting Against Injustice Intersectionality as an Analytic Framework' *Lippincott Williams & Wilkins* pg. 43.

¹²Kelly, UA (2011) *Lippincott Williams & Wilkins* pg. 43.

the responses of relief service providers and social work organisations who work with survivors of IPV.¹³ The response to and effect of social systems (such as law enforcement, courts, child protective services, and healthcare systems) on survivors who have left their abusive environments have been stated as being cruel and intrusive. Formal systems stop women, especially those who have multiple marginalised group identities, from seeking help because their response is connected to the impact the oppressive systems have on their lives.¹⁴ For example, a mother's response to violence may be impacted by her perception of the child protective services – she may keep her abuse to herself if she fears her children will be removed from her care. Inefficient outcomes by law enforcement or courts affect how women respond, depending on if they got the assistance she required, she might stay in the abusive environment and deal with the violence as best as she can. Recognising the complex and sometimes oppressive contexts of women's responses to IPV is important when appreciating the difficulty of their responses to it.¹⁵

VAW in international law has mainly been understood through the very specific lens of gender and the heteronormative nature of patriarchy. Intersectionality presents diverse experiences of GBV and highlights how it can be distinguished regardless of differences based on race, religion, caste, class, sexual orientation, disability etc.¹⁶ Lorena Sosa observes various findings from her exchanges with survivors and service providers working with Romani women.¹⁷ She outlines how different views on gender, ethnicity, religion, and socioeconomic class affect how Romani women experience IPV. Despite having relief services available, it is uncommon for Romani women to seek help with IPV, but not all the available services make concession for these differences (or intersectionalities).¹⁸ Sosa observes that the recognition of such differences could in fact be contrary to the principle of equality within the Spanish Constitution and thus, formal equality places a barrier in the way of addressing Roman women's experience of violence.¹⁹

¹³Kelly, UA (2011) *Lippincott Williams & Wilkins* pg. 43.

¹⁴Kelly, UA (2011) *Lippincott Williams & Wilkins* pg. 43-45.

¹⁵Kelly, UA (2011) *Lippincott Williams & Wilkins* pg. 43-45.

¹⁶Atrey, S (2019) 'Intersectionality in the Human Rights Legal Framework on Violence against Women: At the Centre or the Margins' *Human Rights Quarterly* pg. 535.

¹⁷Atrey, S (2019) pg.538-539.

¹⁸Atrey, S (2019) pg.538-539.

¹⁹Atrey, S (2019) pg.538-539.

She relays her findings from an empirical study conducted from the perspective of indigenous and migrant women – where she found that even though their status made a significant difference to their experience of violence, it was disregarded as causally related to it and used to normalise or justify it; even though the state had a commitment to equality and a great conviction that domestic violence is universal and surpasses class, race, and ethnicity.²⁰ The law needs to reflect and respond to the reality of GBV, not its own version – and this can be found in black women’s contribution to intersectionality.²¹

Feminists use the due diligence principle to deliberately confront the “gendered politics of the public/private divide underlying the historical depoliticization of VAW that, until recently, had shielded the state and international human rights law from addressing it”.²² The politicisation of the private sphere to demolish the deep-rooted public/private dichotomy has been a cornerstone in the feminist endeavour to categorise VAW as a human rights concern and introduce it in the agendas of the UN, regional human rights institutions, and states. As such, the feminist approach to due diligence is intersectional, since it appreciates that women’s experiences are moulded – within and beyond the state – by intersecting inequalities that place women differently within various power hierarchies. In this way, it politicises violence perpetrated by private actors, regardless if they occur in the private sphere, in order to challenge the traditional ideas of state responsibility and human rights.²³ While IPV has been recognised and realised by various human rights bodies and treaties that require the protection of women, such as CEDAW, DEVAW, or Special Rapporteur for Violence against Women, it has been developed that gender inequality and patriarchal standpoints alone do not create IPV in a vacuum, but together with other factors – a note which has not been present in the international human rights system.²⁴

²⁰Atrey, S (2019) pg.538-539.

²¹Atrey, S (2019) pg. 539.

²²García-Del Moral, P & Dersnah, MA (2014) ‘A Feminist Challenge to the Gendered Politics of the Public/Private Divide: On Due Diligence, Domestic Violence, and Citizenship’ *Citizenship Studies* pg. 661-662.

²³García-Del Moral, P & Dersnah, MA (2014) *Citizenship Studies* pg. 661-662.

²⁴Obreja, LD (2019) ‘Human Rights Law and Intimate Partner Violence: Towards an Intersectional Development of Due Diligence Obligations’ *Nordic Journal of Human Rights* pg. 63-64.

2.3. HISTORICAL OVERVIEW OF INTERNATIONAL FRAMEWORK

Treaty law is the cornerstone of international law, and state accountability and obligation are at the foundation of treaties. Once signed, states are obligated to realise the rights within the treaties.²⁵ This section highlights the main international treaties relating to GBV.

The ICCPR²⁶ which came into effect in 1976, prohibits discrimination on the basis of sex.²⁷ Furthermore, the prohibition against inhuman or degrading treatment can be interpreted to encompass a prohibition of VAW.²⁸ CEDAW²⁹ is a massive instrument in advancing rights for women and thus far has been ratified by 189 countries including South Africa.³⁰ It instructs state parties to take all appropriate measures, including legislation, to amend or eliminate existing laws, regulations, customs and practices, which constitute discrimination against women.³¹ While CEDAW did not initially explicitly sanction VAW, subsequent recommendations delivered by the CEDAW Committee (the Committee) that presides over states' responsibility to comply with the convention, has expressly included VAW in its definition of "discrimination".³²

This is clear in the Committee's General Recommendation No. 19,³³ which defines discrimination to include "acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty". The recommendation then goes further to clarify that States can also "be responsible for private acts *if they fail to act with due diligence to prevent* violations of rights or to investigate and punish acts of violence, and for providing compensation".³⁴ This indicates that states are liable when they omit to prevent discriminatory

²⁵Klugman, J (2017) pg. 7-8.

²⁶UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, Vol. 999 (ratified 10 December 1998).

²⁷UN General Assembly, *International Covenant on Civil and Political Rights*, pg. 17 (ratified 10 December 1998).

²⁸Klugman, J (2017) pg. 7.

²⁹UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, Vol. 1249 (ratified 18 October 2005).

³⁰Nelson, S 'The U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): Issues in the U.S. Ratification Debate' available at <https://www.everycrsreport.com/reports/R40750.html> (accessed 12 December 2021).

³¹UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, pg. 2 (ratified 18 October 2005).

³²Klugman, J (2017) pg. 7-8.

³³UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence Against Women*, 1992.

³⁴UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence Against Women*, 1992 pg. 1-2.

actions and GBV against women.³⁵ The Committee defines state responsibility to address VAW as needing “appropriate and effective measures” to tackle “private acts” executed by “any person, organisation or enterprise”.³⁶

United Nations Special Rapporteur on Violence against Women, Rashida Manjoo, provides in her report on due diligence that the state does not have to blatantly cause infringements to invoke the state’s duty to respect, protect, and fulfil human rights for all. She further notes that states are to be held accountable for omissions or failure to take the necessary steps to infringe, regardless of if it was committed by the state or not.³⁷ This was referred to as a “diagonal obligation” by Jan Arno Hessbruegge, and that states need to continuously make an effort to prevent and protect persons from violations as a result of the actions of non-state parties.³⁸ Feminist discourse also provides that abuse done by the perpetrator is no less harmful than abuse committed by the state: Celina Romany explains in her article on the public/private division in international human rights, that when women in abusive relationships are deprived of recourse to the state, they are relegated by the state to rule by a private, and similarly absolute “parallel state” – the rule of the batterer. This means that when a state does not act to prevent private abuse, the effect empowers the abuser and the state cannot claim to be unbiased due to its omission.³⁹

A brief discussion on two cases decided by the Committee relating to the liability of the state for omitting to protect the women against violence by their husbands which thereafter led to the women’s death. *Goekce v. Austria*⁴⁰ and *Yildirim v. Austria*⁴¹ both surround events in which two women were murdered by their husbands after years of abuse. Despite them reporting the violence to the police and obtaining protection orders, the Austrian authorities continually

³⁵Klugman, J (2017) pg. 8.

³⁶UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against women*, 1992 24 (a) pg. 4.

³⁷Manjoo, R (2013) ‘State Responsibility to act with Due Diligence in the Elimination of Violence against Women’ *International Human Rights Law Review*.

³⁸Goldscheid, J & Liebowitz, DJ (2015) ‘Due Diligence and Gender Violence: Parsing Its Power and Its Perils’ *Cornell International Law Journal* Vol 48(2) pg. 307.

³⁹Copelon, R (2002) ‘International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Lawmaking’ *American University Journal of Gender, Social Policy & the Law*, Vol 11(2), pg. 871.

⁴⁰Report of the Comm. on the Elimination of Discrimination against Women, U.N. GAOR, 62nd Sess., Supp. No. 38U.N. Doc. A/62/38, Part III, Annex VII, at 432 (Aug. 10, 2007).

⁴¹Fatma Yildirim v Austria (Communication No. 6/2005).

failed to guarantee the women's safety. Complaints were brought to the Committee after their death by a non-government organisation on behalf of the deceased's descendants.⁴²

For the *Goekce* case, the Committee held that even though the husband had been prosecuted to the full extent of the law, Austria failed in its due diligence obligations "under articles 2(a) and (c) through (f), and Article 3 of the Convention read in conjunction with [A]rticle 1 of the Convention and General Recommendation 19...". It was held that the police were aware or should have known the victim was in significant danger; and therefore, were held responsible for neglecting to protect her. By allowing the perpetrator's rights such as the right to freedom of movement and to a fair trial to overtake the victim's right to life and to physical and mental integrity, Austrian police violated its obligations under Article 2 to end sex-based discrimination through appropriate legislation, and its Article 3 duty to guarantee women's equal access to human rights.⁴³ In the *Yildirim* case, the Committee provided that despite there being policy measures and a comprehensive legal framework addressing violence in the family, the Convention compelled state officials to actually observe their due diligence duty. The Committee held that the state officials should have known of the dangerous environment the victim faced and found Austria in breach of its due diligence obligation. These decisions are crucially relevant for states like South Africa that have a comprehensive framework addressing the problem of IPF but because of the lack of due diligence by state officials, perpetrators remain committing violent crimes without sanction.⁴⁴

Four-year periodic cycles of governments reporting to a supervisory committee at the United Nation (UN) headquarters makes room to re-count on measures employed to meet their duties under the Convention, and all feedback and comments relating thereto is posted online. This opens the floor for women's organisations and others to voice any concerns and to bring attention to any disparities between ratification and fulfilment.⁴⁵ Notably, there are many limitations to the effectiveness of CEDAW regarding GBV. To start with, CEDAW's General Recommendations are not legally binding. Additionally, ratifying members have raised over one hundred reservations to CEDAW in comparison to the Convention on the Elimination of

⁴²Qureshi, S (2013) 'The Emergence/Extension of Due Diligence Standard to Assess the State Response Towards Violence Against Women/Domestic Violence' *A Research Journal of South Asian Studies* Vol. 28(1) pg. 57-58.

⁴³*Goekce v. Austria*. Committee on the Elimination of Discrimination Against Women (CEDAW); 2007.

⁴⁴Qureshi, S (2013) *A Research Journal of South Asian Studies* Vol. 28(1) pg. 57-58.

⁴⁵Klugman, J (2017) pg. 7-8.

All Forms of Racial Discrimination, for example, which only has four reservations. Finally, there is no process of determining the legality of a reservation.⁴⁶

The Commission on Gender Equality (CGE) provided the Committee with an update on the state of South Africa's fulfilment of CEDAW since its ratification in 1995. It was held that South Africa had only submitted the first report in 1998 (three years late) covering the period of 1994-1997, and the second report – which was supposed to have been submitted in 1999 – was submitted by the Office on the Status of Women in 2009, for the period 1998-2008. There have been no other reports submitted.⁴⁷ Furthermore, South Africa neglects to engage with the Concluding Observations from the CEDAW Committee on its Initial Report tendered in 1998.⁴⁸ To conclude her last visit to South Africa in 2015, the Special Rapporteur on Violence against Women, provided in her statement that the South African society has violence inherited from apartheid that has deeply entrenched patriarchal standards of the role of women in society, making violence against them a normalised phenomenon.⁴⁹ The United Nations 2030 Agenda for Sustainable Development provides expressly in Sustainable Development Goal 5 that it is dedicated to addressing gender equality and empowering all women and girls by 2030.⁵⁰ There are indicators in place to measure progress and realisation of these goals, but these need to be interpreted within the context of its specific dynamic environment.⁵¹

To aid in the elimination of all forms of discrimination and VAW there needs to be indicators on the existence of public institutions and policies to guarantee adequate law enforcement and the successful protection of women – moving away from indicators merely stipulating the meeting of formal requirements to the means of implementation. Outcome indicators like that of the submission of reports to the CEDAW Committee assess the elimination of all acts of

⁴⁶Klugman, J (2017) pg. 8.

⁴⁷Parliamentary Monitoring Group (2010) 'South Africa's Compliance with the Convention on the Elimination of all Forms of Discrimination against Women & 1995 Beijing Platform for Action reporting requirements: Commission on Gender Equality Briefing' available at <https://pmg.org.za/committee-meeting/11736/> (accessed 07 February 2022).

⁴⁸Centre for the Study of Violence and Reconciliation 'South African Shadow Report on the Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women' pg. 10.

⁴⁹United Nations Human Rights, Office of the High Commissioner (2015) 'Special Rapporteur on Violence against Women, Its Causes and Consequences finalizes Country Visit to South Africa' available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16877&LangID=E> (accessed 13 February 2022).

⁵⁰Nhamo, G; et al. (2017) 'Women's Needs in New Global Sustainable Development Policy Agendas' *Wiley* pg. 551.

⁵¹Lee, BX; et al. (2016) 'Transforming Our World: Implementing the 2030 Agenda Through Sustainable Development Goal Indicators' *Journal of Public Health Policy* pg. 22.

discrimination against women by persons, organisations, or enterprises⁵² but these still prove to be an insufficient measure of progress since South Africa fails to engage with its duty to report. Nonetheless, indicators serve as crucial markers toward a goal and help highlight progress or failure to obtain objective ends.⁵³

The international basis for the prevention of VAW is stipulated within the 1948 Universal Declaration of Human Rights⁵⁴ (UDHR) by providing a framework of rights and principles of equality, security, liberty, integrity, and dignity for all. International declarations and resolutions are not binding like treaties are, but it does have the ability to advance international legal norms and jurisprudence.⁵⁵ Since the early 1990s, there have been great milestones relating to the protection of women against violence. Leading up to then, women's rights were barely present in the international human rights agenda as the human rights framework upheld a dichotomy between the public and private sectors. Since the human rights agenda ordinarily focused on the actions occurring within the public sector, IPV was considered as beyond its scope.⁵⁶

This changed in Vienna of 1993, where a conference was held at the United Nations World Conference on Human Rights and, for the first time, women's rights were expressly held as human rights. This set a standard in incorporating women's rights into human rights norms and practice.⁵⁷ In the same year, the General Assembly adopted DEVAW,⁵⁸ which defines violence as “any act of GBV that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or in private life,” calling on states to “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of VAW, whether those acts are perpetrated by the State or by private persons”.⁵⁹ Furthermore,

⁵²Esquivel, V (2016) ‘Power and the Sustainable Development Goals: A Feminist Analysis, Gender & Development’ pg. 21.

⁵³Lee, BX; et al. (2016) *Journal of Public Health Policy* 37.1 pg. 22.

⁵⁴UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

⁵⁵Klugman, J (2017) pg. 10.

⁵⁶Klugman, J (2017) pg. 10.

⁵⁷Klugman, J (2017) pg. 10.

⁵⁸UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104.

⁵⁹UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104, pg. 4.

Article 4 of DEVAW provides that member states prohibit VAW and cannot raise custom, tradition, or religion to evade the responsibility of eliminating such violence.⁶⁰

DEVAW was greatly shaped by CEDAW, particularly regarding its definition of VAW which presents GBV as mainly men's violence against women (and girls), and places violence in three connected sectors: in the family; in the community; by the state.⁶¹ Both CEDAW General Recommendation No. 19 and DEVAW provide that VAW is the realisation of unequal power dynamics between men and women. Most significantly, by explicitly stating that GBV occurring in the public and private sphere can constitute a human rights violation, CEDAW and DEVAW bridged a gap in international law.⁶²

There are many regional legal instruments that sanction GBV. Since there is great participation of individual countries to develop regional treaties, these conventions potentially carry importance at a national level, as well as regional monitoring and judicial bodies.⁶³ The African Charter⁶⁴ is the cornerstone of African human rights but when it comes to women's rights it leaves much to be desired. Article 18(3) is the only provision that specifically references women. Article 18(3) states, "[t]he State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions".⁶⁵ While some scholars criticise the drafters of the Article for having a vague perception of women and only mentioning them within a domestic setting, others argue that the Article cleverly integrates international declarations and conventions with women's rights, meaning that state parties to the African Charter which are not party to other international instruments have agreed to be bound by Article 18(3).⁶⁶

⁶⁰UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993 pg. 3-4.

⁶¹Mills, E; et al. (2015) 'Turning the Tide: The Role of Collective Action for Addressing Structural and Gender-based Violence in South Africa' *Institute of Development Studies* pg. 11.

⁶²Mills, E; et al. (2015) pg. 11.

⁶³Klugman, J (2017) pg. 9.

⁶⁴Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁶⁵Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) pg.5

⁶⁶Addadzi-Koom, MA (2020) *Springer* pg. 158.

The Protocol to the African Charter on Human and People's Rights, on the Rights of Women in Africa⁶⁷ (Maputo Protocol) reiterates many of the provisions of other international law instruments on women's rights, but it differentiates itself from the rest by taking into account African cultural and diverse realities, which makes it more comprehensive than CEDAW.⁶⁸ The Maputo Protocol encompasses its prohibition on GBV in women's rights to life, integrity and security of the person, and dignity. Furthermore, it establishes legal obligations for state parties. Article 1 defines VAW to include "all acts perpetrated against women".⁶⁹

While the Maputo Protocol provides extensive and progressive rights for African women, the duty to adequately ensure its realisation lies with its state parties. The duty to provide for the rights within the Maputo Protocol is on state parties to act with due diligence to promote women's rights, prevent abuse of women's right and protect women from abusers.⁷⁰ The Maputo Protocol does not explicitly mention the term 'due diligence' but as a standard it has been incorporated into the discourse on VAW especially regarding the relationship between the state and violence committed by private actors.⁷¹ Given that the due diligence principle holds a state responsible for omitting to act in respect of human rights violations perpetrated by private parties, it is not the case that every failure to act will give rise to state responsibility.⁷²

The Court of Justice of the Economic Community of West African States (ECCJ) has handed down very few judgements, with its first decision applying the Maputo Protocol only in 2017 but it has an expanding jurisprudence in dealing with women's rights issues. The case of *Mary Sunday v Federal Republic of Nigeria*⁷³ is the first ECCJ case dealing with domestic violence against women where the state party was held liable for failure to protect women victims, therefore implicitly applying the due diligence principle (even though it was not explicitly mentioned).⁷⁴ Nigeria was held responsible for violating Mary Sunday's right to effective relief

⁶⁷African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003 (ratified 17 December 2004).

⁶⁸Addadzi-Koom, MA (2020) *Springer* pg. 158.

⁶⁹African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003 (ratified 17 December 2004).

⁷⁰Addadzi-Koom, ME (2020) *Springer* pg. 161.

⁷¹Addadzi-Koom, ME (2020) *Springer* pg. 161.

⁷²Addadzi-Koom, MA (2020) *Springer* pg. 162.

⁷³*Mary Sunday vs Federal Republic of Nigeria* (ECW/CCJ/APP/26/15) [2018] ECOWASCJ 11; (17 May 2018).

⁷⁴Addadzi-Koom, MA (2020) *Springer* pg. 156-157.

under Articles 8⁷⁵ and 25⁷⁶ of the Maputo Protocol. Even though an act of violence by a state official (not acting in an official capacity) was not directly the result of actions by the state, it led to indirect liability of Nigeria because the state failed to adequately respond to the violation in the approach mandated by the Maputo Protocol. Nigeria's violation of Mary Sunday's right to access to justice and effective remedy is recognised irrespective of who caused the violence and the nature of the violence since the state refused to closely investigate and sanction the perpetrator.⁷⁷

The due diligence principle was crucial in holding Nigeria responsible since the state failed in its duty to "avoid", "protect", and "aid".⁷⁸ Meanwhile, the African Charter Court on Human and People's Rights has never handed down a judgement involving VAW.⁷⁹ Hence, at international and regional level, there are extensive preventative mechanisms in place to respect, promote, and fulfil women's rights – yet the violation of women's rights continues to be a pervasive challenge. The section below will focus on the standing of women's rights and how it is safeguarded against IPV within the South African legal framework.

2.4. SOUTH AFRICAN HUMAN RIGHTS AND LEGISLATIVE FRAMEWORK

The Constitution of South Africa provides that every individual under its jurisdiction has the right to be treated equally and not be discriminated against,⁸⁰ have a right to life,⁸¹ human dignity,⁸² bodily and psychological integrity,⁸³ freedom and security⁸⁴ which includes ones

⁷⁵African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003 Article 8: "Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure: effective access by women to judicial and legal services, including legal aid; support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid; the establishment of adequate educational and other appropriate structures with particular attention to women and to sensitise everyone to the rights of women; that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights; that women are represented equally in the judiciary and law enforcement organs; reform of existing discriminatory laws and practices in order to promote and protect the rights of women" pg. 7.

⁷⁶African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003 Article 25: "States Parties shall undertake to: provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated; ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law" pg. 14.

⁷⁷Addadzi-Koom, MA (2020) *Springer* pg. 172-173.

⁷⁸Combrinck, H (1998) *Human Rights Quarterly* pg. 668-669.

⁷⁹Klugman, J (2017) pg. 9.

⁸⁰Section 9 of the Constitution.

⁸¹Section 11 of the Constitution.

⁸²Section 10 of the Constitution.

⁸³Section 12(2) of the Constitution.

⁸⁴Section 12 of the Constitution.

right to be free from all forms of violence.⁸⁵ In terms of section 7(2) of the Constitution, these rights must be respected, protected, and promoted in accordance with the democratic values of the Constitution. Accordingly, all domestic laws must be consistent with the Constitution. Chapter 9 of the South African Constitution provides for the creation of institutions with the purpose of supporting, protecting, and promoting human rights and democracy.⁸⁶ They are the Public Protector, the South African Human Rights Commission (HRC), the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (the CRL Commission), the Commission for Gender Equality (CGE), the Auditor-General and the Electoral Commission.⁸⁷ The South African Human Rights Commission's (SAHRC) purpose is to just that by overseeing human rights in South Africa and raising public awareness through training programmes, enquiries, hearing, and legal interventions. The SAHRC investigates human rights violations which could be through mediation, litigation, or publishing a report. Every governmental department must submit an annual report stipulating the steps taken to advance in achieving the goals laid out in the Bill of Rights. This ensures all departments have a plan to develop the quality of life of citizens.⁸⁸

CGE is focused on gender related rights and abuses.⁸⁹ It analyses gender equality in both the public and private sector and is especially concerned with women's rights. It questions legislature, customs, and practices that could persecute someone on the basis of their gender and also recommends new laws, if necessary. The CGE mainly concentrates on the depiction of women in the public sphere, employment equity, and GBV. Furthermore, it investigates whether the government observes its duties in relation to its international agreements like CEDAW.⁹⁰ The SAHRC holds a greater scope for protection of human rights while the CGE specifically deals with cases related to gender equality. Both were created to promote

⁸⁵Section 12 (1) (c) of the Constitution.

⁸⁶Ahmed Kathrada Foundation (2021) 'The Equality Court Chapter 9 Institutions & The Public Protector' *Civics Academy* pg. 3&8.

⁸⁷Murray, C (2006) 'The Human Rights Commission et al: What is the Role of South Africa's Chapter 9 Institutions?' *Potchefstroom Electronic Law Journal* pg. 1.

⁸⁸Parliamentary Monitoring Group 'State Institutions which Support Constitutional Democracy' available at [https://pmg.org.za/page/state-institutions-supporting-democracy#:~:text=The%20South%20African%20Human%20Rights%20Commission%20\(SAHRC\)%20is%20responsible%20for,human%20rights%20in%20South%20Africa](https://pmg.org.za/page/state-institutions-supporting-democracy#:~:text=The%20South%20African%20Human%20Rights%20Commission%20(SAHRC)%20is%20responsible%20for,human%20rights%20in%20South%20Africa) (accessed 06 July 2022).

⁸⁹Ahmed Kathrada Foundation (2021) *Civics Academy* pg. 3&8.

⁹⁰Parliamentary Monitoring Group 'State Institutions which Support Constitutional Democracy' available at [https://pmg.org.za/page/state-institutions-supporting-democracy#:~:text=The%20South%20African%20Human%20Rights%20Commission%20\(SAHRC\)%20is%20responsible%20for,human%20rights%20in%20South%20Africa](https://pmg.org.za/page/state-institutions-supporting-democracy#:~:text=The%20South%20African%20Human%20Rights%20Commission%20(SAHRC)%20is%20responsible%20for,human%20rights%20in%20South%20Africa) (accessed 06 July 2022).

constitutional democracy as an essential component of supporting women's right to development.⁹¹

The DVA⁹² is the leading Act in providing protection for women against domestic violence and abuse within the family setting. As far as the application of the DVA goes, it provides for easier access whereby an interested third party can apply for a domestic violence interdict on behalf of the victim;⁹³ and regarding the scope of protection, it *inter alia* provides monetary compensation to a victim of violence⁹⁴ as well as removing weapons from the possession of the perpetrator.⁹⁵ It also includes police duties and the protocols when a domestic violence interdict has been breached.⁹⁶

In spite of this, the DVA is not remarkably gender specific, therefore it ignores the inequality of gender roles which, in turn, is perpetuated by police officials who are less inclined to assist in domestic disputes because they deem GBV as a private matter.⁹⁷ Furthermore, studies provide that difficulty in accessing courts and police stations (particularly in rural regions), lack of knowledge of the court process and holdups in administering domestic violence applications is because of staff shortages and/or non-existent inter-departmental structure that deters victims from receiving the best protection as required by the DVA.⁹⁸

In this regard, the case of *Carmichele v the Minister for Safety and Security*⁹⁹ is noteworthy. This case involves a woman who was brutally physically assaulted by a man who had been previously charged with indecent assault. It was held that the state and its officials have a constitutional as well as an international duty to protect and prevent VAW.¹⁰⁰ Additionally, courts are required to develop the common law to reflect the Constitutional fundamental values. Finally, it provides a legal framework to assist the state in doing more to protect women from

⁹¹Ntlama, N & Stevens, C (2016) 'An Overview of South Africa's Institutional Framework in Promoting Women's Right to Development' *Law, Democracy & Development* pg. 46.

⁹²Domestic Violence Act 118 of 1998.

⁹³Section 4(3) of the DVA.

⁹⁴Section 7(3) and (4) of the DVA.

⁹⁵Section 7(2) of the DVA.

⁹⁶Section 8 of the DVA.

⁹⁷Matadi, MT & Calvino, LR (2021) 'Evaluating the Legislative Framework in Curtailing the GBV Epidemic: A Comparative Analysis of South Africa and the DRC' pg. 8.

⁹⁸Matadi, MT & Calvino, LR (2021) pg. 8.

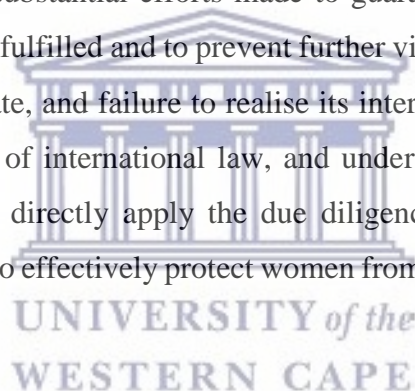
⁹⁹*Carmichele v Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC).

¹⁰⁰*Carmichele v Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC).

violence.¹⁰¹ While the case of *K v Minister of Safety and Security*¹⁰² (where three uniformed police officers raped the applicant) does not relate to IPV, it does strengthen the jurisprudence around police responsibility to protect women against violence. The court provided that it is the duty of every police officer to ensure the safety and security of the public and to prevent crime, a constitutional duty¹⁰³ that is affirmed by the Police Act.¹⁰⁴

Three amendment Acts have been passed by South Africa's Parliament which were vehemently supported by President Cyril Ramaphosa. The Acts have been enacted in response to the increased levels of GBV and femicide. The GBV Acts are the Criminal Law (Sexual Offences and Related Matters) Amendment Act,¹⁰⁵ the Criminal and Related Matters Amendment Act,¹⁰⁶ and the Domestic Violence Amendment Act.¹⁰⁷

South Africa's international legal duties require the state to not only refrain from committing human rights infringements, but also taking affirmative action to protect persons from private violations. There needs to be substantial efforts made to guarantee the state duty to protect women from violence has been fulfilled and to prevent further violence from occurring. Where there is failure to act by the state, and failure to realise its international legal obligations, the courts should take cognizance of international law, and under the authority of *Carmichele*, develop the common law and directly apply the due diligence principle. Since the South African government has failed to effectively protect women from IPV, recourse could be found in this manner.¹⁰⁸



The promulgation and the provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act¹⁰⁹ (SOA) have developed the court processes, laws of evidence, and procedures relating to cases that involve sexual violence which include provisions describing the services addressing the specific needs of survivors of sexual violence¹¹⁰ - such as sexual

¹⁰¹Di Silvio, L (2011) 'Correcting Corrective Rape: Carmichele and Developing South Africa's Affirmative Obligations to Prevent Violence against Women' *Georgetown Law Journal* pg. 1474.

¹⁰²*K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

¹⁰³Section 205(3) of the Constitution.

¹⁰⁴ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para 18 pg. 13.

¹⁰⁵The Criminal Law (Sexual Offences and Related Matters) Amendment Act 13 of 2021.

¹⁰⁶The Criminal and Related Matters Amendment Act 12 of 2021.

¹⁰⁷The Domestic Violence Amendment Act 14 of 2021.

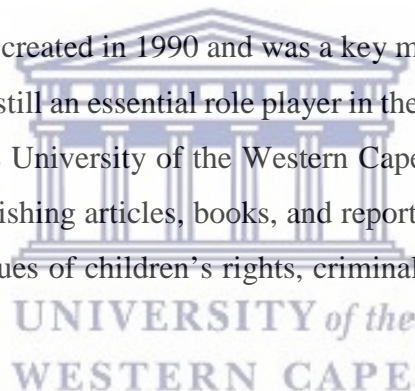
¹⁰⁸Di Silvio, L (2011) pg. 1511-1512.

¹⁰⁹Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 Of 2007.

¹¹⁰Chapter 5 of the SOA.

offences courts, victim support rooms, and care centres.¹¹¹ The Sexual Offences Court (SOC) was first created in 1993 in Cape Town, followed by many others being established all over the Western Cape and in other provinces as well. However, since the SOCs were not formed as a result of legislative authority, and even despite its widespread success, no other SOCs were allowed to be established.¹¹² The SOC plan had gone under revision in 1997 and was overall found to be successful in reducing victim trauma and improving reporting and conviction rates. Since then, the Department of Justice, through the National Prosecuting Authority, drew up a blueprint whereby South Africa could start creating SOCs all over the country, especially in areas that have high sexual violence rates.¹¹³ In the beginning, the courts held a conviction rate of over 80 percent within a year, however there various elements which ultimately led to its downfall, such as: “a lack of a specific legal framework to establish these courts; a lack of a dedicated budget; poor visibility of these courts in remote areas; restricted space capacity in courts; a lack of training of court personnel; and a lack of a monitoring and evaluation mechanism developed specifically for the management of these courts”.¹¹⁴

The Dullah Omar Institute was created in 1990 and was a key member in the negotiations that led to the fall of apartheid. It is still an essential role player in the development of human rights policies and operates under the University of the Western Cape’s Faculty of Law. The work the Institute does includes publishing articles, books, and reports, and holding workshops and conferences and focuses on issues of children’s rights, criminal justice reform, and women’s rights.¹¹⁵



Even though there is progressive and extensive legislation addressing GBV as required by international standards, South Africa still faces the great challenge of implementing it, and this chapter shows that IPV is of particular concern especially within the context of COVID-19.¹¹⁶ Therefore, the lack of effective implementation and enforcement thereof by the South African criminal justice system are failing the survivors of violence. Despite GBV being internationally regarded as a cruel violation of human rights and it was included as a goal by the UN to

¹¹¹Chapter 7 part 3 of the SOA.

¹¹²Chinnian, K & Petersen, A (2020) *Acta Juridica* pg. 142.

¹¹³Chinnian, K & Petersen, A (2020) *Acta Juridica* pg. 151.

¹¹⁴Chinnian, K & Petersen, A (2020) *Acta Juridica* pg. 151.

¹¹⁵Human Rights Careers ‘5 Human Rights Organisations in South Africa’ available at <https://www.humanrightscareers.com/magazine/human-rights-organisations-in-south-africa/> (accessed 06 July 2022).

¹¹⁶Matadi, MT & Calvino, LR (2021) pg. 1-2.

eliminate all forms of VAW (and children) in the Sustainable Development Goals 2030, GBV cases are still high.¹¹⁷

2.5. CONCLUSION

Thus, this chapter shows that despite a broad and thorough legal framework in place in South Africa to eliminate GBV, it falls short in implementation and enforcement of the protection of women even before and during the COVID-19 lockdown.¹¹⁸ Chapter 3 will focus on the full analysis of the South African human rights and legislation framework in respect to GBV and whether it is subscribing adequately to its due diligence during COVID-19.



¹¹⁷Matadi, MT & Calvino, LR (2021) pg. 1-2.

¹¹⁸Matadi, MT & Calvino, LR (2021) pg. 22.

CHAPTER THREE

SOUTH AFRICAN MEASURES TO PROTECT WOMEN FROM INTIMATE PARTNER VIOLENCE DURING LOCKDOWN

3.1. INTRODUCTION

Violence has had a place in South African history for many decades, grounded within historical apartheid laws and reinforced by great inequality, poverty, racism, unequal gender power relations, and hostility to sexual and gender diversity.¹ This has led to deep-rooted shared trauma manifesting throughout all social spheres as extreme crime rates. Furthermore, apartheid laws affected family structures to such an extent that if men were unable to maintain masculine superiority, it would more likely result in them using violence to carry out their “power”. Essentially, GBV became a part of the social structures that allowed the use of violence to maintain the apartheid regime.² The advent of democracy in South Africa caused a drastic and swift change in norms and identities.³

3.1.1. CONTEXTUALISING INTIMATE PARTNER VIOLENCE IN POST-APARTHEID SOUTH AFRICA

More than two and a half decades later, South Africa is still in constant pursuit of the full realisation of human rights as mandated by the Constitution, through the means of establishing norms, ethos, and standards.⁴ However, South Africa remains to have one of the highest rates of VAW in the world for a country not at war. It is caused by the structures of patriarchy that are familiar and universal but formed against the unique backdrop of South Africa’s specific history.⁵

The culture of violence created by the apartheid government was met with an equally violent opposition movement that fostered “tough, aggressive, brutal, and competitive masculinity”.⁶

¹Republic of South Africa *National Strategic Plan on Gender-Based Violence & Femicide Human Dignity and Healing, Safety, Freedom & Equality in our Lifetime* (2020) pg. 26.

²Republic of South Africa *National Strategic Plan on Gender-Based Violence & Femicide Human Dignity and Healing, Safety, Freedom & Equality in our Lifetime* (2020) pg. 26.

³Sideris, T (2013) ‘Intimate Partner Violence in Post-Apartheid South Africa: Psychoanalytic Insights and Dilemmas’ *Research Gate* pg. 4.

⁴Ntlama, N (2020) ‘Gender-Based Violence Ignites the Re-Emergence of Public Opinion on the Exercise of Judicial Authority’ *De Jure Law Journal* pg. 287.

⁵Tanzer, Z (2015) ‘Violence Against Women in Post-Apartheid South Africa – Still a Long Road to Justice’ *Violence Against Women Series* pg. 7.

⁶Tanzer, Z (2015) *Violence Against Women Series* pg. 7.

The socio-economic aftermath of apartheid caused massive wealth, infrastructural, and living inequities, which combined, continue to greatly disadvantage black women today.⁷ Preventative measures need to consider that women in poor communities, particularly black women, are at a higher risk of being abused since support services are more likely to be missing. However, the depth of patriarchy has roots everywhere and all women are subject to its violent effects.⁸ The measure of violence associated with South African VAW has been compared to the violence committed in armed conflict countries. The state even provided in a report to CEDAW that “despite concerted efforts on policy, legislative and programmatic levels, together with numerous awareness campaigns and consistent media focus”, the rate of VAW is not desisting.⁹ It is necessary to note that the intention is not to represent South Africa as a country of chaos, nor to depict women as helpless victims but to illustrate a true form picture of the pervasive VAW and the effect that such violence has on the capacity of women to enjoy the benefits of women’s rights protection since the democratic order.¹⁰

Post-apartheid South Africa has attempted to redress many of its gender injustices and inequalities through the means of introducing laws, programs, policies, and institutions such as the Commission for Gender Equality.¹¹ The Global Gender Gap Index 2021 ranks South Africa 18th out of 153 countries,¹² meaning that there has been great gender-empowerments leaps, more so than many developed countries. Regardless, the challenge of inequality is still highly prevalent in both public and private spaces and even though the Constitution is one of the most progressive and comprehensive in terms of gender equality, South Africa has among the highest prevalence rates of IPV in the world.¹³ Studies show that between 20% to 50% of women have reported to have experienced IPV.¹⁴

⁷Tanzer, Z (2015) *Violence Against Women Series* pg. 7.

⁸Andrews, P (1999) ‘Violence Against Women in South Africa: The Role of Culture and the Limitations of the Law’ *Temple Political & Civil Rights Law Review* pg. 430.

⁹Tanzer, Z (2015) *Violence Against Women Series* pg. 10.

¹⁰Andrews, P (1999) *Temple Political & Civil Rights Law Review* pg. 428.

¹¹Shibambu, N ‘The Scourge of Gender-Based Violence in South Africa’ available at <https://www.globalsistersreport.org/news/social-justice/column/scourge-gender-based-violence-south-africa> *Global Sisters Report* 08 December 2020 (accessed 09 June 2022).

¹²World Economic Forum (2021) ‘Global Gender Gap Report’ pg. 10.

¹³Shibambu, N *Global Sisters Report* 08 December 2020.

¹⁴Sere, Y; Roman, NV & Ruiters, RA (2021) ‘Coping with the Experiences of Intimate Partner Violence Among South African Women: Systematic Review and Meta-Synthesis’ *Frontiers in Psychiatry* pg. 2.

IPV is the second highest burden of disease after HIV/AIDS in South Africa.¹⁵ South African research provides that women with abusive partners are at a higher risk of contracting HIV because their abusers are more likely to force them to engage in HIV risk behaviours. Further research by Jewkes et al. provide evidence of an important link between IPV and risk of HIV infection in young South African women.¹⁶ It is unlikely that survivors get tested for HIV or seek medical help, in fear that their partner resorts to violence or abandons them if they are in fact HIV-positive.¹⁷ South Africa has the fourth highest interpersonal-violence death rate out of the 183 countries listed by the WHO in 2016, and in 2019-2020 there was a total of 2 695 women murdered in South Africa.¹⁸ Furthermore, statistics provide that during the period of October to December 2021, 902 women were murdered – 232 of these being related to domestic violence.¹⁹ Prior to the pandemic, studies showed that South African women are five times more likely than the global average to be murdered because of their gender, having overcrowded homes, drug use, and limited access to relief services and community support as aggravating conditions.²⁰ CEDAW also reported that many did not receive the protection orders they requested. Accordingly, they provide that out of 143,824 applications for protection orders in 2018-2019, only 22,211 were awarded – with many of the protection orders merely directing the abuser to sleep in another room but in the same residence.²¹

The National Strategic Plan on Gender-Based Violence and Femicide and the White Paper on Safety and Security has recently restated how crucial it is to prevent VAW. However, even as the GBV problem worsens, the South African state seemingly refuses to give the proper support and attention to resolve it. With focused effort, it is not an issue that cannot be improved.²² The South African economy perpetuates racialised inequality and punishing the poor for living in

¹⁵Sere, Y; Roman, NV & Ruiter, RA (2021) *Frontiers in Psychiatry* pg. 2.

¹⁶Norman, R; Schneider, M; Bradshaw, D; Jewkes, R; Abrahams, N; Matzopoulos, R & Vos, T (2010) 'Interpersonal Violence: An Important Risk Factor for Disease and Injury in South Africa' *Population Health Metrics* pg. 2.

¹⁷Gordan, C (2016) *South African Medical Journal* pg. 962.

¹⁸'Facts and Figures: Global Domestic Violence Numbers' available at <https://mg.co.za/news/2021-06-22-facts-and-figures-global-domestic-violence-numbers/> *Mail&Guardian* 22 June 2021 (accessed 18 April 2022).

¹⁹Nyoka, N 'Talking About Gender-Based Violence is Not Enough' available at <https://www.newframe.com/talking-about-gender-based-violence-is-not-enough/> *New Frame* 25 February 2022 (accessed 18 April 2022).

²⁰Parry, BR (2020) 'The Shadow Pandemic: Inequitable Gendered Impacts of COVID-19 in South Africa' *Wiley* pg. 802.

²¹United Nations 'South Africa: Failure to tackle Domestic Violence a Violation of Women's Rights – UN Experts' available at <https://www.ohchr.org/en/press-releases/2021/05/south-africa-failure-tackle-domestic-violence-violation-womens-rights-un> *United Nations Human Rights* 17 May 2021 (accessed 23 June 2022).

²²Amisi, MM; Bridger, E & Vanyoro, K 'Calling it a Crisis Won't Prevent Violence Against Women' available at <https://issafrica.org/iss-today/calling-it-a-crisis-wont-prevent-violence-against-women> *Institute for Security Studies* 19 July 2022 (accessed 24 July 2022).

poverty – of which one of the consequences is private violence. There are billions of rands spent on bailing out bankrupt state-owned institutions when those funds could be put to better use by supporting community-based primary prevention programmes or shelters that lessen vulnerability to violent behaviour.²³ With the combination of the COVID-19 pandemic, its lockdown policies, and the rate of VAW, it highlighted pre-existing flaws and inadequacies in the redressing and prevention of VAW as a human rights violation that had not been properly dealt with by South Africa even before the beginning of the pandemic.²⁴ The lack of accountability in South Africa, the ineffective use of resources to prevent GBV, and the inadequate response of political leaders are critical factors that have all resulted in the on-going crisis.²⁵

3.2. THE SOUTH AFRICAN RESPONSE TO COVID-19

Although the South African government has taken certain substantial steps in protecting women, many survivors of violence have been left more vulnerable within the context of COVID-19; and despite the South African government recognising the worryingly high rates of GBV both before and after the commencement of the pandemic and the state's undertakings to address GBV and IPV, there has been continuous failure to provide adequate funding for shelters and other services since.²⁶ When COVID-19 led to a complete lockdown, it heightened the rise in IPV and femicide, and the National Education, Health, and Allied Workers' Union recorded a 500% increase in GBV during the COVID-19 lockdown in South Africa.²⁷ The lockdown had restricted physical contact, which limits the perpetrators of GBV to intimate partners and family members only, leading to the inevitable rise of IPV.²⁸

To combat the spread and to contain the outbreak of COVID-19, the South African government implemented various measures such as closing schools, enforcing remote working guidelines,

²³Amisi, MM; Bridger, E & Vanyoro, K *Institute for Security Studies* 19 July 2022.

²⁴Simonović, D (2020) 'The Special Rapporteur on Violence Against Women, Its Causes and Consequences Intersection Between the Coronavirus Disease (COVID 19) Pandemic and the Pandemic of Gender-Based Violence Against Women, with a Focus on Domestic Violence and the "Peace in the Home" Initiative' *United Nations General Assembly Resolution 73/148* pg. 4.

²⁵Republic of South Africa *National Strategic Plan on Gender-Based Violence & Femicide Human Dignity and Healing, Safety, Freedom & Equality in our Lifetime* (2020) pg. 34.

²⁶Human Rights Watch (2021) 'South Africa: Broken Promises to Aid Gender-Based Violence Survivors' available at <https://www.hrw.org/news/2021/11/24/south-africa-broken-promises-aid-gender-based-violence-survivors> (accessed 20 March 2022).

²⁷Ofusori, L 'COVID-19 and Gender-Based Violence in South Africa: How Can the Scourge Be Curbed?' available at <https://ddp.org.za/blog/2020/08/03/covid-19-and-gender-based-violence-in-south-africa-how-can-the-scourge-be-curbed/> *Democracy Development Program* 03 August 2020 (accessed 28 March 2022).

²⁸Ofusori, L *Democracy Development Program* 03 August 2020.

banning international and national travelling, and the ban on the sale of alcohol. In the beginning of lockdown, it appeared that the amplified awareness regarding domestic violence in South Africa had a positive impact on the domestic violence cases in some provinces.²⁹ There was a reported decline in the domestic violence cases, the South African Police Minister stated a “decrease by 69.4% from 9 990 cases between 29 March and 22 April last year to 3 061 since the lockdown until 20 April 2020, meaning a difference of 6 929”.³⁰ This held true in trauma units in hospitals, with the Medical Research Council reporting a 66% decrease in trauma cases at the beginning of the lockdown (including domestic violence cases). The Western Cape Women’s Shelter Movement provides that there had been no increase in calls for shelter services, and the Western Cape Social Development Department’s Victim Empowerment Programme, which collects daily updates on available beds in shelters, even states that there are a number of available beds.³¹ Despite the relative state of domestic violence and IPV, it is crucial to explore what had been the reality of women’s experience in seeking help during lockdown and why, unlike so many other countries, had South Africa not reported the same increase in domestic violence.³²

On the one hand, this could be due to the Department of Social Development working together with non-governmental organisations (NGOs) running shelters to guarantee their services are continuously available to victims of domestic violence or the ban on alcohol which showed a reduced rate of severity of domestic violence; or, on the other hand, it could be the rise in police brutality and the hard lockdown that kept women at home – unable to leave without a valid reason to report their cases or go to court to obtain orders under the Domestic Violence Act because they were afraid of being confronted by police or scared of contracting COVID-19.³³

The Independent Police Investigative Directorate reported a 32% increase in complaints against the police in the first 41 days of lockdown and 10 deaths because of police action. These figures do not represent an active environment that accommodates the reporting of IPV. It also suggests

²⁹Clark, B (2020) ‘Gender-based Violence and COVID-19 in South Africa: The Clash of Pandemics’ *LexisNexis* pg. 6.

³⁰Gould, C ‘Why is South Africa not Showing the Rise in Domestic Violence Cases Reported elsewhere in the World?’ available at <https://issafrica.org/iss-today/gender-based-violence-during-lockdown-looking-for-answers> *Institute for Security Studies* 11 May 2020 (accessed 22 June 2022).

³¹Gould, C *Institute for Security Studies* 11 May 2020.

³²Clark, B (2020) *LexisNexis* pg. 6.

³³Clark, B (2020) *LexisNexis* pg. 6.

that the police were primarily focused on enforcing lockdown regulations that their other obligations regarding the protection of women were not prioritised.³⁴

Since the onset of the enactment of pandemic control measures, IPV rates have greatly escalated worldwide and even though there are not many immediately accessible administrative and reporting data in South Africa, various newspapers and NGOs had reported a rise in GBV cases.³⁵ The head of SAPS issued a media statement related to the decline in general violent crimes but noted it was not the same for GBV, which accumulating more than 2300 calls (received through the GBV Command Centre, a National, 24hr/7days-a-week Call Centre facility, operating under The Department of Social Development) within the first 7 days of lockdown. The report stated that the calls coming in from the first 90 days of the year (1 January– 31 March 2020) amounted to 177 calls per day, indicating an increase in women seeking help in relation to GBV occurring in lockdown.³⁶

In February 2020 – just prior to the declaration of a National State of Disaster due to COVID-19 – while delivering the State of the Nation Address, President Ramaphosa stated that over the previous six months, the nation had banded together across communities to end the pandemic of VAW.³⁷ In that time, more than a hundred frontier domestic abuse foundations had received government subsidies, leading to a R1.6-billion Emergency Response Action Plan on Gender-Based Violence and Femicide (ERAP), and a report regarding this was published in April 2020. ERAP was primarily meant to provide access to recourse for survivors and victims, as well as host prevention drives to develop and change attitudes, it involved strengthening the criminal justice procedures, and focused on creating economic prospects for women vulnerable to abuse – but little to no funding has been afforded to civil society bodies to employ the ERAP where needed.³⁸

The Gender-Based Violence Command Centre was established to work under the Department of Social Development and is a national Call Centre trauma counselling service that is

³⁴Vetten, L (2021) 'The Impact of the Covid-19 Lockdown on Domestic Violence in South Africa: What Do We Know?' *Heinrich Böll Stiftung* pg. 9.

³⁵Abrahams, N & Dekel, B (2021) '“I will rather be killed by corona than by him. . .”: Experiences of Abused Women Seeking Shelter During South Africa's COVID-19 Lockdown' *Gender and Health Research Unit, The South African Medical Research Council* pg. 2

³⁶Abrahams, N & Dekel, B (2021) *Gender and Health Research Unit, The South African Medical Research Council* pg. 2

³⁷Clark, B (2020) pg. 7-8.

³⁸Clark, B (2020) pg. 7-8.

operational 24/7. Additionally, the Department of Social Development introduced a National Emergency Response Team to lead in a national rapid response measure to provide psychosocial aid after the event of trauma. Furthermore, the National Prosecuting Authority (NPA) worked in partnership with the Department of Social Development, the Department of Justice and Constitutional Development, the Department of Health, and the South African Police Service, to create a national anti-rape policy to assist in eliminating the problem. The state provides a 24/7 relief service through the Vodacom Foundation Gender-Based Violence Command Centre.³⁹ This service offers survivors help from professional social workers who provide counselling; there is also geo-location technology which can be used to alert the police of any danger. The limitations of using technology in this context is that many women in townships and informal settlements do not have access to it. The Federation of Unions of South Africa and the International Commission of Jurists requested that the state provide more mobile pharmaceutical and counselling clinics to assist GBV survivors, particularly focusing on townships and informal settlements during the pandemic but there are no records of this taking place.⁴⁰

Thuthuzela Care Centres (TCC) are there to manage the extreme rate of sexual violence against women by offering professional medical care, therapy, and access to legal aid to prevent secondary victimisation. The TCC are designed to advance the course of reporting and prosecuting of abuse within a safe environment inside hospitals so that there is immediate medical intervention and evidence can be collected. Organisations like the National Shelter Movement, Rape Crisis, and more, planned and assembled sites where women could report violence physically, online, and telephonically, and receive counselling at state hospitals which were open during lockdown – all services were widely publicised but none faced the surge in cases that had been expected.⁴¹

South African police released data which corroborated the decrease in reported cases of domestic violence, hospital trauma units followed a similar trend, the Western Cape Women's Shelter Movement similarly stated that there had been no increase in demands for shelter facilities during the lockdown.⁴² However, there had been reports of sexual abuse against

³⁹Gutura, P & Nunlall, R (2020) 'Gender-Based Violence Amid the Covid-19 Pandemic: A Critical Reflection on the Global Response' *African Journal of Criminology & Victimology* pg. 117.

⁴⁰Gutura, P & Nunlall, R (2020) *African Journal of Criminology & Victimology* pg. 117.

⁴¹Clark, B (2020) pg. 7-8.

⁴²Clark, B (2020) pg. 7-8.

women in the temporary shelters for homeless people that had been established for COVID-19 relief.⁴³ Nevertheless, shelter services in South Africa have its own limitations; the lack of funding negatively affects the functioning of many shelters, leaving the organisations under considerable stress in an exceptionally challenging time during lockdown.⁴⁴ Relief service providers have a vital role in addressing safety concerns and providing support for survivors who seek help, such as assessing factors and developing safety plans assist survivors in isolation. Normal safety plans would include information on emergency contacts of the survivor, the safest rooms in the house, and where personal items should be kept in the case of a quick escape. With COVID-19, it created new challenges for safety planning since risk assessments could not be conducted with the abuser still home.⁴⁵ For example, abusers practiced coercive control as a means of abuse. This involves behaviour from the perpetrator where he will isolate, intimidate, use controlling tactics and violence against his partner. During the COVID-19 lockdown, coercive control was more challenging to identify because many abusers had the ability to control and restrict their partner's communication with any support services or family and friends.⁴⁶

On 28 January 2022, President Cyril Ramaphosa signed three new GBV bills, one of which with the purpose of strengthening the legislation opposing the relevant persons be released into civil society, namely the Criminal and Related Matters Amendment Act.⁴⁷ The law further restricts bail and minimum sentencing provisions in the context of GBV. This could bring respite to survivors who are at risk of re-victimisation if the perpetrator is released on bail and could prevent a repeat of circumstances like those in the *Carmichele* case.⁴⁸

The amendment of the DVA addresses practical challenges, gaps and inconsistencies which have manifested since its introduction. The amended legislation includes new definitions as well as introduces online applications for protection order against acts of domestic violence

⁴³Uzobo, E & Ayinmoro, AD (2021) 'Trapped Between Two Pandemics: Domestic Violence Cases Under COVID-19 Pandemic Lockdown: A Scoping Review' *International Quarterly of Community Health Education* pg. 6.

⁴⁴Gutura, P & Nunlall, R (2020) *African Journal of Criminology & Victimology* pg. 116-117.

⁴⁵Aujla, W; Slakoff, DC & PenzeyMoog, E (2020) 'The Role of Service Providers, Technology, and Mass Media When Home Isn't Safe for Intimate Partner Violence Victims: Best Practices and Recommendations in the Era of COVID-19 and Beyond' *Archives of Sexual Behaviour* pg. 2782.

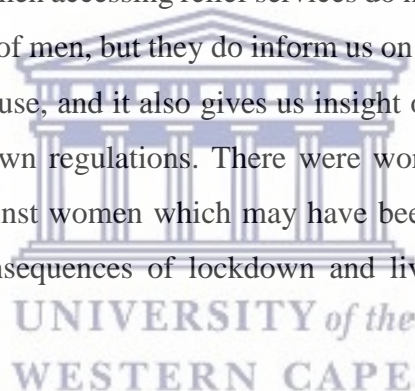
⁴⁶Aujla, W; Slakoff, DC & PenzeyMoog, E (2020) *Archives of Sexual Behaviour* pg. 2781.

⁴⁷Criminal and Related Matters Amendment Act 12 of 2021.

⁴⁸'Legislative Change on Gender Based Violence and Femicide' available at <https://www.scalabrini.org.za/legislative-change-on-gender-based-violence-and-femicide/> Scalabrini Centre of Cape Town 16 March 2022 (25 October 2022).

and imposes obligations on functionaries in the Departments of Health and Social Development to provide certain services to victims of domestic violence.⁴⁹ Furthermore, the DVA amendment introduces online applications for protection order against acts of domestic violence. This allows survivors to apply for protection orders remotely, which is important when the survivor's freedom is restricted by the abuser. In an effort to digitise communication, the DVA amendment introduces a provision that requires electronic communications service providers to furnish particulars to court in specified circumstances.⁵⁰

Furthermore, the National Prosecution Authority instructed the Directors of Public Prosecution to reject bail as far as possible where the accused is charged with an offence that falls under the umbrella of GBV.⁵¹ During March to April 2020, the amount of domestic violence incidences reported to the South African police showed a 69.4% decrease, which could lead one to believe that unlike many other countries, South Africa and its COVID-19 pandemic control measures assisted in reducing domestic violence. However, police and call centre statistics and the number of women accessing relief services do not reflect the reality of women suffering violence at the hands of men, but they do inform us on who was able to contact relief service providers and report abuse, and it also gives us insight on whether it was possible for women to do so under lockdown regulations. There were worldwide recorded increases in reported cases of violence against women which may have been affected by the high stress, fear, and pressures of the consequences of lockdown and living without escape of one's abuser.⁵²



These are struggles that many, if not the majority, of South African women experience. It might even be *expected* that the police, NGOs, and shelters report a decrease in the influx of domestic violence cases during lockdown – women confined with their abusers could be unable to find a safe time or place or lack the resources to make contact, they might not have any hope that

⁴⁹Worwood, F 'The Gender Based Violence Bills and Their Objectives to Curb Gender Based Violence in South Africa' available at <https://www.chmlegal.co.za/gender-based-violence-bills-and-their-objectives-curb-gender-based-violence-south-africa> Cowan-Harper-Madikizela Legal 14 February 2022 (accessed 25 October 2022).

⁵⁰Singo, D 'Proposed Amendments to the Domestic Violence Act' available at <https://www.werksmans.com/legal-updates-and-opinions/proposed-amendments-to-the-domestic-violence-act/> Werksmans Attorneys 4 November 2020 (accessed 25 October 2022).

⁵¹Clark, B (2020) pg. 7-8.

⁵²Dartnell, E 'Domestic Violence During COVID-19: Are We Asking the Right Questions?' available at <https://www.saferspaces.org.za/blog/entry/domestic-violence-during-covid-19-are-we-asking-the-right-questions> SaferSpaces 03 July 2020 (accessed 18 April 2022).

they would receive help if needed, and they may not know who to contact.⁵³ For example, many women living with HIV experience IPV and since the COVID-19 lockdown restricted their movement, it could have also affected their safety.⁵⁴ Older women of colour living with HIV may remember how their movement was restricted and brutally enforced by law enforcement during apartheid, and even though the COVID-19 restrictions applied to everyone, the trauma of reliving the past and their negative connections to lockdown could lead them to avoid travelling and remain in abusive environments.⁵⁵ By June 2020, labour unions also raised concerns about the amount of GBV related calls they received and at the same time South Africa's first Gender-Based Violence and Femicide National Strategic Plan launched.⁵⁶ At this point, 21 women had been murdered by intimate partners – one of which was the tragic murder of Tshegofatso Pule, an eight months pregnant 28 year old woman who had gone missing on 4 June 2020 and was found on 8 June 2020, stabbed and hanging from a tree in Johannesburg.⁵⁷

The South African Minister of Police's regard for IPV reflects why the government is so slow to assist in the fight against GBV and acknowledge the dire state of women who are exposed to IPV as a priority requiring essential services. This was brought to public notice after a man murdered his wife and daughter Altecia and Rayneceia Kortje on 19 June 2020 after the police had failed to provide them with a protection order one week prior. Reports provide that Altecia and her daughter sought a protection order because they feared for their lives and the magistrates' court denied them the order, saying they should come back once the COVID-19 regulations had been lifted.⁵⁸

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Police Minister, Bheki Cele, said on 27 July 2020 during a radio interview:

Society needs to rise on this one [GBV]. I can assure you most women that die, don't die on the first attempt, they die on the second or third attempt. Even [Tshegofatso] Pule died on the second attempt. So, somebody somewhere must ring the bell, a brother, a sister, a friend to say something bad is coming.⁵⁹

⁵³Dartnell, E *SaferSpaces* 03 July 2020.

⁵⁴Joska, JA; et al. (2020) 'COVID-19: Increased Risk to the Mental Health and Safety of Women Living with HIV in South Africa' *Springer AIDS and Behaviour* pg. 2.

⁵⁵Joska, JA; et al. (2020) *Springer AIDS and Behaviour* pg. 1.

⁵⁶Amnesty International (2021) 'Treated Like Furniture' Gender-Based Violence and COVID-19 Response in Southern Africa' *Amnesty International* pg. 14.

⁵⁷Amnesty International 'Southern Africa: Homes Become Dangerous Place for Women and Girls During COVID-19 Lockdown' available at <https://www.amnesty.org/en/latest/press-release/2021/02/southern-africa-homes-become-dangerous-place-for-women-and-girls-during-covid19-lockdown/> 09 February 2021 (accessed 14 July 2022).

⁵⁸Amnesty International (2021) *Amnesty International* pg. 26.

⁵⁹Amnesty International (2021) *Amnesty International* pg. 26.

The next day he reiterated his statement on a local television channel:

The statistics tell me that in the previous year, 30,000 women were raped in the home and places where they are supposed to be safe. Tell me, what must the police do if you are raped by your own husband or boyfriend, an uncle? The core issue is a societal problem.⁶⁰

Cele placed the blame of GBV and IPV on family and friends, implying that society – not the police – should be held primarily accountable for protecting women against violence. His words are the result of systematic and institutional conditions within which VAW is not taken seriously in South Africa.⁶¹

Then, in September 2020, the state declared GBV and femicide a national crisis after women had protested their frustration regarding the need for change within the country.⁶² Survivors of violence experience various obstacles in accessing justice, such as the lack of trust in law enforcement and the criminal justice system. They suffer secondary trauma at the hands of police and healthcare services when they attempt to report IPV cases. This was highlighted during lockdown, igniting public outrage at the governmental failure to provide justice for women. The Minister of Justice and Constitutional Development admitted that there were weaknesses in the system that often failed victims of GBV.⁶³ Survivors blame the state for the impunity abusers appear to have and the rise in IPV cases. One woman provided: “The system is failing victims which is why most people who have been through this do [not] speak out, they are too scared”.⁶⁴

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3.2.1. FACTORS THAT AFFECTED IPV DURING LOCKDOWN IN SOUTH AFRICA

The rise in IPV can be attributed to the combination of various issues: being forced to remain with an abuser during lockdown, feelings of fear, anxiety, and stress that comes with loss of income, and a survivor of violence being isolated from peer support systems and relief services, a common abuse device which became easier for an abuser to exercise during lockdown with their compounded power over the survivor’s actions.⁶⁵ Professor of Law Michelle Madden Dempsey says that domestic violence and its components can be composed of three interrelated

⁶⁰Amnesty International (2021) *Amnesty International* pg. 26.

⁶¹Amnesty International (2021) *Amnesty International* pg. 26.

⁶²Uzobo, E & Ayinmoro, AD (2021) *International Quarterly of Community Health Education* pg. 6.

⁶³Amnesty International 09 February 2021.

⁶⁴Amnesty International (2021) *Amnesty International* pg. 27.

⁶⁵Weiner, J ‘COVID-19 and Domestic Violence in South Africa’ available at <https://ohrh.law.ox.ac.uk/covid-19-and-domestic-violence-in-south-africa/> *Oxford Human Rights Hub* 26 April 2020 (accessed 23 June 2022).

factors: violence, domesticity, and structural inequality.⁶⁶ The structural inequality component is heightened within a South African context because gender, class, racial, and economic inequality remains widespread in a post-apartheid setting. Affording relief and protection to survivors is difficult because of the lack of resources and COVID-related safety issues. Even though the relief channels stayed open, it became harder to reach out for help since the survivor is never left alone by the abuser or they may not have access to phones, public transport, law enforcement, or shelters.⁶⁷ There is also the very real fear that law enforcement themselves will be abusive or they will not receive the help they require. Fear of retaliation by the abuser is greatly intensified when there is nowhere to escape or no safe places. Nevertheless, when survivors have sought relief and legal protection against domestic violence during lockdown, processes had become delayed because of the restriction on physical interaction. Additionally, survivors had to be tested, quarantined, and cleared of COVID-19 before being admitted into shelters.⁶⁸

There are a few direct and indirect factors that may have contributed to the increase of IPV during lockdown. First, many people lost their jobs and source of income because of the pandemic. There has been research that has linked financial strain and IPV, with other aggravating factors such as emasculation and alcohol use. Furthermore, financial strain could lessen the likelihood of a survivor of violence leaving, especially if she has become financially dependent on her abuser.⁶⁹ Secondly, social distancing restrictions made it even more challenging for survivors to leave. It prevented women from contacting others and seeking help from support services in fear that they might be exposed to COVID-19. Isolation is a common tactic used by abusers to control their victims. Consequently, with increased isolated contact with the abuser and limited contact with others, it creates a dangerous environment for an already vulnerable victim. Thirdly, service disruption limited survivors' access to healthcare, emergency, law enforcement, and support services. These services often act as the first point of contact for IPV survivors and are vital in screening for IPV, identifying it, and assisting and encouraging survivors in reporting their experience. Furthermore, survivors would be less likely to contact the police after an incidence of violence since their role during lockdown

⁶⁶Weiner, J *Oxford Human Rights Hub* 26 April 2020.

⁶⁷Weiner, J *Oxford Human Rights Hub* 26 April 2020.

⁶⁸Weiner, J *Oxford Human Rights Hub* 26 April 2020.

⁶⁹Brewer, G & Lyons, M (2021) 'Experiences of Intimate Partner Violence during Lockdown and the COVID-19 Pandemic' *Springer* pg. 1-2.

seems primarily focused on enforcing lockdown regulations. It is possible the pandemic left many survivors feeling overlooked and neglected.⁷⁰

3.2.1.1. THE BAN ON ALCOHOL

During level 4 and level 5 of the South African lockdown, the purchase of alcohol was prohibited which had a direct effect on IPV, reducing the severity of cases. Even though sober perpetrators still commit violence, the likelihood of it becoming extreme lowered considerably. By comparison, the United Kingdom lockdown restrictions did not include an alcohol ban and British domestic violence abuse NGO Refuge reported a 700% surge in calls from survivors. This implies that the ban on alcohol had an effect on the decrease in reported cases and the drop in cases of serious injury in South Africa.⁷¹ Over 20% of men who perpetrate IPV consume alcohol before acts of violence.⁷² In 2016, the Sonke Gender Justice Project conducted research on the connection between IPV and alcohol consumption, finding that men who frequently come home drunk are 4 to 7 times more violent than men who drink less frequently. Additionally, abusers are 5 times more likely to consume alcohol and abuse is 11 times more likely to happen on the days alcohol has been consumed.⁷³ Alcohol acts as a factor that aggravates IPV because of its influence on aggression, in spite of this, it can also be noted that suddenly removing access to alcohol could trigger withdrawal symptoms and increase aggression as well, exacerbating the risk of abuse during lockdown.⁷⁴

The effect of removing an addictive substance without forewarning could have the opposite desired effect and increase stress levels and potentially cause conflict or violence.⁷⁵ Data collected from a study focusing on the trauma ward at Groote Schuur Hospital in Cape Town from 1 February 2020 to 30 June 2020, collected figures in three distinctive periods: “pre-

⁷⁰Brewer, G & Lyons, M (2021) *Springer* pg. 1-2.

⁷¹Gould, C ‘Gender-Based Violence During Lockdown: Looking For Answers’ available at <https://issafrica.org/iss-today/gender-based-violence-during-lockdown-looking-for-answers> *Institute for Security Studies* 11 May 2020 (accessed 06 September 2020).

⁷²Crossroads Recovery Centres ‘Is Alcohol Fuelling South Africa’s GBV Crisis?’ available at <https://crossroadsrecovery.co.za/is-alcohol-fueling-south-africas-gbv-crisis/> 18 June 2020 (accessed 13 July 2022).

⁷³Wasserman, Z ‘Alcohol Abuse is Linked to Gender-Based Violence, So Why are Increased Alcohol Prices Not in the Liquor Amendment Bill?’ available at <https://genderjustice.org.za/article/alcohol-abuse-linked-gender-based-violence-increased-alcohol-prices-not-liquor-amendment-bill/> *Sonke Gender Justice* 19 December 2016 (accessed 13 July 2022).

⁷⁴Gutura, P & Nunlall, R (2020) *African Journal of Criminology & Victimology* pg. 112.

⁷⁵Newham, G & du Plessis, A ‘How Might the COVID-19 Lockdown Affect Public Safety in SA?’ available at <https://www.dailymaverick.co.za/article/2020-04-06-how-might-the-covid-19-lockdown-affect-public-safety-in-sa/> *Daily Maverick* 06 April 2020 (accessed 13 July 2022).

lockdown (February and March 2020); hard lockdown (April and May 2020), which coincided with the restrictions on alcohol and tobacco sales; and post-lockdown (June 2020), which started at lockdown alert level 3 when people were allowed to return to work and there was a resumption of alcohol sales”.⁷⁶ The level of admitted trauma patients decreased during hard lockdown by 53%, then during the post-lockdown period the number increased to its original rate during the pre-lockdown period.⁷⁷ Consequently, during the hard lockdown period, the rate of GBV reflected an increase as well.⁷⁸

In the first five days of lockdown, the rate of complaints regarding IPV increased by 37% when compared to the same week in 2019.⁷⁹ This implies that women were left vulnerable and in constant danger of abuse, even with the ban on the sale of alcohol, having to remain with their abuser with no escape to healthcare services. In South Africa, violence-related trauma and homicides are mainly due to drinking, and men represent the main perpetrators of IPV. An increase in IPV should have been a key concern with women and their abusers confined together during lockdown and it has shown to be confirmed by having early accounts of a substantial drop in trauma unit admissions for alcohol-related injury and a reported rise in domestic violence complaints to the police.⁸⁰

3.2.1.2. LOCKDOWN, QUARANTINE, AND SELF-ISOLATION WITH ABUSERS

During the COVID-19 lockdown, women were forced to be at home, and they bore the brunt of this because they were unable to partake in any economic pursuits and were in constant close proximity to their abusers. It can therefore be assumed that the reduced reported violence is the result of violence that had previously been occurring in multiple spaces now having been shifted to only occur within the domestic space – meaning the occurrence of the violence perpetrated against them may have increased in frequency and severity rather than new cases of violence occurring – which then led to the rise in calls to aides.⁸¹ Women in the process of

⁷⁶Navsaria, PH; Nicol, AJ; Parry, CDH; Matzopoulos, R; Maqungo, S & Gaudin, R (2021) ‘The Effect of Lockdown on Intentional and Non-intentional Injury during the COVID-19 Pandemic in Cape Town, South Africa: A Preliminary Report’ *South African Medical Journal* pg. 111.

⁷⁷Navsaria, PH; Nicol, AJ; Parry, CDH; Matzopoulos, R; Maqungo, S & Gaudin, R (2021) *South African Medical Journal* pg. 111.

⁷⁸Murhula, PBB & Nunlall, R (2021) ‘COVID-19 and the Ban of Alcohol Sales in South Africa: A Critical Overview’ *African Journal of Criminology & Victimology* pg. 10.

⁷⁹Murhula, PBB & Nunlall, R (2021) *African Journal of Criminology & Victimology* pg. 10.

⁸⁰Matzopoulos, R; Walls, H; Cook, S & London, L (2020) ‘South Africa’s COVID-19 Alcohol Sales Ban: The Potential for Better Policymaking’ *International Journal of Health Policy and Management* pg. 486.

⁸¹Nduna, M & Tshona, SA (2021) ‘Domesticated Poly-Violence Against Women During the 2020 COVID-19 Lockdown in South Africa’ *National Academy of Psychology* pg. 350-351.

separation or divorce may have had to stay confined with their abusers due to a number of courts, lawyers, and legal aid organisations decreasing their scope or even closing during lockdown.⁸² It was provided that some women have a better chance at surviving COVID-19 than they do of surviving domestic violence, yet, similar to many other countries, South Africa did not take heed of initial warnings provided by feminist organisations like the UN Women which understand women's risk of violence.⁸³ Reports disclose that many public health control measures taken by the South African government were somewhat gender insensitive and might have placed vulnerable groups at greater risk of violence during lockdown; it most likely amplified the risk of an increase of violence in households and relationships that were already experiencing IPV before the onset of COVID-19.⁸⁴

The Special Rapporteur on violence against women, its causes, and consequences (Dubravka Šimonović) in her report issued in July 2020 and based on more than 270 submissions from all over the world, states that:

[These health measures] have left thousands of women and girls trapped at home, a place of fear, where psychological, sexual, physical and economic abuse are rampant. For those women who are already in abusive situations, their situation has been exacerbated by the crisis, as they have now been left more exposed to increased control by their abusers.⁸⁵

In order to understand how the pandemic restrictions may have impacted women in abusive relationships in South Africa, an exploratory qualitative study was conducted by the Gender and Health Research Unit to better understand women's experiences of being in and leaving an abusive relationship during the COVID-19 pandemic. All the women were already experiencing abuse before COVID-19 occurred and they all stated that the abuse only worsened during the lockdown period.⁸⁶

The Western Cape province still reflects the apartheid spatial segregation structures, where black people reside in areas that receive access to scarcely any basic services, are overpopulated, and are overrun with crime. There are commonly three to six people living in

⁸²Nduna, M & Tshona, SA (2021) *National Academy of Psychology* pg. 350-351.

⁸³Nduna, M & Tshona, SA (2021) pg. 351.

⁸⁴Dekel, B & Abrahams, N (2021) pg. 1

⁸⁵Šimonović, D (2020) 'Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences: Disease (COVID-19) Pandemic and the Pandemic of Gender-Based Violence Against Women, with a Focus on Domestic Violence and the "Peace in the Home" Initiative' *United Nations General Assembly Resolution 73/148* pg. 12.

⁸⁶Dekel, B & Abrahams, N (2021) pg. 4&6.

one household where tensions are high due to socioeconomic factors. Accordingly, working-class black women are especially at risk of experiencing IPV because of their impoverished living conditions with already scarce access to health, safety, policing, and socio-economic needs.⁸⁷

3.2.1.3. SOCIO-ECONOMIC PROBLEMS AND LOSS OF INCOME

The pandemic saw new difficulties within the socioeconomic sphere; however, it only heightened the issue of gender inequality in South Africa, making economic hardship even more difficult for women.⁸⁸ Economic stress as a result of unemployment is a factor that greatly impacts GBV, and studies show that unemployed men have a higher likelihood of perpetrating violence against their partners. There is a greater likelihood that men feel the burden of economic challenges because of the pandemic and being unable to work and provide basic necessities.⁸⁹ This results in tension at home and the possibility of violence. Conversely, survivors who are unemployed and are financially dependent on their abusers find it more difficult to leave and seek help because their abusers provide for their basic needs. As a result of the COVID-19 pandemic, the South African unemployment rate rose from 29.1% to 30.1% in the first quarter of 2020.⁹⁰ Culturally for some men, this meant a loss of power and authority; in a patriarchal society like South Africa, men hold the duty of being the heads of households with the responsibility of providing to maintain their masculinity. Lockdown consequences therefore deprived men of their masculinities when they could no longer provide for their household.⁹¹

Like many professional sectors in the world, the business, catering, and personal care sectors, and its employees suffered at the hands of the pandemic because of closures and restrictions. In South Africa, women overpopulate these sectors. Before the pandemic, women were more likely to be either unemployed or in low-wage jobs than men, with the poverty rate for women was 17% higher than for men.⁹² A study was conducted to determine how the pandemic impacted women in the South African economy and it was found that sectors that relied on

⁸⁷Parry, BR (2020) Wiley pg. 803.

⁸⁸Maisonnave, H; Chitiga-Mabugu, M; Henseler, M & Mabugu, R.E 'How Covid-19 has made Life Harder for South African Women' available at <https://theconversation.com/how-covid-19-has-made-life-harder-for-south-african-women-169705> *The Conversation* 12 December 2021 (accessed 23 June 2022).

⁸⁹Gutura, P & Nunlall, R (2020) *African Journal of Criminology & Victimology* pg. 112.

⁹⁰Gutura, P & Nunlall, R (2020) *African Journal of Criminology & Victimology* pg. 112.

⁹¹Gutura, P & Nunlall, R (2020) *African Journal of Criminology & Victimology* pg. 112.

⁹²Maisonnave, H; Chitiga-Mabugu, M; Henseler, M & Mabugu, RE *The Conversation* 12 December 2021.

female labour had been the most negatively affected, meaning that there was a disproportionate rise in unemployment for women, since most of the sectors in which they worked were hit hardest by the lockdown measures, such as hospitality and personal care.⁹³

3.2.1.4. SERVICE DISRUPTION

When survivors seek but are unable to obtain external relief and support, they become less likely to leave their abusers. The pandemic restrictions caused various interruptions in support services for survivors of IPV, leaving them vulnerable with no escape to the safety of family or women's shelters. With the restriction of movement, survivors had less contact with healthcare providers and police, which are support services that often advise survivors to leave and report their abusive partners. There have been disruptions in court proceedings⁹⁴ and the early release of prisoners (as a safety measure against the spread of COVID-19),⁹⁵ both of which raise concerns for the safety of women since prolonged prosecution and early release increase the risk of abuse from a violent partner.⁹⁶

The Centre for the Study of Violence and Reconciliation conducted a study in 2016, reporting that an ineffective justice system increases the risk of violence and femicide. This was confirmed during lockdown, as the South African Police Service and court systems were unsuccessful in addressing matters despite remaining operational for emergency issues.⁹⁷ An example of this is the tragic murder of Altecia and Raynevia Kortje, wherein the courts failed to provide the pair with a protection order. Furthermore, before the pandemic, reports on police attitudes towards survivors revealed that many suffered secondary victimisation which did not improve during lockdown and could be cause of the decrease in reports in IPV. Other disruptions in support were legal practitioners having to work remotely, causing further delays in cases.⁹⁸ In the early stages of lockdown, many magistrate's courts as well as the justice department's head office in Pretoria had to be temporarily closed down due to COVID-19 cases. The Gauteng Community Safety Acting Department Head stated that many magistrate

⁹³Maisonave, H; Chitiga-Mabugu, M; Henseler, M & Mabugu, RE *The Conversation* 12 December 2021.

⁹⁴Brewer, G & Lyons, M (2021) *Springer* pg. 6.

⁹⁵"The special parole was announced by Justice Minister Ronald Lamola in May last year in response to the department's inability to enforce social distancing and other COVID-19 protocols in its facilities due to overcrowding" – Davis, G 'Nearly 14,000 Inmates Released on Special Covid-19 Parole So Far, MPS Told' available at <https://ewn.co.za/2021/05/12/nearly-14-000-inmates-released-on-special-covid-19-parole-so-far-mps-told> *Eyewitness News* 12 May 2021 (accessed 17 July 2022).

⁹⁶Brewer, G & Lyons, M (2021) *Springer* pg. 6.

⁹⁷Gutura, P & Nunlall, R (2020) *African Journal of Criminology & Victimology* pg. 114.

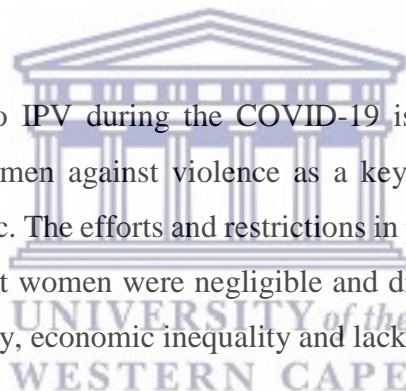
⁹⁸Gutura, P & Nunlall, R (2020) *African Journal of Criminology & Victimology* pg. 114.

courts were unable to function adequately during hard lockdown and many cases had to be delayed. He added that there had been a failure to appropriately manage the GBV cases that had been withdrawn because officials were unable to travel to various courts.⁹⁹

There have been attempts to virtually bridge the gap in service provision during lockdown to improve the delivery of support to women in abusive environments so as to adhere to social distancing and lockdown regulations. However, these attempts fall short in addressing the already existing inequalities that affect the most vulnerable populations experiencing violence.¹⁰⁰ There are amendments to the Domestic Violence Act that provide online applications for protection orders. However, even with the progressive use of technology in the court system, it still undermines marginalised women who do not have access to technology or the internet.¹⁰¹ In Africa, women are 34% less likely to have access to a smartphone. This already represents a digital barrier for women who seek help during lockdown as well as a lack of reporting and interaction with helplines.¹⁰²

3.3. CONCLUSION

The South African response to IPV during the COVID-19 is flawed and appears to have forgotten the protection of women against violence as a key international obligation even before the onset of the pandemic. The efforts and restrictions in place were necessary, however the measures in place to protect women were negligible and did not take heed of underlying factors such as gender inequality, economic inequality and lack of resources and funding.¹⁰³



⁹⁹Tracey-Temba, L ‘Police and Courts Must Do More to Reduce Gender-Based Violence’ available at <https://reliefweb.int/report/south-africa/police-and-courts-must-do-more-reduce-gender-based-violence>

Institute for Security Studies 13 July 2020 (accessed 14 July 2022).

¹⁰⁰Gutura, P & Nunlall, R (2020) *African Journal of Criminology & Victimology* pg. 119.

¹⁰¹Gutura, P & Nunlall, R (2020) *African Journal of Criminology & Victimology* pg. 118.

¹⁰²Gutura, P & Nunlall, R (2020) *African Journal of Criminology & Victimology* pg. 116.

¹⁰³Gutura, P & Nunlall, R (2020) *African Journal of Criminology & Victimology* pg. 119.

CHAPTER FOUR

COVID-19 AND THE DUE DILIGENCE OBLIGATION TO PROTECT WOMEN IN SOUTH AFRICA

4.1. INTRODUCTION

States have normally only been liable for their own actions or actions of state actors, however, international law has established as an authority to mandate states to apply due diligence to promote, protect and fulfil human rights.¹ Traditionally, the way a due diligence duty towards the protection of women against violence would involve the state reacting to violence that already happened, by way of legal reform, access to justice, and the delivery of relief services. Nevertheless, the due diligence standard has evolved and was summarised by Helené Combrinck in 1998 and in 2006 by Yakın Ertürk, the former Special Rapporteur on Violence against Women.² The due diligence standard is understood to work as a means to promote better state accountability with the goal of eliminating VAW. The two authors set up a framework of analysis, using four key elements namely, prevention, protection, punishment, and compensation, against which the actions or omissions of a state can be assessed.³

IPV remains an ever-growing challenge in South Africa and the pandemic and lockdown restrictions further exacerbated the circumstances under which vulnerable women who live with their abusers had to endure.⁴ Based on the forgoing analysis, South Africa does, in fact, possess a due diligence duty in terms of international law to not only refrain from committing human rights infringements against women but also take positive action to protect women from private violations.⁵ This chapter will explore the ways, if any, in which South Africa fulfilled its due diligence duty during the COVID-19 lockdown.

¹Abdul-Aziz, Z & Moussa, J (2019) *Due Diligence Project* pg. 1.

²Qureshi, S (2013) *A Research Journal of South Asian Studies* Vol. 28(1) pg. 56.

³Qureshi, S (2013) *A Research Journal of South Asian Studies* Vol. 28(1) pg. 56.

⁴Mkhize, S (2022) 'Locked in Abuse: Intimate Partner Violence against Women during the COVID-19 Pandemic' *African Journal of Gender, Society and Development* pg. 157.

⁵Di Silvio, L (2011) *The Georgetown Law Journal* pg. 1511-1512.

4.2. FRAMEWORK OF ADDRESSING THE DUE DILIGENCE OBLIGATION REGARDING IPV DURING COVID-19 LOCKDOWN

Helené Combrinck examines the nature of duties constructed by human rights by reviewing the “conceptual typology of duties” recommended by Henry Shue. Although Shue applies his typology successfully in a different context, it can be an effective framework to examine state responsibility in international law for VAW.⁶ Shue puts forth that every basic right holds three types of duties – which need to be performed to fully realise the right, but not necessarily by the same party or institution. These duties include: a duty to *prevent* violating the right in question, a duty to *protect* from violation of the right, and a duty to *aid* those whose rights have been violated. There is an additional duty referred to by scholars from the Human Rights Foundation⁷ and The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence⁸ that realises the duty to provide compensation.

Therefore, the right to physical security has four corresponding duties: First, to not remove a person’s security (prevention).⁹ This duty of the state to comply with the due diligence standard requires the prevention of VAW. CEDAW illustrates that this duty requires state parties “[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”.¹⁰ Secondly, to protect persons against the deprivation of security by others (protection).¹¹ The second duty of the state to comply with the due diligence standard requires that crimes and VAW are thoroughly and successfully investigated.¹² Thirdly, to provide for the security of people incapable of providing for themselves (punishment). This duty should provide for the fair and effective prosecution of perpetrators.¹³ Fourthly, to provide compensation, even if the state agents are not directly responsible for the violence (compensation). General Recommendation 19 provides that: “[s]tates may also be responsible

⁶Combrinck, H (1998) ‘Positive State Duties to Protect Women from Violence: Recent South African Developments’ *Human Rights Quarterly* pg. 669.

⁷Rittenhouse, RH (2011) ‘The Due Diligence Obligation to Prevent Violence Against Women: The Case of Pakistan’ *Human Rights Foundation*.

⁸Council of Europe, *The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, Article 30, November 2014.

⁹Combrinck, H (1998) *Human Rights Quarterly* pg. 668-669.

¹⁰UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249 pg. 3.

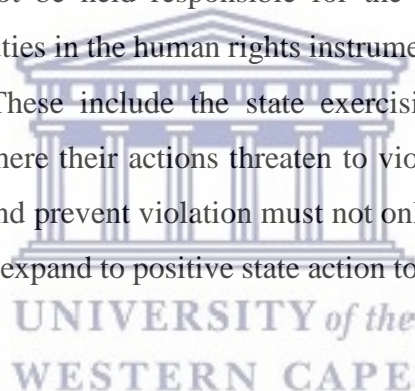
¹¹Combrinck, H (1998) *Human Rights Quarterly* pg. 668-669.

¹²Rittenhouse, RH (2011) *Human Rights Foundation* pg. 6.

¹³Combrinck, H (1998) *Human Rights Quarterly* pg. 668-669.

for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and to provide compensation”.¹⁴ The obligation of states is to ensure the full exercise of rights and under the due diligence standard, states need to “prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible, attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation”.¹⁵ Furthermore, the *Carmichele* case establishes a precedent where compensation was awarded to the survivor because of the duty of care state actors hold towards the general public to protect them any public or private violation of their rights.¹⁶

When considering the nature of VAW, the need for this framework becomes crucial because in most cases violence is committed by one private person against another, not a state official acting in an official capacity. However, regarding the VAW perpetrated by non-state actors, it could be easy to release the state from responsibility of their duties because it did not directly cause the harm and should not be held responsible for the acts of private individuals.¹⁷ However, the formulation of duties in the human rights instruments to which the state is party, creates crucial implications. These include the state exercising due diligence to prevent violations by private parties where their actions threaten to violate the right guaranteed, and that the duty to respect rights and prevent violation must not only be reserved for state action, instead it must, to some extent, expand to positive state action to overcome violations of rights by private actors as well.¹⁸



To establish state responsibility under the due diligence principle, there first needs to be an obligation to act. It helps significantly when rights are framed as obligations rather than the traditional way of phrasing them as principles like many international human rights treaties. Consequently, the Maputo Protocol does exactly that, potentially making it an important vehicle to drive the due diligence principle in establishing state responsibility for failure to act.¹⁹ However, even though laws, policies and resources are required to sufficiently combat

¹⁴UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against women*, 1992.

¹⁵Combrinck, H (1998) *Human Rights Quarterly* pg. 670.

¹⁶Ntlama, N (2007) ‘When the State Becomes a Liability to Society: Lessons from Carmichele’ *Global Jurist* pg. 7.

¹⁷Combrinck, H (1998) *Human Rights Quarterly* pg. 670.

¹⁸Combrinck, H (1998) *Human Rights Quarterly* pg. 670.

¹⁹Addadzi-Koom, MA (2020) *Springer* pg. 162.

against GBV, there needs to be action to address the structural and systemic issues at the root of the problem.²⁰

Furthermore, the violence experienced by women in South Africa needs to be understood within the context of their life and the complexities of the relationship between their identity, race, and economic and social factors. This means that the state's duty to act is both a systemic-level duty and an individual-level duty; requiring the state to develop and implement effective systems and structures that aim to focus on the root causes and consequences of GBV and deliver successful systems of prevention, protection, punishment (of the perpetrator), and compensation to each survivor.²¹ Comprehensive research has been undertaken to determine the root causes of GBV, with results providing that gender oppression acts as a main function to the way violence is manifested in South Africa. Therefore, to solve for and eliminate the different forms of GBV in South Africa, an intersectional approach that includes power dynamics between men and women and challenges the discrimination and subordination of women through the domination of men, in addition to race, class, and poverty, needs to be used.²² If GBV and patriarchal systems continue to be ignored in this manner, specifically by enforcing the subordination of women through the control of men, it will ultimately become impossible to eliminate GBV in South Africa. The manner in which patriarchal dominance intersects with all elements of race, gender, class, etc, needs to be examined and confronted to fully address GBV in South Africa.²³



4.2.1 FULFILLING THE PREVENTION DUTY

The South African preventative response to IPV has mainly been in the form of progressive legislative, judicial and health policies promoting basic human rights and equality. Available governmental and non-governmental services are typically reactionary (as opposed to preventative) because it emphasises the enforcement of law or provided care and support for survivors. This is called secondary prevention because it only becomes relevant *after* the violence has occurred. Primary prevention therefore entails addressing the root cause of IPV

²⁰Manjoo, R (2013) 'State Responsibility to act with Due Diligence in the Elimination of Violence against Women' *International Human Rights Law Review* pg. 244-245.

²¹Manjoo, R (2013) *International Human Rights Law Review* pg. 244-245.

²²Allen, S (2018) 'The Importance of an Intersectional Approach to Gender-Based Violence in South Africa' *Portland State University* pg. 43.

²³Allen, S (2018) *Portland State University* pg. 43.

to prevent it from happening altogether.²⁴ There are many ways to fulfil the prevention duty, and while amending and proposing new legislation is crucial to that duty, it has not made a significant impact in adequately addressing IPV and VAW in South Africa. Accordingly, more than legislation is required to change deep-rooted patriarchal perspectives on gender roles and prevent the occurrence of VAW,²⁵ for example, consistently running awareness-raising programmes, training those in close contact with survivors, providing treatment plans for the person responsible for the violence, working in conjunction with NGOs, and engaging the media as well as the community to assist in eliminating gender stereotypes and support mutual respect.²⁶ The enactment of the three GBV Bills demonstrated how (in this instance) public outcry and demands assisted in further legislation being cast as law. These Bills promise to enhance the criminal justice system and ensure harsh consequences for perpetrators of violence to make it more difficult for perpetrators to escape justice.²⁷

While South Africa has made some progressive leaps in GBV prevention and response, it remains fundamentally under-prioritised even before the COVID-19 pandemic where GBV relief services, such as health and psychosocial services, were curtailed and only more easily available in urban areas.²⁸ By contrast, access to relief services in rural areas were by and large more difficult because of the distance and the expense of transport. Furthermore, there was a shortage of resources and operational capacity in the judicial system, leaving GBV cases inadequately resolved, and often requiring a lot of money to travel to see legal professionals. GBV prevention services are mainly subsidised by international NGOs and are greatly underfunded. After the lockdown regulations were first affected in March 2020, the only way GBV relief organisations could continue its services was if it was deemed an “essential service”.²⁹ Since many governments did not clearly provide for GBV prevention and response

²⁴Shai, NJ & Sikweyiya, Y (2015) ‘Programmes for Change: Addressing Sexual and Intimate Partner Violence in South Africa’ *Institute for Security Studies* pg. 32-33.

²⁵Rittenhouse, RH (2011) *Human Rights Foundation* pg. 13.

²⁶Council of Europe ‘The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)’ available at <https://www.coe.int/en/web/gender-matters/council-of-europe-convention-on-preventing-and-combating-violence-against-women-and-domestic-violence> November 2014 (accessed 20 July 2022).

²⁷Republic of South Africa ‘Changes to Three Bills Strengthen Fight Against GBV’ available at <https://www.sanews.gov.za/south-africa/changes-three-bills-strengthen-fight-against-gbv> SA News 31 January 2022 (accessed 26 October 2022).

²⁸Roy, CM; Bukuluki, P; Casey, SE; Jagun, MO; John, NA; Mabhena, N; Mwangi, M & McGovern, T (2022) ‘Impact of COVID-19 on Gender-Based Violence Prevention and Response Services in Kenya, Uganda, Nigeria, and South Africa: A Cross-Sectional Survey’ *Frontiers in Global Women’s Health* pg. 2.

²⁹Roy, CM; Bukuluki, P; Casey, SE; Jagun, MO; John, NA; Mabhena, N; Mwangi, M & McGovern, T (2022) *Frontiers in Global Women’s Health* pg. 2.

services in the COVID-19 response plan, relief providers were confronted with a lot of uncertainty. Similarly, South Africa merely made an exception to the lockdown regulations for those in search of emergency, life-saving, or chronic medical care and no clarification on services available to GBV survivors was given until 13 April 2020 where President Ramaphosa stressed that GBV relief services are to remain active.³⁰ Furthermore, with the restrictions, social-distancing measures imposed, relief shelters for women had to refuse new survivors unless they had proof of a negative COVID-19 test result to avoid the spread of the virus.³¹

A study was conducted to measure the impact COVID-19 had on GBV prevention and response services in Kenya, Uganda, Nigeria, and South Africa where each respondent described a damaging effect in respect to the state failing to explicitly label GBV relief services as “essential” during the early stages of lockdown. Most of the respondents reported that regulations relating to staff, goods, and financing inhibited their ability to provide proper services.³² For instance, movement and travel limitations within and across countries constrained the movement of staff and goods, resulting in shortages. The result of this study illustrates the de-prioritisation of GBV relief services during the pandemic in countries where GBV was prevalent, and services were under-funded even before the COVID-19 pandemic. Respondents reported that community-based prevention programmes were highly impacted, with some operating at limited capacity or even being completely unavailable. This was because these services mainly depend on direct interactions, normally conducted in a group setting, which could affect the momentum building from GBV prevention programmes with the long-term goal of creating community awareness and change.³³

This study further provided that the South African respondents reported that the supply of response services, including clinical management, psychosocial services, case management, and shelters, were unaffected since the beginning of the pandemic. This may be due to South Africa, relative to the other countries in the study, clarifying earlier that GBV relief services were to stay operational during lockdown, showing that early prioritisation of GBV prevention

³⁰Roy, CM; Bukuluki, P; Casey, SE; Jagun, MO; John, NA; Mabhena, N; Mwangi, M & McGovern, T (2022) *Frontiers in Global Women's Health* pg. 2.

³¹John, N; Casey, SE; Carino, G & McGovern, T (2020) 'Lessons Never Learned: Crisis and Gender-Based Violence' *Developing World Bioeth* pg. 66.

³²Roy, CM; Bukuluki, P; Casey, SE; Jagun, MO; John, NA; Mabhena, N; Mwangi & M; McGovern, T (2022) *Frontiers in Global Women's Health* pg. 6.

³³Roy, CM; Bukuluki, P; Casey, SE; Jagun, MO; John, NA; Mabhena, N; Mwangi & M; McGovern, T (2022) *Frontiers in Global Women's Health* pg. 6.

is crucial to the continuation of service provision during a pandemic or any other complex emergency.³⁴ A different study which documented the experiences of abused women who sought shelter during South Africa's COVID-19 lockdown concluded that the stay-at-home order was not safe for women in abusive relationships and the pandemic response did not consider such vulnerabilities. In reality, it is generally in the privacy of home where abuse occurs because it is where power dynamics can be undermined by abusers, with no question from people outside the household, particularly during lockdown restrictions where there are limitations on movement.³⁵

This study demonstrated that the lockdown restrictions effectively played into the hands of abusive partners because it maintained an environment for controlling tactics, manipulation, and coercion to fester. The lockdown restrictions inadvertently provide abusers with the freedom to act with impunity which consequently emphasised the lack of urgent gendered considerations and opinions in the South African pandemic control measures, which ultimately created an environment where IPV increased during the COVID-19 pandemic. While the lockdown measure was necessary to an extent, the voices and needs of survivors of violence need to be highlighted since it appears to have been forgotten within some policy and political spheres, made clear by the gender-insensitive pandemic control policies.³⁶

In an anticipatory effort to prevent IPV relating to the COVID-19 lockdown and consequent lack of access to GBV relief services by survivors, Lawyers Against Abuse commenced a large-scale door to door awareness campaign to grow community awareness of rights, legal remedies, and available services in cases of GBV. Before this campaign started, Lawyers Against Abuse trained 22 volunteers on the different types of GBV and legal support services available to survivors. By July 2020, they had reached 4,780 community members throughout Diepsloot and educated them on their rights and legal relief services in the instance of GBV.³⁷ Sixteen Days of Activism was implemented in South on the 25 November (International Day of No

³⁴Roy, CM; Bukuluki, P; Casey, SE; Jagun, MO; John, NA; Mabhena, N; Mwangi, M & McGovern, T (2022) *Frontiers in Global Women's Health* pg. 7.

³⁵Abrahams, N & Dekel, B (2021) *Gender and Health Research Unit, The South African Medical Research Council* pg. 10.

³⁶Abrahams, N & Dekel, B (2021) *Gender and Health Research Unit, The South African Medical Research Council* pg. 10.

³⁷Henson, L 'Door to Door Campaigns to Raise Awareness' available at <https://www.lva.org.za/2020/07/17/door-to-door-campaigns-to-raise-awareness/> Lawyers Against Abuse 17 July 2020 (accessed 04 August 2022).

Violence Against Women).³⁸ During the height of the upsurge in GBV cases in the COVID-19 lockdown, South Africa implemented five national days of mourning, from the 25th to the 29th of November, with the purpose of mourning those who lost the battle against COVID-19 and GBV. The South African flag was hoisted half-mast during these five days as well.³⁹

4.2.1.1. ASSESSMENT OF FULFILMENT OF DUTY

South Africa has overcome the first challenge of implementing and adopting laws and policies. However, this does not solve the problem of IPV.⁴⁰ South Africa failed to ensure the prioritisation of GBV prevention and response services. Many of these services were more accessible in the cities but were inaccessible in rural areas where service delivery should have been prioritised. Furthermore, the social distancing restrictions exacerbated the violent circumstances under which many survivors had to endure, and illustrating how, though necessary to stop the spread of COVID-19, it proved to be gender-insensitive for women trapped without an escape from their abusers.

4.2.2. FULFILLING THE PROTECTION DUTY

The approach police officials take, their attitude towards survivors, and the safety they are intended to provide are crucial in the initial steps and response to guarantee survivor safety and perpetrator accountability. However, when interviewed by the Special Rapporteur survivors and activists shared the opinions that law enforcement officials treat cases involving VAW with less seriousness than other crimes, especially when it relates to IPV.⁴¹ Additionally, police rarely respond to reports of IPV and when they do, it is done in an inappropriate manner. The police would insist on an informal resolution between the parties instead of arresting the abuser, or they would allege that the survivor had also behaved in an abusive manner and arrest both parties. Often police officials allow their personal gendered views to affect whether they arrest perpetrators or dismiss a case. In addition to the absence of sensitivity and specialised gender

³⁸Lowe-Morna, C 'South Africa Needs New Approaches to End GBV' available at <https://health-e.org.za/2021/11/25/south-africa-needs-new-approaches-to-ending-gbv/> *Health-E News* 25 November 2021 (accessed 04 August 2022).

³⁹Amaechi KE; Thobejane, TD & Rasalokwane, R (2021) 'Feminist Reflections on the Impact of the South African National COVID-19 Lockdown on the Upsurge of Gender-Based Violence in Mahwelereng Township of Limpopo Province, South Africa' *Ife Centre for Psychological Studies/Services* pg. 17201.

⁴⁰Govender, M (2003) 'Domestic Violence: Is South Africa Meeting its Obligations in Terms of the Women's Convention?' *South African Journal on Human Rights* pg. 671.

⁴¹Manjoo, R (2013) *International Human Rights Law Review* pg. 256.

training, the law enforcement response is curtailed in most instances due to the lack of adequate resources to perform their duties.⁴²

The police and criminal justice system are not the only remedy for dealing with GBV. Given South Africa's history of violent racial oppression and the way it affects gender identity, more attention needs to be given to transforming actions and attitudes. Nevertheless, the police are normally the first responder in IPV cases, and it is their duty to collect evidence, make sure the survivors receive the proper medical attention and alternative accommodation, but research indicates that police officials do not effectively respond to survivors. A member of the South African Parliament Claudia Ndaba, a Chairwoman on the Commission for Gender Equality's 2020/21 Annual Performance Plan meeting, stated that she had heard accounts from women during lockdown who explained how they had been victimised and humiliated by law enforcement officials and the police were unwilling to assist them. These issues only worsened during lockdown.⁴³

At the beginning of July 2020, 36 police officers had passed away from COVID-19 and more than 5000 were infected leading to many police stations closing down. During this time, courts were not operational either since several magistrate's courts (and the justice department's head office in Pretoria) had been temporarily shut down to decontaminate subsequent to COVID-19 cases. The Gauteng Community Safety Acting Department Head Siphon Thanjekwayo reported that the magistrate's courts were not functioning properly in the initial lockdown stages which caused the postponement of many cases. Thanjekwayo also provided that there was a failure to properly manage GBV cases which had been withdrawn since officials were incapable of travelling to various courts.⁴⁴

Other countries implemented creative methods to combat IPV: police officers followed up on previously reported cases telephonically, in Spain and France, the use of code words such as "mask-19" were in use in shopping centres and pharmacies to assist domestic violence survivors in accessing therapy and provide help with reporting, and courts in Columbia instinctively extended protection order expiry dates. The United Nations Office on Drugs and Crime acknowledged various other measures like special hearings and mobile courts that only

⁴²Manjoo, R (2013) *International Human Rights Law Review* pg. 256.

⁴³Tracey-Temba, L *Institute for Security Studies* 13 July 2020.

⁴⁴Tracey-Temba, L *Institute for Security Studies* 13 July 2020.

dealt with GBV cases.⁴⁵ Many countries developed virtual training programmes for prosecutors and prosecution staff to address GBV cases as well as digital platforms to host work meetings and training plans. In August 2020, the South African judiciary held webinars every two weeks for stakeholders and the public on the various characteristics of GBV.⁴⁶

Nationwide interviews were conducted by Human Rights Watch at seven shelters and six frontline institutions working with survivors to prevent GBV or provide emergency support, as well as activists and experts from 12 establishments working to end GBV. The Department of Social Development (DSD), which oversees shelter services, was unsuccessfully approached for interviews as well. It was reported from those interviewed that their greatest shortcoming was insufficient government funding to assist NGOs that deliver direct support to survivors during the pandemic.⁴⁷ Many shelters experienced government funding differently across provinces in South Africa, with some reporting strong relationships and direction from the provincial DSD members. For instance, shelters in the Western Cape stated that the DSD had reportedly given guidance, solidarity, and personal protective equipment and that funding had been received timeously. However, other places had delayed funding. The National Shelter Movement of South Africa, a non-profit organisation that runs 78 shelters, stated that staff had to take out personal loans to help with funding.⁴⁸ The South African government ran GBV hotlines, but users reported that it would occasionally provide confusing or outdated information, and many did not use it because they were scared their abusers would hear them.⁴⁹

In a follow-up report submitted by South Africa regarding the inquiry concerning South Africa conducted under Article 8 of the Optional Protocol to the Convention, it was provided that South African Police Services (SAPS) had mobile community centres introduced to expand police presence, to guarantee ease of access, to develop service delivery in crime hot spots and to improve and strengthen the relationship between communities and the police. Twelve cab trucks had been transformed to be used as these centres.⁵⁰

⁴⁵Tracey-Temba, L *Institute for Security Studies* 13 July 2020.

⁴⁶Commission on Crime Prevention and Criminal Justice (2021) 'The Impact of COVID-19 on Criminal Justice System Responses to Gender-Based Violence Against Women: A Global Review of Emerging Evidence' *United Nations* pg. 37.

⁴⁷Human Rights Watch *Human Rights Watch* 24 November 2021 (accessed 24 July 2022).

⁴⁸Human Rights Watch *Human Rights Watch* 24 November 2021 (accessed 24 July 2022).

⁴⁹Human Rights Watch *Human Rights Watch* 24 November 2021 (accessed 24 July 2022).

⁵⁰*Inquiry concerning South Africa conducted under article 8 of the Optional Protocol to the Convention - Follow-up report submitted by South Africa* (2022) CEDAW/C/ZAF/FIR/1 pg. 7.

Social care and shelter services are provided for through a relationship between NGOs and the DSD, where the DSD subsidises either the programmes or centres. Research conducted by the Heinrich Böll Foundation confirms that the demand for shelter services increased dramatically in some provinces and if it were not for NGO-led shelter services there would have been a critical shortage of space and even lower degree of access to the public. “From a numerical point alone, the availability and accessibility of shelters would have been extremely limited, as NGO shelters provide the overwhelming majority of shelter services in the country,” Lisa Vetten provides, a research associate at the Southern Centre for Inequality Studies at the University of the Witwatersrand and lead researcher on Adapting to Disaster.⁵¹ During the lockdown, the National Shelter Movement mobilised rapidly to guarantee that shelter services were available, and that staff and beneficiaries kept safe. Furthermore, the National Shelter Movement established a shelter helpline in November 2020 to assist people in accessing care and partnering with Uber to assist with bringing people to shelter.

These services were created by NGO-led shelters and were many times financed personally by staff, without advice or further subsidy from the DSD. The research also shows that DSD social workers do not execute their duty of providing therapy services in some provinces.⁵² It was reported that often the DSD had not been aided by the National Treasury when more funding was requested, and this support is expected to further decline because of the budget cuts outlined in the Medium-Term Expenditure Framework. Therefore, it is evident the state is not ensuring a proper allocation of funds. Vetten further provides that “it is very clear from the research that there was no realisation [by the DSD] of the extent of costs that the lockdown was going to impose”.⁵³ Even so, in 2021 the DSD did not spend their full budget and returned a shocking R1,141,296,000 in unspent resources to Treasury.⁵⁴ During the height of COVID-19 in 2021, CEDAW noted the absence of state-owned shelters for women, stating that South Africa “cannot absolve itself from its obligation to ensure protection and assistance to victims of domestic violence by delegating the provision of such services to NGO-run shelters without adequately funding them”.⁵⁵

⁵¹Thorpe, J ‘How Non-Governmental Shelters Have Had to Adapt to a National State of Disaster’ available at <https://za.boell.org/en/2021/12/14/how-non-governmental-shelters-have-had-adapt-national-state-disaster> Heinrich Böll Stiftung 14 December 2021 (accessed 24 July 2022).

⁵²Thorpe, J Heinrich Böll Stiftung 14 December 2021.

⁵³Thorpe, J Heinrich Böll Stiftung 14 December 2021.

⁵⁴Thorpe, J Heinrich Böll Stiftung 14 December 2021.

⁵⁵United Nations *United Nations Human Rights* 17 May 2021 (accessed 24 August 2022).

4.2.2.1. ASSESSMENT OF FULFILMENT OF DUTY

The lack of funding provided to shelters, the lack of gender sensitivity training provided to police officials dealing with abuse survivors during COVID-19, and the lack of access to justice for women trying to escape abusive homes during lockdown demonstrates how South Africa has devastatingly failed to protect women from IPV during lockdown.

4.2.3. FULFILLING THE PUNISHMENT DUTY

Survivors often report feeling discriminated against and persecuted by the insensitive attitude of police officials when they report abuse. They endure inadequate service, drawn-out waiting periods, and inappropriate questioning. In 2009, the Tshwaranang Legal Advocacy Centre reported a study that because the police officials do not properly record domestic violence data, it falsely indicates a decrease in GBV.⁵⁶ This trend has only worsened during lockdown, where, at the beginning of lockdown, SAPS performance indicators had reflected a massive decrease of 69,4% in reported GBV,⁵⁷ when reports show a 30% increase in the first week of lockdown compared to the same dates in 2019⁵⁸ and a 54% increase within the first three months of lockdown.⁵⁹

By four months into lockdown, the National Education, Health, and Allied Workers' Union reported a 500% increase in GBV during the COVID-19 lockdown in South Africa.⁶⁰ The false reporting of a decrease in GBV rates would therefore decrease the attention to and funding of GBV intervention programmes by the state. Funding for the NGO-led shelters were cut and redirected to COVID-19 safety measures. All state-led programmes are “performance-managed” and are responsible for its level of efficacy and service delivery. Therefore, the need to display competence and effective practice can be linked to systematic announcements by state officials of there being a decrease in GBV in the country or that GBV levels are under control.⁶¹

⁵⁶Naidoo, K ‘The War on Women and Children in South Africa’ available at <https://www.saferespaces.org.za/blog/entry/the-war-on-women-and-children-in-south-africa> *SaferSpaces* 15 October 2020 (accessed 18 April 2022).

⁵⁷Gould, C *Institute for Security Studies* 11 May 2020 (accessed 06 September 2020).

⁵⁸Doctors Without Borders, ‘South Africa: Sexual and Gender-Based Violence, a Concern During COVID-19 Lockdown’ available at <https://www.msf.org.za/news-and-resources/latest-news/south-africa-sexual-and-gender-based-violence-concern-during-covid> 07 April 2020 (accessed 26 June 2021).

⁵⁹‘Gender-based Violence’ available at <https://mg.co.za/special-reports/2020-12-04-gender-based-violence/> *Mail & Guardian* 04 December 2020 (accessed 16 April 2021).

⁶⁰Ofusori, L *Democracy Development Program* 03 August 2020 (accessed 28 March 2022).

⁶¹Naidoo, K *SaferSpaces* 15 October 2020.

Regarding the developing authority and discretion of prosecutors and judges, there is insufficient training on the problem of IPV and how to adequately interpret new laws when addressing VAW. Additionally, when investigating cases and punishing abusers, there are always underlying patriarchal beliefs regarding the gendered functions of men and women.⁶² There is a heavy reliance on testimony rather than the collection of the appropriate evidence which presents as a problem in police investigations as well. Women go through the criminal proceedings with scarcely any social, psychological, and legal assistance and often suffer re-victimisation during the process. Although free legal aid is normally available, there is difficulty in accessing it due to the complicated paperwork, low-income level requirements, or lack of information regarding these aids. When it comes to IPV, many countries try such violence as a misdemeanour because the turnaround time will be faster, and it is “easier” to process. Nevertheless, the misdemeanour system still has its delays on providing protection measure and concluding trials.⁶³

It is generally only the cases that involve serious bodily harm or murder that get tried as criminal offences. In the justice system, there is not much understanding of the complexities of domestic violence, or the trauma caused by prolonged, continuous violence. Judges may not believe the survivor or question why a woman may have only reported the crime after some time has passed. With the insufficient resources available, the possibility of specialisation by judges is impossible.⁶⁴

COVID-19 regulations negatively affected the effectiveness of the criminal justice system by revealing and emphasising its already established shortcomings. After lockdown was implemented, the police, courts, and prosecutors were put under extreme pressure that further aggravated the difficulties faced by survivors in accessing proper justice.⁶⁵ By September 2020, there had been only 130 convictions from 4,058 arrests related to GBV since the beginning of lockdown. This translates into a shocking conviction rate of only 3%.⁶⁶ In 2013, after a report of the Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters was released, the Sexual Offences Courts were returned by the Department of Justice and

⁶²Manjoo, R (2013) *International Human Rights Law Review* pg. 257.

⁶³Manjoo, R (2013) *International Human Rights Law Review* pg. 257.

⁶⁴Manjoo, R (2013) *International Human Rights Law Review* pg. 257.

⁶⁵Tracey-Temba, L *Institute for Security Studies* 13 July 2020.

⁶⁶Zuzile, M ‘Conviction Rate for Gender-Based Violence an Abysmal 3%’ available at <https://www.timeslive.co.za/news/south-africa/2020-09-18-conviction-rate-for-gender-based-violence-an-abysmal-3/> *Times Live* 18 September 2020 (accessed 27 July 2022).

Constitutional Development with the aim to provide specialised services to survivors who are marginalised. The Minister of Justice reports that in December 2021 only 19% of sexual offences cases were processed while the other 81% (15,605 cases) were delayed. This increase from the backlog rate in March 2021 which was 52%.⁶⁷ Delays have been aggravated by issues such as DNA testing, loadshedding⁶⁸ and the COVID-19 restrictions. Court officials place blame on COVID-19 restrictions, employee shortages, and the lack of departmental checks.⁶⁹

4.2.3.1. ASSESSMENT OF FULFILMENT OF DUTY

Carmichele draws attention to crucial flaws within the justice system of South Africa. It purports that an effective justice system is reliant on the efforts of the police and prosecutors since they are the officials who bring the perpetrators to justice.⁷⁰ When state officials falsely record IPV statistics to reflect a decrease in violence, it suggests that efforts that are in action are effectively eliminating IPV. This decreases the attention to and funding of GBV intervention programmes by the state, which are already grossly underfunded. COVID-19 restrictions impacted GBV convictions at an extraordinary rate, delaying many cases even further. The analysis suggests the lockdown negatively impacted South Africa's execution of their duty to investigate and punish the most – however, the failure to fulfil this duty had been completely neglected before the implementation of COVID-19 restrictions.

4.2.4. FULFILLING THE COMPENSATION DUTY

The former Special Rapporteur regarded compensation to be the most underdeveloped leg of the due diligence standard. The legal basis for a right to a remedy and, linked to it, a right to reparation, has become definitely protected by the corpus of international human rights and humanitarian instruments.⁷¹ The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious

⁶⁷Human, L 'Massive Backlog at Sexual Offences Court because of Broken Recording Machines' available at <https://www.groundup.org.za/article/sexual-offences-court-faces-massive-backlog-because-broken-machines/> *GroundUp* 25 May 2022 (accessed 28 July 2022).

⁶⁸'The deliberate shutdown of electric power in a part or parts of a power-distribution system, generally to prevent the failure of the entire system when the demand strains the capacity of the system' available at <https://www.dictionary.com/browse/load-shedding> (accessed 13 August 2022).

⁶⁹Eybers, J 'Mess in SA Courts: These are Cases that Have Dragged on for More than Six Months' available at <https://www.news24.com/citypress/news/mess-in-sa-courts-these-are-cases-that-have-dragged-on-for-more-than-six-months-20220417> *News24* 18 April 2022 (accessed 28 July 2022).

⁷⁰Govender, M (2003) *South African Journal on Human Rights* pg. 675.

⁷¹*Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Rashida Manjoo on Her Mission to Kyrgyzstan* [2010] Human Rights Council, 14th Session.

Violations of International Humanitarian Law describe the outline of state responsibility for providing reparation to victims for acts or omissions which can be attributed to the state. States are responsible for their failures to meet their international obligations even when substantive breaches start off the conduct of private persons, as states have to exercise due diligence to eliminate, reduce and mitigate the incidence and consequences of private discrimination.⁷²

However, the framework and the functional consequences of the due diligence duty to afford compensation – as outlined in CEDAW – is still greatly underdeveloped, even more so during COVID-19. GBV perpetuates patriarchal attitudes and systemic marginalisation, so to adequately compensate survivors, reparations need to include both individual and wider underlying aspects that perpetuate the abuse of rights. The compensation needs to consider all facets of the discrimination women face and should not only be focused on returning women to the situation in which they were found before the individual instance of violence. It needs to have a transformative nature, meaning that the compensation needs to challenge instead of highlight pre-existing dispositions of gender and structural inequalities that lie at the root of VAW.⁷³

Even though the Constitution does not explicitly mention compensation, it does however, protect the right to freedom and security of the person. However, the international framework provided by CEDAW would imply that it is expected for states to have an objective to achieve it. As customary international law carries the same status of law in South Africa, the Constitutional Court does not restrict itself to applying established customary international law exclusively.⁷⁴ In the particular circumstances of the present analysis and based on the reasoning of the breach of the aforementioned obligations of due diligence, the lack of state action to prevent violence, protect survivors, and punish perpetrators could therefore amount to wrongful conduct giving rise to liability for the consequences. While there are no current examples during the COVID-19 lockdown to refer to, the material facts of *Carmichele* are similar enough to use as a precedent for providing compensation for survivors in the instance where the state has failed to adequately protect women against violence. The state is liable due to its *action or*

⁷²Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Rashida Manjoo on Her Mission to Kyrgyzstan [2010] Human Rights Council, 14th Session.

⁷³McRaith, C ‘The Due Diligence Standard for Violence against Women’ *International Human Rights Law Clinic at the University of Virginia School of Law* pg. 4-5.

⁷⁴Von Bonde, JC (2010) ‘Victims of Crime in International Law and Constitutional Law: Is the State Responsible for Establishing Restitution and State-Funded Compensation Schemes’ *South African Journal of Criminal Justice* pg. 208.

omission, not due to a responsibility towards a survivor of abuse regardless of the cause of that abuse. The way the state usually fulfils that liability is by monetary compensation to the survivor.⁷⁵

There is no definitive proof that international law places a legally binding duty on countries to establish state-funded survivor compensation schemes and efficient restitution provisions. However, if South Africa perceives itself as a country that plays a major role in the international and national sphere, it needs to address the matter of compensation head-on.⁷⁶ It is also not an alien concept for South Africa, as *Carmichele*⁷⁷ has already opened the discourse to broadening state liability.⁷⁸

The case facts surround the assault of a woman (the plaintiff) by a man who had a history of assault but had nevertheless been granted bail on a charge of rape, despite the opposition of interested parties to convince the police as well as the prosecutor to deny bail. The plaintiff instituted action for the negligence of the duty of the latter persons. The High Court granted absolution on the basis that there was no confirmed *prima facie* duty of care, which was upheld by the Supreme Court of Appeal. The Constitutional Court then overturned the absolution, referring the matter back to the High Court – where the plaintiff’s claim was found successful.⁷⁹

The Constitutional Court found the plaintiff’s cause of action to be based primarily on delict arising from a violation of an obligation due to her by the police and/or the prosecutor, conditional on a causal link existing between such breach and the injuries suffered.⁸⁰ The Constitutional Court therefore sustained the proposition that the Constitution establishes a legal duty of protection vesting in the state to protect individuals not only from the actions of the state officials, but also from the actions of private individuals. The breach of such duty can lead to the state being delictually liable *vis-a-vis* the victim. For the state to incur liability to survivors, the court restricted the state’s liability by implementing the requirements of proportionality, foreseeability, and proximity.⁸¹ Nevertheless, “[a] public interest immunity

⁷⁵Von Bonde, JC (2010) *South African Journal of Criminal Justice* pg. 196.

⁷⁶Von Bonde, JC (2010) *South African Journal of Criminal Justice* pg. 183.

⁷⁷*Carmichele v Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (16 August 2001).

⁷⁸Wessels, B (2019) ‘Reconsidering the State’s Liability for Harm Arising from Crime: The Potential Development of the Law of Delict’ *Stellenbosch Law Review* pg. 365.

⁷⁹Von Bonde, JC (2010) *South African Journal of Criminal Justice* pg. 202.

⁸⁰Von Bonde, JC (2010) *South African Journal of Criminal Justice* pg. 203-204.

⁸¹Von Bonde, JC (2010) *South African Journal of Criminal Justice* pg. 203-204.

excusing respondents from liability that they might otherwise have in the circumstances of the present case, would be inconsistent with our Constitution and its values”.⁸² However, in 2008, after battling in multiple courts, thirteen years after the incident Carmichele received only R1-million in damages, less than a quarter of her claim of R4,6-million.⁸³

4.2.4.1. ASSESSMENT OF FULFILMENT OF DUTY

While the consequences of the *Carmichele* judgment cannot be denied – it should have assisted in the eradication of VAW, however, the impact of this decision is yet to be seen.⁸⁴

4.3. CONCLUSION

UN experts provided that South Africa has failed to fulfil its duty to adequately prevent, protect, and punish domestic violence and, by extension, IPV cases. South Africa also failed to deliver systematic and effective buildings suitable for the judiciary and law enforcement bodies, thereby violating the right of South African women to live free from violence.⁸⁵ The due diligence standard comprises of four essential elements namely: prevention, protection, punishment, and compensation. South Africa has mainly focused its attention on implementing new legislature,⁸⁶ however, chapter 5 will provide recommendations on each duty.



⁸²*Carmichele v Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) para. 49 pg. 22.

⁸³Breytenbach, K 'Crime Victim Awarded R1m in Damages' available at <https://www.iol.co.za/news/south-africa/crime-victim-awarded-r1m-in-damages-415626> IOL 09 September 2008 (accessed 10 September 2022).

⁸⁴Ndashe, S (2004) 'The Duty to Protect Women from Sexual Violence in South Africa' *Feminist Legal Studies* pg. 220.

⁸⁵United Nations *United Nations Human Rights* 17 May 2021.

⁸⁶Rittenhouse, RH (2011) *Human Rights Foundation* pg. 2.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

5.1. INTRODUCTION

The analysis in the previous chapter has provided that South Africa has failed in its due diligence duty to protect women from violence, particularly during the COVID-19 lockdown. Although there have been attempts to resolve the crisis, there are numerous shortcomings with regards to implementation. Multiple public sectors carry the heaviest burden due to the consequences of violence, while most programmes are aimed at responding after the violence has occurred. Furthermore, the extent of violence in South Africa creates a huge challenge for socio-economic development and requires a lot of resources. However, violence can become preventable with committed and consistent attention – studies demonstrate how interventions at state, community, familial, and individual levels have worked when implemented correctly.⁸⁷

While South Africa does a lot more than many of its African contemporaries, it does not proactively protect women from IPV by delivering access to services that could assist in reducing the risk of abuse. In summary, South Africa fails to reach international and regional standards of the protection of women. To attain these standards requires resources.⁸⁸ By funnelling funding to the state as the “locus of responsibility” could cause more bilateral funding and less allocated resources going towards women’s NGOs that provide legal services to survivors of IPV, establish survivor support centres at police stations and courts, and organise women’s shelters. In relating to fulfilling the due diligence standard, passing legislation is the easy part. The challenge comes by ensuring that legislation is properly implemented, and relief services are developed and are sustained with considerable resources and continuous monitoring from state bodies.⁸⁹

There is no all-purpose model for a feminist COVID-19 recovery framework, but it is crucial that the state work together with feminists and women’s rights advocates.⁹⁰ South Africa

⁸⁷Lee, BX; et al. (2016) *Journal of Public Health Policy* pg. 20.

⁸⁸Smythe, D (2008) ‘South Africa’s Response to Domestic Violence’ *Nijhoff Law Specials* pg. 169-170.

⁸⁹Smythe, D (2008) *Nijhoff Law Specials* pg. 169-170.

⁹⁰Piscopo, JM (2021) ‘Pathways to Building Back Better: Advancing Feminist Policies in COVID-19 Response and Recovery’ *UN Women* pg. 3.

experiences VAW at the same rate as that of a country in a state of war.⁹¹ The 2019 protests represent a pivotal time as women fought to bring GBV to an end. The protests re-enforced the need for collective action, shining leadership, and education on the duty South Africa has to protect women from GBV and hold perpetrators accountable. It called on the President to listen to the voices of women and affect change against a patriarchal system. A specific perspective on the South African problem of GBV is expressed by Naidoo which correctly states that a feminist-informed political agenda can challenge patriarchy at multiple levels such as the home, the workplace, at college, or any public space. It can possibly alter perspectives, mindsets, and conduct, and hold state actors liable for the way they protect and serve the interests of survivors.⁹²

The violence women experience is affected by various factors, namely, their gender, sexual orientation, race, religion, age, education, migrant status, being pregnant, etc. When women are a part of more than one marginalised group, they may face a greater likelihood of abuse. Additionally, underlying elements like poverty can further exacerbate gendered disadvantages. All these factors intersect, are interrelated, connected, comprehensive, and affect how women experience abuse; there is no blanket remedy because abuse is not linked to a predetermined set of factors that is collectively shared.⁹³

5.2. RECOMMENDATIONS TO FULFIL THE DUE DILIGENCE DUTY TO PROTECT WOMEN IN SOUTH AFRICA POST-COVID-19

This chapter will outline recommendations for the fulfilment of each due diligence duty to protect women from violence. This chapter will also revisit the research questions and provide conclusions to the thesis.

5.2.1. PREVENTION

When dealing with the prevention of abuse, it is a challenge to identify proper responses that fully realise the experiences of women. Therefore, an intersectional approach needs to be considered when aiming to prevent VAW.⁹⁴ The starting point is acknowledging that all

⁹¹Naidoo, K *SaferSpaces* 15 October 2020.

⁹²Naidoo, K *SaferSpaces* 15 October 2020.

⁹³Palm, S & Le Roux, E (2021) 'Learning from Practice: Exploring Intersectional Approaches to Preventing Violence Against Women and Girls' *UN Women* pg. 9.

⁹⁴Palm, S & Le Roux, E (2021) *UN Women* pg. 9.

women are not experiencing abuse in the same manner. Many women have overlapping marginalised identities making them more vulnerable to abuse. When developing a prevention approach, the first stage should involve identifying a specific group of women who possess to an aggravated risk of violence due to the intersecting aspects of their identities or conditions. It begins with firstly identifying broad factors of women's various identities that make her more vulnerable to abuse, then narrowing it down to a subgroup to create a targeted plan. In the next stage, it involves assessing the various ways in which intervention programmes can focus on the risk of abuse due to intersecting identities, rather than directing intervention programmes on specific groups of women.⁹⁵ This would involve working with specialised NGOs, and with women of those intersecting identities to assist in creating, implementing, and providing feedback on the programmes. This stage is to provide understanding of the context of the intervention and its implementation and to guarantee the involvement of the women on whom the intervention centres. The final stage involves putting the experiences of women who have been marginalised in overlapping ways at the focal point of affecting change, for the purpose of changing underlying socio-structural systems with the intention of addressing the root causes that make women more vulnerable to violence. This is an extensive, multi-stakeholder undertaking that cannot be effectively completely if only executed once or by one organisation.⁹⁶

There have been progressive strides in terms of policy reform and the provision of relief services for survivors over the years, coinciding with prevention campaigns that have mainly been focused on raising awareness of the issue of IPV. The prevention of violence requires continuous multi-stakeholder efforts from institutions at the community and state levels, including schools, faith-based organisations, media, and popular culture.⁹⁷ Additionally, CEDAW provides that states need to challenge the harmful social and cultural patterns of men and women to eliminate prejudices and harmful gender norms, which can only be accomplished with the involvement of men and boys. Recognising that men also have their own challenges, even against the backdrop of deep-rooted patriarchal systems and structures that allow men to

⁹⁵Palm, S & Le Roux, E (2021) *UN Women* pg. 12.

⁹⁶Palm, S & Le Roux, E (2021) *UN Women* pg. 12.

⁹⁷Fulu, E; Warner, X; Miedema, S; Jewkes, R; Roselli, T & Lang, J (2013) 'Why do Some Men Use Violence Against Women and how can we Prevent it?' *Partners for Prevention. A UNDP, UNFPA, UN Women and UNV Regional Joint Programme for Gender-Based Violence Prevention in Asia and the Pacific* pg. iii.

assert power and control over women, will assist in focusing on the underlying causes of abuse to eliminate violence before it occurs.⁹⁸

Primary prevention is the approach taken wherein the violence is prevented before it has begun, and it remains the most effective way to address the issue of IPV in South Africa. The following prevention intervention approaches have been proven to be the most successful in terms of reducing IPV. The information provided is founded through evidence-informed theoretical plans and cultural application. The programmes address various groups, such as parents and teenagers (Sinovuyo and Skhokho Supporting Success) and teachers and learners, and individual or peer group-based programmes, that engage men and women on gender norms and positive relationships (Skhokho Supporting Success, Prepare, and Stepping Stones).⁹⁹

Schools also have a role in prevention programmes by providing education and planned events that both children and parents can join. Trained experts and teachers can provide violence prevention programmes and act as role models outside of the family setting. Schools present great safe spaces where teachers can challenge harmful social and cultural norms that tolerate violence towards others. Introducing violence prevention programmes from a young age has been proven to be effective in preventing violence and this approach aims to ensure the entire school – staff, teachers, students, and parents – are all committed to reducing violence.¹⁰⁰ In many cases, there are overlaps between a child's experience of physical punishment and a women's experience of IPV. This does not imply that children's experience of abuse fuels IPV, but children are experiencing and constructing an underlying normalisation of violence in a household and male patriarchal privilege. Therefore, the aim of prevention programmes focused on the youth should identify these constructs and vehicles of IPV and attempt to challenge them.¹⁰¹

Furthermore, comprehensive research needs to be conducted to contextualise various aspects of people's lives and identities that may drive and result in violence. This can assist in

⁹⁸Fulu, E; Warner, X; Miedema, S; Jewkes, R; Roselli, T & Lang, J (2013) *Partners for Prevention. A UNDP, UNFPA, UN Women and UNV Regional Joint Programme for Gender-Based Violence Prevention in Asia and the Pacific* pg. iii.

⁹⁹Shai, NJ & Sikweyiya, Y (2015) pg. 38.

¹⁰⁰World Health Organization (2019) 'School-Based Violence Prevention: A Practical Handbook' pg. 2-3.

¹⁰¹Gibbs, A; Dunkle, K; Ramsomar, L; Willan, S; Shai, NJ; Chatterji, S; Naved, R & Jewkes, R (2020) 'New Learnings on Drivers of Men's Physical and/or Sexual Violence Against Their Female Partners, and Women's Experiences of this, and the Implications for Prevention Interventions' *Global Health Action* pg. 9.

developing appropriate prevention interventions as well as finding the risk factors that ultimately lead to IPV.¹⁰² Research is vital for appreciating which aspects are prominent and how they intersect to increase IPV in each area, which allows an intervention programme to relate to specific local circumstances and be more successful. It can also document and recognise the positive and negatives of different approaches. Changing norms in a manner that promotes zero tolerance of abuse must be a priority for the state and the community.¹⁰³

5.2.2. PROTECTION

Gender budgeting is a process of using financial policy and administration to address gender inequality and women's development. The Council of Europe defines gender budgeting as a gender-based calculation of budgets involving a gendered view at every stage of the budget plan and reforming incomes and expenses in order to promote gender equality. South Africa was the first country in Sub-Saharan Africa to adopt this initiative with some levels of success, but its efforts have been diminishing with changes in parliamentarians¹⁰⁴ while the state maintains that it remains dedicated to gender equality and addressing women's needs.¹⁰⁵ Over two decades later and South Africa's gender budgeting initiatives are yet to make a substantial impact on gender equality.¹⁰⁶ In this regard, the leadership of the Minister of Finance is crucial to the success of integrating gender-oriented goals.¹⁰⁷ Gender budgeting can be properly executed by allocating more resources to address VAW, especially after the effect of the COVID-19 national response plan; increasing services for women who experience abuse during COVID-19, particularly in rural areas; ensure that accurate data is being collected to fully understand the impact the COVID-19 lockdown had on VAW so that the state can make a more informed response to GBV in the future.¹⁰⁸

¹⁰²Gibbs, A; Dunkle, K; Ramsoomar, L; Willan, S; Shai, NJ; Chatterji, S; Naved, R & Jewkes, R (2020) *Global Health Action* pg. 9.

¹⁰³Gibbs, A; Dunkle, K; Ramsoomar, L; Willan, S; Shai, NJ; Chatterji, S; Naved, R & Jewkes, R (2020) *Global Health Action* pg. 9.

¹⁰⁴Dlamini, NJ (2020) 'Gender-Based Violence, Twin Pandemic to COVID-19' *Critical Sociology* pg. 587-589.

¹⁰⁵Stotsky, JG 'Gender Budgeting in Sub-Saharan Africa' available at <https://ecdpm.org/great-insights/she-drives-change/gender-budgeting-sub-saharan-africa/#:~:text=South%20Africa%20has%20had%20two,equality%20and%20addressing%20women's%20needs> May 2017 (26 September 2022).

¹⁰⁶Hingston, D (2021) 'A Gender Mainstreaming Approach to South Africa's Budget Response to COVID-19' *Agenda* pg. 89.

¹⁰⁷Stotsky, JG (2016) 'Gender Budgeting: Fiscal Context and Current Outcomes' *International Monetary Fund* pg. 25.

¹⁰⁸Dlamini, NJ (2020) *Critical Sociology* pg. 587-589.

The lack of government funding results in fewer shelters being built, especially in rural areas, as well as existing shelters being unable to be adequately maintained. A South African study conducted by Kailash Bhana, Claudia Lopes and Diane Massawe provided that even though shelters represent safety for many women in abusive circumstances, it is a challenge to get the state to pay for the shelters to be kept functional and maintained.¹⁰⁹ Follow-up services for women who have left the shelters should also be more widely implemented, such as helping survivors in finding jobs, skills development, learning needs, information on how to obtain legal aid, therapy, or access to healthcare. It should be a priority to assist the survivor in finding independence since there is a pattern in South Africa where police officials try and reconcile the survivor with the abusive partner¹¹⁰ because they view these cases as a private matter between partners and that it should be dealt with as such.¹¹¹

Various countries addressed the shortage of shelter space during COVID-19 by turning empty hotel rooms into emergency shelter space for survivors of IPV. However, this alternative can become expensive without the assistance of government funding. This could be a great way for the community to get involved in providing for the safety of survivors. Public and hotel policies can be updated so that survivors can safely check in.¹¹²

An empirical study was conducted in Msinga, South Africa to examine the experiences of survivors of IPV and how effective the interventions had been in preventing abuse.¹¹³ Msinga is a rural area in Kwazulu-Natal where women endure appalling rates of IPV at the hands of men and has a long history of domestic violence which results in a strange relationship with gender dynamics. This study implemented a post-structural feminist theory¹¹⁴ of IPV and it

¹⁰⁹Naidoo, K *SaferSpaces* 15 October 2020.

¹¹⁰Naidoo, K *SaferSpaces* 15 October 2020.

¹¹¹Centre for the Study of Violence and Reconciliation (2016) 'Gender-Based Violence (GBV) in South Africa: A Brief Review' *Embassy of Finland* pg. 13.

¹¹²Aujla, W; Slakoff, DC & PenzeyMoog, E (2020) *Archives of Sexual Behaviour* pg. 2783.

¹¹³Ndlovu, CS (2021) 'Examining the Effectiveness of Prevention Programmes being Implemented to Address the Needs of Women Experiencing Intimate Partner Violence in Msinga, Kwazulu-Natal, South Africa' *Gender Studies in the School of Social Sciences at the University of KwaZulu-Natal, Scottsville Campus* pg. 248.

¹¹⁴Anderson, HJ & Damarin, KS 'Post-structural Feminism and Research in Educational Communications and Technology' available at <http://members.aect.org/edtech/ed1/10/10-04.html> *The Handbook of Research for Educational Communications and Technology* 03 August 2001 (accessed 27 August 2022):

"Post-structural feminists are concerned with 'how gender power relations are constituted, reproduced, and contested'. Post-structural feminists use post-structural concepts of language, subjectivity, social organization, and power in an effort to understand why women tolerate social relations that subordinate their interests to those of a masculinist culture. They/we also seek insights into the social mechanisms that convince people to adopt and act from particular attitudes. Post-structural feminism challenges dominant masculinist views of knowledge by using strategies of opposition, resistance, and deconstruction. According to poststructuralism, theory is in the midst of a paradigm shift: The view of knowledge as objective and disinterested of social context is being

found that IPV in Msinga was deep-rooted in patriarchal systems and cultural beliefs that contextualise the abuse. In this sense, the study found that many survivors were of the mindset that as long as a woman had a partner, she should be willing to be submissive to his authority. Under a post-structural feminist theory, men use VAW to exercise their dominance upon women and assert their masculinity.¹¹⁵ Furthermore, the survivors of IPV in this community were unaware of the services available to assist them after abuse. However, once intervention occurred, the study showed that the survivors were able to adopt some coping mechanisms through face-to-face counselling and support groups that empowered them to restore their lives. This study illustrated the importance of implementing these initiatives that are focused on addressing the needs of survivors of IPV in Msinga.¹¹⁶

This could be done by using an intervention which the author calls the “cultural negotiation” approach. This approach challenges the root causes of violence within the community and creates awareness on the patriarchal nature of certain customs in the name of culture.¹¹⁷ It would entail focusing on the positive aspects of the culture to interpret the oppressive aspects of it; acknowledging women’s challenges; and demonstrating how culture is not unchanging and recognising that there are alternative less harmful cultural beliefs.¹¹⁸ Article 4 (j) of the DEVAW¹¹⁹ provides that states need to adopt measures to change social and cultural patterns of both men and women to eliminate any beliefs and practices formed on the idea of inferiority or superiority of either of the sexes. This is why it is important to develop awareness-raising and educational programmes based on separating patriarchal masculinity from oppressive exercise of power. Furthermore, the use of “gender-sensitive language and a rights-based discourse public statements, media reporting, and educational material, among others” can clarify certain beliefs about gender stereotypes and break the silence around violence.¹²⁰

replaced with a conception of knowledge as 11 constructed, contested, incessantly perspectival and polyphonic. Post-structural feminists seek to reveal patriarchal genealogies and delegitimize their centrality to society. Another aim of post-structural feminists is to empower people who have been marginalized and to offer these people new ways of understanding the world.”

¹¹⁵Ndlovu, CS (2021) *Gender Studies in the School of Social Sciences at the University of KwaZulu-Natal, Scottsville Campus* pg. 247-248.

¹¹⁶Ndlovu, CS (2021) *Gender Studies in the School of Social Sciences at the University of KwaZulu-Natal, Scottsville Campus* pg. 248.

¹¹⁷Ertürk, Y (2008) ‘The Due Diligence Standard: What Does It Entail for Women’s Rights?’ *Nijhoff Law Specials* pg. 40.

¹¹⁸Ertürk, Y (2008) *Nijhoff Law Specials* pg. 41.

¹¹⁹UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104 pg. 5.

¹²⁰Ertürk, Y (2008) *Nijhoff Law Specials* pg. 41.

5.2.3. PUNISHMENT

The lack of organisation within state branches influences whether perpetrators are arrested and brought to court. Therefore, when a woman reports her abuser, she is not assured her safety and protection nor that her abuser will be punished in terms of the law. For this to become a reality, a conjoined effort from the police, department of health, social development, the national prosecuting authority and possibly victim empowerment programs is needed.¹²¹ Even though the police are often first responders to cases of IPV, many police officials inadequately respond to survivors – they lack dedicated and sensitivity-trained staff to assist in such matters and provide survivors with the right legal information and other alternative services.¹²²

Punishment of perpetrators should be aimed at avoiding re-offending, it should rehabilitate them, prepare them for re-entering society, and act as a deterrent for others. Criminal sentences that are lenient can foster re-offending and a sense of impunity that normalises abuse in our state. It can also discourage survivors from reporting or place them in a dangerous situation where the perpetrator could seek revenge once they are released. It is common that states respond to public protest from media attention on GBV by increasing the sentence of the crime. This is done because they believe the increased sentence will deter other individuals from committing the same crime, however, research provides that this method of sentencing is not effective within a weak justice system, such as South Africa's.¹²³ One method of approaching combatting recidivism of perpetrators is by adopting a risk-need-responsivity (RNR) framework.¹²⁴

This approach involves altering treatment intensity depending on the perpetrator's risk, meaning that higher risk perpetrators receive a higher intensity treatment. The RNR approach investigates eight risk factors that have been linked with general criminal offending.¹²⁵ RNR has been acknowledged as one of the most empirically backed interventions in relation to

¹²¹Naidoo, K *SaferSpaces* 15 October 2020.

¹²²Tracey-Temba, L *Institute for Security Studies* 13 July 2020.

¹²³Abdul-Aziz, Z & Moussa, J (2016) *Due Diligence Project* pg. 66.

¹²⁴Travers, A; McDonagh, T; Cunningham, T; Armour, C & Hansen, M (2021) 'The Effectiveness of Interventions to Prevent Recidivism in Perpetrators of Intimate Partner Violence: A Systematic Review and Meta-Analysis' *Clinical Psychology Review* pg. 2.

¹²⁵Travers, A; McDonagh, T; Cunningham, T; Armour, C & Hansen, M (2021) *Clinical Psychology Review* pg. 2. "These are: 1) history of antisocial behaviour, 2) antisocial personality pattern, 3) antisocial cognition, 4) antisocial associates, 5) family/ marital circumstances, 6) school/work, 7) leisure/recreation problems and 8) substance abuse"

general criminal reoffending, and the model has been adopted to great extent in Canada, the UK, Australia, and New Zealand, however there is room to develop more long-term effects.¹²⁶

Public statements made by state leaders need to reflect that VAW is severely unacceptable, because their opinion carries considerable impact on cultural norms. Recently, the Minister of Police, Bheki Cele, stated that a 19-year-old survivor who was raped in Krugersdorp in August 2022 was “lucky to be raped” by only one man since the other survivors were raped by multiple men.¹²⁷ This demonstrates a failure by one of the highest state officials to act with due diligence in challenging oppressive patriarchal norms. The state has a duty to deliver an unambiguous message that VAW is a severe crime that will be investigated, prosecuted, punished, with compensation provided to the survivor. Therefore, the police and the courts should be provided suitable gender-sensitive edification on dealing with cases that relate to GBV. The secondary victimisation of survivors must be avoided and evidentiary procedures need to protect survivors and guarantee that they are not subject to any further harm.¹²⁸

5.2.4. COMPENSATION

The process of compensation should have an empowering effect for survivors. That is why it is crucial to have the involvement of women who can assist in developing, monitoring, and evaluating compensation schemes and determining which best fits the survivors needs. The state needs to widen their definition of compensation and go beyond monetary reparations and punishing perpetrators. Reparation should not only have the purpose of restitution, but it should also act to repair underlying causal elements of GBV. The objective should be to challenge and transform power dynamics inherent in structural discrimination and eliminate systems driven by violence and exclusion.¹²⁹

While there is naturally a delay between drafting legislation and its implementation, action is further undermined by prevalent socio-cultural practices and political discourse. Even though the DVA has been in effect for almost 25 years, many media reports illustrate how state officials themselves are complicit in acts of VAW, including their intimate partners. Women

¹²⁶Travers, A; McDonagh, T; Cunningham, T; Armour, C & Hansen, M (2021) *Clinical Psychology Review* pg. 15-16.

¹²⁷Lusengo, A ‘Bheki Cele Says 19-Year-Old was ‘Lucky to Be Raped’ by only One Man’ available at <https://www.thesouthafrican.com/news/latest-bheki-cele-says-19-year-old-was-lucky-to-be-raped/> *The South African* 02 August 2022 (accessed 13 September 2022).

¹²⁸Ertürk, Y (2008) *Nijhoff Law Specials* pg. 43.

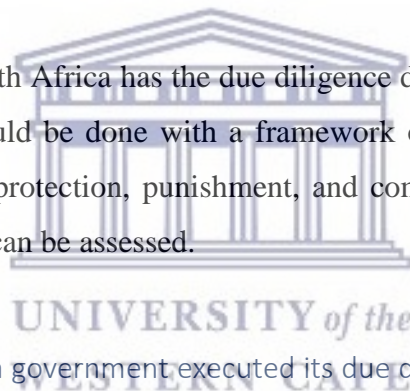
¹²⁹Abdul-Aziz, Z & Moussa, J (2016) *Due Diligence Project* pg. 84.

prefer not to report their abuse because the state perpetuates patriarchal environments in which victim-blaming is normalised. CEDAW has recommended adopting measures that open a dialogue about socio-cultural practices and institutes that perpetuate prejudices, misogyny, and gender inequality.¹³⁰ In light of the many forms of discrimination that women are faced with, reparations must not be about simply returning the survivor to the same situation in which they were found before the abuse. Instead, reparations should be transformative in nature, meaning that it should seek, to the highest degree, to challenge instead of re-enforce pre-existing ideals of cross-cutting organisational subordination, gender hierarchies, systemic discrimination, and underlying inequalities that could be at the root of the abuse women face.¹³¹

5.3. REVISITING THE RESEARCH QUESTIONS

5.3.1. South African government has obligations to protect women under international, regional, and national law. What obligations to due diligence does the South African government have in protecting women against IPV?

This thesis establishes that South Africa has the due diligence duty to to promote, protect and fulfil human rights which should be done with a framework of analysis that uses four key elements namely, prevention, protection, punishment, and compensation, against which the actions or omissions of a state can be assessed.



5.3.2. How has the South Africa government executed its due diligence obligations to protect women from IVP during the COVID-19 lockdown?

While Chapter 3 outlines the various steps that the South African government took to protect women from IPV during the COVID-19 lockdown, Chapter 4 illustrates how the measures lacked implementation, funding, and the proper gender sensitive outlook from state actors to fully execute the due diligence obligation to protect women from violence.

¹³⁰Naidoo, K *SaferSpaces* 15 October 2020.

¹³¹UN Commission on Human Rights, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on the Due Diligence Standard as a Tool for the Elimination of Violence against Women*, 20 January 2006, E/CN.4/2006/61.

5.3.3. If these legal obligations have not been addressed adequately, what proactive measures can the South African government take in combatting IPV, to meet legislative standards for the protection of women during national lockdown and thereafter?

Chapter 5 has provided recommendations for the fulfilment of each duty according to the due diligence standard for South Africa to take steps towards properly prevent, protect, punish perpetrators, and provide compensation to survivors.

5.4. CONCLUSION

For us to comprehend the society in which South African women live there must be a comprehensive understanding of tradition, culture, gender, and ideals that – to this day – are still impacted by apartheid. Following the fall of apartheid in 1994, there has been great progress in realising and protecting women’s rights. This occurred at a national, regional, and international level, with the Constitution being enacted and treaties like CEDAW and the Maputo Protocol being ratified. However, the position of women on paper is so vastly different to women’s lived experience in South African society. To understand the effect the COVID-19 lockdown had on women’s experience of IPV, we examined the gendered factors that influenced violence in South Africa.¹³² When reporting on whether IPV is worsening in South Africa, Professor Soraya Seedat provides: “To some extent we became stuck. There have been pockets of progress, but it is difficult to see them because this is such an endemic problem. It is entrenched. It is so common. It digs deep into the social fabric because it is so intertwined with all the other societal problems we have”¹³³

The COVID-19 pandemic revealed already grossly present gender inequalities in the rise of IPV as another pandemic that is prevalent in all societies in different levels of severity.¹³⁴ Acknowledging that IPV is a massive human rights violation in South Africa is vital when appreciating that policy amendment is not enough to change the gross rate of VAW. Addressing IPV should be a priority, not only as the shadow pandemic of increasing GBV during COVID-19, but as the overwhelming and devastating pandemic it is for the women in South Africa. GBV needs to be treated with the same conviction and effort as seen during lockdown to help contain the spread of COVID-19. In the words of Madumise-Pajibo, “this form of VAW is not

¹³²Parry, BR & Gordan, E (2020) *Feminist Frontiers* pg. 796.

¹³³Brits, E ‘South Africa’s Staggering Intimate Partner Violence Stats Aren’t Shifting – Here’s What We Can Do About It’ available at <https://www.dailymaverick.co.za/article/2022-06-14-intimate-partner-violence-in-south-africa-the-staggering-stats-and-the-solutions/> *Daily Maverick* 14 June 2022 (accessed 27 July 2022).

¹³⁴Dlamini, NJ (2020) *Critical Sociology* pg. 583.

new, it was with us prior to this health pandemic and will inevitably remain afterwards, and we need to leverage the new zeal of the state to deal with COVID-19 in the direction of addressing gender-based violence as well”.¹³⁵ The home was an unsafe place for a numerous women, and they found it difficult to escape the violence of their partners. Prior to lockdown, some women were able to find safety in shelters or friends and family’s homes, but during lockdown that same support was nearly impossible to access. This placed women in a greater heightened state of vulnerability and risk of violence.¹³⁶ To hold the state accountable for failing to protect women against IPV during lockdown, an appropriate application of the due diligence standard needs to be applied.

An appropriate application of the due diligence standard lies in this interpretation of duties to prevent, protect, punish, and compensate, which provides a framework for state responsibility in respect to responding to VAW, particularly IPV. However, what is required for South Africa to meet the due diligence standard will ultimately rely on “domestic context, internal dynamics, nature of the actors concerned and the international conjuncture”.¹³⁷ Further research needs to be conducted to understand the full scope of the risks, dynamics, and remedies needed for IPV, particularly during lockdown. While online research is possible, many South African women do not have access to technology or the internet – this means that face-to-face research will also need to be conducted.¹³⁸ Challenging gender structures is not a simple task, especially in light of how deep-rooted patriarchy is in South Africa. Change can be inherently unsettling to the comfort of the status quo, as oppressive as it may be. Even though this level of change carries many risks, there is promise of progress and freedom for everyone, not only women. Therefore, eliminating VAW and guaranteeing that human rights are unanimously enjoyed a common interest and duty. Both state and non-state actors should be involved in acting with due diligence to prevent the occurrence of VAW and acting efficiently when it does.¹³⁹

It is important, now more than ever when we are coming up to what appears to be the closing of the COVID-19 pandemic, to reflect on the lessons learnt during the pandemic regarding the state’s reaction and response to IPV. Therefore, it is crucial to use these lessons and assess key

¹³⁵Parry, BR & Gordan, E (2020) *Feminist Frontiers* pg. 804.

¹³⁶Parry, BR & Gordan, E (2020) *Feminist Frontiers* pg. 803.

¹³⁷UN Commission on Human Rights, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on the Due Diligence Standard as a Tool for the Elimination of Violence against Women*, 20 January 2006, E/CN.4/2006/61 pg.23.

¹³⁸Nduna, M & Tshona, SO (2021) *National Academy of Psychology* pg. 352.

¹³⁹Ertürk, Y (2008) *Nijhoff Law Specials* pg. 46.

takeaways that can assist us in how we can properly address IPV now and in the future.¹⁴⁰ Even though due diligence duties to protect, investigate, punish and compensate survivors has not been challenged to its full extent in South African courts, there is valuable groundwork upon which South African survivors can rely on to support state fulfilment of the obligations imposed through international, national, and domestic law.¹⁴¹

Word count: 30 984



¹⁴⁰Gevers, A; Zimmerman, J & Antoni, D 'How Lessons from COVID-19 can Strengthen Efforts to Prevent Gender-Based Violence' available at <https://www.undp.org/blog/how-lessons-covid-19-can-strengthen-efforts-prevent-gender-based-violence> United Nations Development Programme 29 July 2021 (accessed 22 September 2022).

¹⁴¹Smythe, D (2008) *Nijhoff Law Specials* pg. 166.

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