INTERNATIONAL HUMAN RIGHTS LAW AND VIOLENCE AGAINST WOMEN AND GIRLS IN AFRICA

*John Mukum Mbaku**

The UN has recognized that violence against women and girls is a manifestation of historically unequal power relations between men and women, which has led to significant levels of discrimination against women and girls in virtually all parts of the world and in all spheres of human endeavor. Since its founding in 1945, the UN has made a concerted effort to recognize and protect human rights, including those of women and girls. As part of that effort, the UN has established several mechanisms and instruments to help both the international community and Member States confront and deal with violence against women. In addition to international and regional human rights instruments (e.g., ICCPR, CEDAW, Maputo Protocol, and the Banjul Charter), the UN has also facilitated the establishment of the Special Rapporteur mechanism, which provides advice to the international community and Member States on violence against women and girls, its causes and consequences. However, the responsibility for making certain that the rights guaranteed to women and girls by international human rights instruments and national constitutions are recognized and protected, lies with each State Party. Today, rape has emerged as one of the most pervasive and egregious forms of violence against women and girls around the world. Examining case law from several countries provides insight into how the African continent is dealing with rape. An important lesson from this comparative case law is that African countries need to revisit their legal definition of rape, especially as it relates to gang-rape and sexual intercourse with children. These definitions must be designed to reflect provisions of international and regional human rights instruments and provide optimal protections for children in particular and women in general.

**John Mukum Mbaku* is an Attorney and Counselor at Law (licensed in the State of Utah) and Brady Presidential Distinguished Professor of Economics & John S. Hinckley Research Fellow at Weber State University (Ogden, Utah, USA). He is also a Nonresident Senior Fellow at the Brookings Institution, Washington, D.C. He received the J.D. degree and Graduate Certificate in Environmental and Natural Resources Law from the S.J. Quinney College of Law, University of Utah, where he was Managing Editor of the *Utah Environmental Law Review*, and the Ph.D. (economics) from the University of Georgia. This article reflects only the present considerations and views of the author, which should not be attributed to either Weber State University or the Brookings Institution.

INTRODUCTION 528
I. INTERNATIONAL LAW AND FORMS OF VIOLENCE AGAINST WOMEN 535
A. Violence in the Family 535
B. Trafficking and Migration 543
C. Armed Conflict 557
II. CASE LAW ON VIOLENCE AGAINST WOMEN IN AFRICA 573
A. Introduction 573
B. *Coalition on Violence Against Women & 11 Others v. Attorney General of the Republic of Kenya & 5 Others (High Court of Kenya)* 576
C. *Rapula Molefe v. The State (Court of Appeal of Botswana)* ... 581
D. *Tshabalala v. The State; Ntuli v. The State (Constitutional Court of South Africa)* 588
III. DEALING FULLY AND EFFECTIVELY WITH VIOLENCE AGAINST WOMEN IN AFRICA: LESSONS FROM CASE LAW 608
IV. SUMMARY AND CONCLUSION 635

INTRODUCTION

In its Resolution 48/104, the United Nations ("UN") General Assembly recognized "that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men."[1] Since the UN was established in 1945 in the aftermath of World War II, efforts to recognize and protect the human rights of women and girls have been quite slow.[2]

During the early years of the United Nations, efforts to recognize the rights of women began "with addressing civil and political exclusions/restrictions . . . and moving on to women's integration into development in the 1960s, then on to addressing sex discrimination in public and private areas—within the family, employment, development, health, education and the State—in the late 1970s, as embodied in the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW")."[3]

UN Special Rapporteur on Violence Against Women, Its Causes and Consequences, Yarkin Ertük, has noted that although the CEDAW represented a "comprehensive bill of rights" for women, the treaty failed to explicitly "name violence against women ("VAW") until 1992 in its General Recommendation 19 on VAW," effectively "reading gender-based violence into several of the treaty's substantive provisions."[4] The

---

1. UN General Assembly, *Declaration on the Elimination of Violence Against Women*, UNGA Res. A/RES/48/104 (Dec. 20, 1993), at PMB para. 6.

2. Yarkin Ertük, *15 Years of the United Nations Special Rapporteur on Violence Against Women, its Causes and Consequences (1994-2009)—A Critical Review*, U.N. Doc. A/HRC/11/6/Add.5 (2009) (a special rapporteur on violence against women).

3. *Id.* at 3.

4. *Id.*; *See also* CEDAW Committee, *General Recommendations Adopted by the Committee on the Elimination of Discrimination Against Women: General Recommendation No. 19: Violence Against Women*, Eleventh Session (1992), contained in UN Doc. A/47/38 (1992), https://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm (noting the impact of gender-based violence on women's human rights and fundamental freedoms under general international law or under human rights conventions).

CEDAW Committee, argued Ms. Ertük, "was largely motivated by the sustained global campaign of the 1980s led by the women's movements on VAW," and which was "followed by the recognition of women's rights as human rights at the 1993 World Conference on Human Rights in Vienna."[5] The delegates at the Vienna Conference also developed "a blueprint for strengthening and integrating women's human rights within the United Nations, spurring developments towards the creation of the mandate."[6]

According to the Vienna Declaration and Program of Action:

> [t]he human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community.[7]

In addition to arguing that women's human rights should be "'integrated into the mainstream of United Nations system-wide activity,'—through the treaty monitoring bodies, through the effective use of existing procedures, and through the creation of new procedures to 'strengthen implementation of the commitment to women's equality and the human rights of women,'" the Vienna Declaration also outlined specific steps that should be taken to attain the goals of recognizing and realizing women's rights.[8]

The delegates at Vienna also endorsed the development of a new mechanism on VAW, as well as an Optional Protocol to CEDAW.[9] Eventually, the UN created the position of a Special Rapporteur on Violence against Women ("SRVAW") in 1994 and in 2000, the UNGA

---

5. Ertük, *supra* note 2, at 3.
6. *Id.*
7. *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights, Vienna, Austria, June 25, 1993, https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action.
8. *Id.*; *See also*, Ertük, *supra* note 2, at 3.
9. Ertük, *supra* note 2, at 3-4.

adopted the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.[10]

According to the CEDAW Committee, "[g]ender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men."[11] In addition to noting that gender-based violence "constitutes a serious obstacle in the enjoyment of human rights and fundamental freedoms by women," the CEDAW Committee also addressed "intersections of gender-based violence with the different substantive areas covered by the articles of CEDAW."[12] CEDAW Recommendation No. 19 defines gender-based violence as "violence that is directed against a woman because she is a woman or that affects women disproportionately."[13] It "includes acts that inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion, and other deprivations of liberty."[14] In addition, noted the CEDAW Committee, "[g]ender-based violence may breach specific provisions of the [CEDAW], regardless of whether those provisions expressly mention violence."[15]

In terms of "definition, scope, obligations of the State, and the role of the United Nations," the Declaration on the Elimination of Violence against Women ("DEVAW"), "provides a more comprehensive framework.[16] The DEVAW defines "violence against women" as "any act of gender-based violence that results in, or is likely to result in, 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."[17]

Ms. Ertük, the former UN Rapporteur on Violence Against Women, noted that reports of various Special Rapporteurs have elaborated on the various forms of violence against women, including:

---

10. UNGA, *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, UNGA Res. A/RES/54/4 (Oct. 6, 1999).
11. CEDAW Committee, *supra* note 4.
12. Ertük, *supra* note 2, at 4.
13. CEDAW Committee, *supra* note 4, at para. 6.
14. *Id.*
15. *Id.*
16. Ertük, *supra* note 2, at 4.
17. UN General Assembly, *supra* note 1, at art. 1.

> *Violence in the family*—such as domestic violence; battering; marital rape; incest; forced prostitution by the family; violence against domestic workers and the girl-child (non-spousal violence related to exploitation); sex-selective abortion and infanticide; traditional practices such as female genital mutilation; dowry-related violence; and religious/customary laws.
>
> *Violence in the community*—such as rape/sexual assault; sexual harassment; violence within institutions; trafficking and forced prostitution; violence against women migrant workers and pornography.
>
> *Violence perpetrated or condoned by State*—such as gender-based violence during armed conflict; custodial violence; violence against refugees and internally displaced persons (IDPs); and violence against women from indigenous and minority groups.[18]

Ms. Ertük also noted that over the years, the international community has continued to address violence against women and has done so in various documents. One such document is the *Beijing Declaration and Platform for Action*, which was adopted by delegates at the Fourth World Conference on Women, held in Beijing, from September 4th to 15th, 1995.[19] Among Beijing's critical areas of concern are violence against women, women and armed conflict, human rights of women, and the girl child.[20] The document also specified various forms of "sexual assault on women that were not specifically mentioned in DEVAW," including "systematic rape and forced pregnancy during armed conflict, sexual slavery, forced sterilization and forced abortion, female infanticide, and prenatal sex selection."[21]

At the 23rd session of the UN General Assembly in 2000, it was made clear that the VAW had "become a priority issue on the agenda of many

---

18. Ertük, *supra* note 2, at 4-5.

19. *See generally* Fourth World Conference on Women, *Beijing Declaration and Platform for Action* [hereinafter BDPFA], 16th plen. mtg., (Sept. 15, 1995).

20. *See generally, id*. at 18-118.

21. *See id.* at ¶¶ 114-15 (defining DEVAW as Declaration on the Elimination of Violence against Women); *see also* Ertük, *supra* note 2, at 5.

[UN] Member States."[22] Meanwhile, the outcome of the special session on Beijing + Five "went a step further in calling for the criminalization of VAW, punishable by law."[23] Paragraph 69(c) of Beijing + Five imposes an obligation on States to "[t]reat all forms of violence against women and girls of all ages as a criminal offence punishable by law, including violence based on all forms of discrimination."[24] Beijing + Five also imposes an obligation on States to take measures "to address VAW resulting from prejudice, racism and racial discrimination, xenophobia, pornography, ethnic cleansing, armed conflict, foreign occupation, religious and anti-religious extremism, and terrorism."[25]

DEVAW and other documents, noted UN Special Rapporteur Ms. Ertük, "pay specific attention to the increased risk of violence against women on account of [their] marginalized status, location or context."[26] In addition, the SRVAW has addressed other forms of violence against women "on various grounds."[27] In its Resolution 7/24, the UN Human Rights Council has noted that it is

> [d]eeply concerned that all forms of discrimination, including racism, racial discrimination, xenophobia and related intolerance and multiple or aggravated forms of discrimination and disadvantage can lead to the particular targeting or vulnerability to violence of girls and some groups of women, such as women belonging to minority groups, indigenous women, refugee and internally displaced women, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, women with disabilities, elderly women, widows and women in situations of armed conflict, women who are otherwise discriminated against, including on the

22. Ertük, *supra* note 2, at 5.
23. *Id.*; *see generally* UN Women, *Beijing Declaration and Platform for Action: Beijing + 5 Political Declaration and Outcome*, (1995).
24. UN Women, *supra* note 23, ¶ 69(c).
25. Ertük, *supra* note 2, at 5.
26. *Id.*
27. *Id.*

> basis of HIV status, and victims of commercial sexual exploitation.[28]

The work and mandate of the SRVAW are guided by various international human rights treaties and instruments, including particularly the CEDAW, the Universal Declaration of Human Rights (UDHR), and the DEVAW.[29] Specifically, the work of the SRVAW is "structured on the basis of the substantive framework set out in DEVAW, listing distinct forms of violence," such as violence in the family, community, and also that perpetrated or condoned by the State.[30]

The SRVAW is expected:

> (a) to seek and receive information on VAW, its causes and consequences, from governments, intergovernmental bodies, women's groups, and United Nations agencies/mechanisms/treaty bodies, and to respond effectively to such information;
>
> (b) to recommend measures, ways and means of national, regional and international levels towards the elimination of VAW and its causes, and to remedy its consequences; and
>
> (c) to work closely with other special mechanisms created by the Commission on Human Rights (and since 2006 by the Human Rights Council), and bodies within the United Nations.[31]

The SRVAW's annual reports are considered important sources for "providing a normative framework for addressing distinct forms of gender-based violence, an analysis of the causes and consequences of violence, and an elaboration of the role of the State as well as regional and international stakeholders in combating violence in the public and private domains."[32] In addition, these annual reports are critical for "informing policy and shaping the advancement of women's human rights standards

---

28. Human Rights Council, Res. 7/24, at ¶ 7 (Mar. 28, 2008).
29. Ertük, *supra* note 2, at 6.
30. *Id.* at 5-7.
31. *Id.* at 6.
32. *Id.* at 7.

in international law."[33] For example, during her service as Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy dedicated her annual reports to examining and discussing "the three categories of VAW in the family, in the community, and perpetrated or condoned by the State, in addition to violence in specific contexts."[34] In her last report, Ms. Coomaraswamy indicated that "the next decade should focus on strategies for a more effective implementation," while Ms. Ertük, in her first report, considered the theme "towards an effective implementation of international norms to end VAW" as "her stating point" and then prioritized "issues of intersectionality and obstacles in advancing women's human rights."[35]

All UN Special Rapporteurs on Violence Against Women have regularly elicited the assistance of experts "to undertake comprehensive research to complement themes covered by [their] annual reports, such as in relation to domestic violence, trafficking and indicators of VAW and State response to violence."[36] Ms. Ertük notes that "[e]ach of the annual reports of the SRVAW reflects the extent to which the mandate draws upon various stakeholders, through consultations with NGOs, review of research studies, and questionnaires sent to governments and United Nations agencies."[37]

In addition to the fact that since 2004, all the SRVAWs have been "mandated to make an annual oral presentation to the [UN] General Assembly" on violence against women,[38] its causes and consequences, UN Resolution 7/24 also imposes an obligation on the Special Rapporteurs to make an oral presentation to the Commission on the Status of Women.[39] The mandate of the SRVAW also works with "other special [human rights mechanisms] and recommends ways and means of integrating the issue of VAW within the United Nations human rights system," as well as with other "regional bodies and mechanisms, such as

33. *Id.*

34. *Id.*; *See also* Radhika Commeraswamy, *Addendum: Report on the Mission of the Special Rapporteur to Poland on the Issue of Trafficking and Forced Prostitution of Women*, UN Doc. E/CN.4/1997/47/Add. 1 (Dec. 10, 1996) (a special rapporteur on violence against women, its causes and consequences).

35. Ertük, *supra* note 2, at 7.

36. *Id.*

37. *Id.*

38. *Id.* at 8.

39. Human Rights Council Res. 7/24, ¶12 (Mar. 28, 2008).

the Special Rapporteur on Women's Rights of the African Commission on Human and Peoples' Rights, the European Parliament's Rapporteur on Women's Rights in Turkey and the Council of Europe."[40]

Over the years, the international community has been concerned about certain specific areas (e.g., domestic violence) that exacerbate violence against women. In the section that follows, this Article will provide an overview of these specific areas.

I. INTERNATIONAL LAW AND FORMS OF VIOLENCE AGAINST WOMEN

The decision by the UN to create a special mechanism to deal with violence against women "has enabled the dynamic development of human rights standards that are responsive to contemporary challenges and emerging issues with respect to gender-based violence."[41] As argued by Special Rapporteur Ms. Ertük, "[t]he value of the mandate must be understood in the context of the historic, endemic and structural nature of VAW, as well as the history of gender blindness within domestic and international law."[42] In examining sources of violence against women, it is important and necessary to do so in the context of "women's status and gender inequality in society, patriarchal structures, and socio-economic frameworks/policies that exacerbate or condone VAW."[43]

A. Violence in the Family

Violence in the family has two dimensions—domestic violence (e.g., spousal abuse) and practices that are justified by each community's culture but which harm or violate the rights of women and girls, such as female genital mutilation ("FGM").[44] Since its creation, the mandate has expanded

40. Ertük, *supra* note 2, at 8-9.
41. *Id.* at 10.
42. *Id.*
43. *Id.*
44. *Id.* at 4, 40; *see also* Amany Refaat et al., *Female Genital Mutilation & Domestic Violence Among Egyptian Women*, 27 J. SEX & MARITAL THERAPY 593, 593 (2001) (examining domestic violence, which includes spousal abuse and FGM in Egypt).

> the concept of State obligation to develop protection for women in diverse family forms; to develop State obligation beyond prosecution of private actors to encompass protection from violence, including provision of legal support and health, safety, and shelter requirements for the survivor [of violence]; and to develop the obligation to prevent VAW by addressing its root causes.[45]

During her term as Special Rapporteur, Ms. Coomaraswamy noted that "[v]iolence against women within the family is a significant pattern in all countries of the globe" and that in all situations, except "criminal homicide, . . . the victim is most likely to be the wife of the offender."[46] She also noted that the First Report of the British Crime Survey determined that "10% of all assault victims were women who had been assaulted by their present or previous husbands or lovers."[47] Ms. Coomaraswamy also made reference to a study of 170 cases "of murder of women in Bangladesh between 1983 and 1985 revealed that 50% occurred within the family."[48] In Papua New Guinea, noted Ms. Coomaraswamy, interviews of villagers determined that "55% of females and 65% of males felt that a man could use force to control his wife."[49]

In several countries, noted Ms. Coomaraswamy, "[t]he traditional legal systems [have] sanctioned violence in the family by recognizing the husband's 'right to chastisement,'" and that "[t]his right was recognized by courts in many jurisdictions."[50] In addition, noted Ms. Coomaraswamy, "many legal systems [have] allowed men to use force to extract 'conjugal duties' and the crime of marital rape was unrecognized."[51] Finally, noted the Special Rapporteur, "[t]he legal systems [in many of the countries studied] were therefore relatively unconcerned with abused women unless there was serious injury or a

---

45. Ertük, *supra* note 2, at 10.

46. UN Commission on Human Rights, *Preliminary Report Submitted by the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, in Accordance with Commission on Human Rights Resolution 1994/45*, UN Doc. E/CN.4/1995/42, ¶ 120 (Nov. 22, 1994).

47. *Id.*

48. *Id.* at para. 121.

49. *Id.*

50. *Id.* at para. 122.

51. *Id.*

public nuisance" and that in some countries, "the defense of 'honor' allowed for the easy acquittal of husbands who killed their wives."[52]

In an effort to adopt a more holistic approach to the protection of women from violence in the context of the family, the mandate made an effort to "redefine the concept of family as the first step towards addressing domestic violence."[53] The mandate brought "the wide-ranging experiences of women into international law," and by doing so, it adopted "a subjective definition of the family based on individual bonds of nurturance and care, to encompass 'difference and plurality' of family forms rather than institutional State-based definitions."[54] The Special Rapporteur also noted that the definition of "family" has been "expanded by the mandate to encompass intimate-partner and interpersonal relationships, including non-cohabitating partners, previous partners and domestic workers."[55] This broader definition has made it possible for additions to be made to what constitutes a family for the purpose of recognizing and dealing with violence against women in the context of the family. Hence, the definition of "family" now includes "wives, live-in partners, former wives or partners, girl-friends (including girl-friends not living in the same house), female relatives (including but not restricted to sisters, daughters, mothers) and female household workers," making it possible for these individuals to qualify for State protection.[56]

This broader definition of "family" is very important for the protection of the rights of women and girls in Africa because domestic servitude has become endemic.[57] For example, in Benin, there is a traditional practice called *vidomegon*, which contributes significantly to the exploitation and abuse of children.[58] Under this customary and traditional practice, "poor families, most of which are found in the rural areas of the country, send their children, primarily girls, to work in the houses of rich urbanites as domestic servants."[59] Although this arrangement is generally voluntary,

52. *Id.*
53. Ertük, *supra* note 2, at 11.
54. *Id.*
55. *Id.*
56. *Id.*
57. *See* John Mukum Mbaku, *The Rule of Law and the Exploitation of Children in Africa*, 42 HASTINGS INT'L & COMP. L. REV. 287, 309-14 (2019).
58. *Id.* at 313.
59. *Id.*

many of the children often end up being subjected to working conditions that are akin to slavery or at the very least, some form of forced servitude.[60] In addition, many of these children, particularly the girls, are vulnerable to sexual exploitation and abuse by the men in the urban family.[61]

The Special Rapporteurs have argued in favor of rejecting the "institutional definition of the family" while noting that "upholding dominant norms of the family despite the empirical realities of diverse family forms serves to sanction violence against women transgressing traditional roles within and outside the home."[62] However, in the decade following the mandate's recognition of "diverse family forms," Special Rapporteur Yakin Ertük noted that "attention [had] focused, albeit insufficiently, on violence against women by family members and intimate partners; the situation of domestic workers, who are employed in the private household setting, has been largely ignored in research, policy and standard-setting."[63] Ms. Eurtük made these comments in 2003, however, the situation for domestic workers, especially in Africa, has actually deteriorated.[64]

A study released by the Solidarity Center of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") in 2021—the largest federation of labor unions in the United States—noted that the "International Domestic Workers Federation ("IDWF") . . . [had urged] more than 25 Africa-based affiliates to use the results of a new survey documenting the suffering of Africa's domestic workers and their dependents during the pandemic to lobby their governments for urgent

---

60. U.S. Department of State, *2022 Trafficking in Persons Report: Benin*, https://www.state.gov/reports/2022- trafficking -in-persons-report/benin/ (Jan. 28, 2023); *see also* Veronika Gyurácz, *Domestic Servitude & Ritual Slavery in West Africa from a Human Rights Perspective*, 17 AFR. HUM. RTS. J. 89, 93 (2017) (examining videomegon in Benin as a form of servitude).

61. Mbaku (2019), *supra* note 57, at 313.

62. Ertük, *supra* note 2, at 11.

63. UN Commission on Human Rights, *Towards an Effective Implementation of International Norms to End Violence Against Women: Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Yakin Ertük*, ¶ 41, U.N. Doc. E/CN.4/2004/66 (Dec. 26, 2003).

64. Carolyn Butler, *Africa's Domestic Workers Demand Urgent Reform in Pandemic Crisis*, SOLIDARITY CTR, May 11, 2021, https://www.solidaritycenter.org/survey-africas-domestic-workers-demand-urgent-reform-in-pandemic- crisis/.

reform."[65] The survey mentioned by the IDWF was "[c]onducted by domestic workers with 3,419 of their peers in 14 African countries from November 2020 through January 2021."[66] The survey determined that "only 17% of respondents received emergency income, food or other state-provided social support—and that most of that number received such support through another household member because they were not themselves eligible."[67]

A significant proportion of women in developing countries, including Africa, engage in "informal employment," mostly in the form of domestic work, usually in the homes of economically well-off urban dwellers.[68] In a study of workplace violence among domestic workers in urban households in Nairobi, Kenya, Ondimu determined that "overall, children account for a higher proportion of domestic workers, most of them girls from poor family backgrounds" and that "[c]hild domestic workers in Nairobi face many workplace social hazards that include injury, verbal harassment and sexual abuse."[69] Ondimu also determined that of the 677 respondents, 30.3% worked for more than ten hours a day.[70] In addition, 56.7% of the respondents were forced to work "throughout the week without break" and that "31.9% suffered work-related injuries in the month preceding the survey."[71]

Ondimu's study of domestic workers in Nairobi also revealed that female domestic workers were more likely than their male counterparts, to be subjected to exploitation and abuse.[72] According to Ondimu, only "6.1% of the male respondents work for more than 10 hours a day compared to 37.0% of the female respondents"[73] In addition, as many as "90.4% of the female respondents were not entitled to annual paid leave" and in terms of the regularity of salary payments, "only 43% of female respondents reported receiving their monthly payment on [a] regular basis,

65. *Id.* at 61.
66. *Id.*
67. *Id.*
68. Kennedy Nyabuti Ondimu, *Workplace Violence Among Domestic Workers in Urban Households in Kenya: A Case of Nairobi City*, 23 E. AFR. SOC. SCI. RSCH. REV. 37 (2007).
69. *Id.* at 37.
70. *Id.* at 51.
71. *Id.*
72. *Id.* at 53.
73. *Id.* at 53.

compared to 100% of their male counterparts."[74] With respect to workplace injuries, while "37.9% of female respondents suffered work related injuries in the month preceding the survey," only "10.2% of the male respondents" suffered similarly.[75]

The study also revealed gender differentials "in terms of exposure to psychological stress, physical and sexual abuse among the sampled household workers."[76] The results show that the majority of female domestic workers—84.7%—reported that they had been "victims of verbal insults from members of their employers' households, compared to 32.7% of the male respondents."[77] In addition, female domestic workers were more likely than their male counterparts to be subjected to physical assault, as well as sexual abuse and rape, by members of their employers' households.[78]

Similar studies on violence against domestic workers have been conducted in Malawi, specifically in the city of Blantyre, the country's financial capital.[79] The authors of the Malawi study noted that "[t]he lives of the women in the sample were best characterized by the theme 'surviving.'"[80] The authors of this study noted that a common form of domestic abuse mentioned by the women that they interviewed was "extramarital affairs."[81] Many of these women were afraid that they would be infected with HIV by their promiscuous husbands, given the fact that HIV is "endemic in Malawi."[82]

Many women in Malawi, noted Mkandawire-Valhmu, et al., suffer significant levels of domestic violence at the hands of their husbands and their relatives.[83] Some of them are either forced out of their matrimonial homes, either by their husbands or their in-laws; abandoned by their

---

74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. Lucy Mkandawire-Valhmu et al., *Surviving Life as a Woman: A Critical Ethnography of Violence in the Lives of Female Domestic Workers in Malawi*, 30 HEALTH CARE FOR WOMEN INT'L. 783, 783 (2009).
80. *Id.* at 790.
81. *Id.* at 793.
82. *Id.*
83. *Id.* at 793.

husbands; or voluntarily leave in order to escape further violence.[84] The authors of this study determined that many of the women interviewed "felt that remaining with their spouses was more trouble than it was worth, either because of the fear of contracting HIV or because of the trauma of physical abuse."[85] Domestic work provided these women with the money they need to "cope with life as single mothers or as poor single women."[86] Thus, noted Mkandawire-Valhmu et al., many women in Malawi "entered domestic service as a way of coping with the poverty associated with their limited formal education and challenging family dynamics."[87]

Many of the girls who are forced into domestic work, quite often in the households of rich urban dwellers, fail to complete their education and training.[88] Like child marriage, domestic work not only subjects African girls to situations where they are likely to be abused and exploited sexually, psychologically, and physically, they are also deprived of the opportunity to complete school and acquire the skills that they need to evolve into productive and contributing members of their communities.[89] This is especially problematic for many women and girls in Africa today since they live in economies where survival is determined by the level of one's education.[90]

In her 1996 report to the UN Commission on Human Rights, Ms. Radhika Coomaraswamy, elaborated on a framework for a model legislation on domestic violence.[91] As described in the document, "[t]he objective of this model legislation is to serve as a drafting guide to

84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. HUMAN RIGHTS WATCH, FAILING OUR CHILDREN: BARRIERS TO THE RIGHT TO EDUCATION 42 (Sep. 12. 2005) https://www.hrw.org/sites/default/files/reports/education0905.pdf.
89. John Mukum Mbaku, *International Law, Corruption and the Rights of Children in Africa*, 23 SAN DIEGO INT'L L. J. 195, 226 (2022) (noting that when children are deprived of the opportunity to attend school, they are unlikely to develop the skills that they need to "evolve into productive adults and contributing members of their communities").
90. Lucy Mkandawire-Valhmu et al., *supra* note 79, at 799.
91. U.N. Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences: a framework for model legislation on domestic violence*, U.N. Doc. E/CN.4/1996/53/Add. 2 (Feb. 2, 1996).

legislatures and organizations committed to lobbying their legislatures for comprehensive legislation on domestic violence."[92] The framework for model legislation on domestic violence begins by declaring the purpose of legislation.[93] For example, in addition to making certain that the legislation complies "with international standards sanctioning domestic violence," it must also "[r]ecognize that domestic violence constitutes a serious crime against the individual and society which will not be excused or tolerated" and that "domestic violence is gender-specific violence directed against women, occurring within the family and within interpersonal relationships."[94]

In addition, the framework states that "[l]egislation shall clearly state that violence against women in the family and violence against women within interpersonal relationships constitute domestic violence."[95] With respect to how the legislation is articulated and stated, "[it] must be clear and unambiguous in protecting women victims from gender-specific violence within the family and intimate relationships," and that "[d]omestic violence must be distinguished from intra-family violence and legislated for accordingly."[96] Regarding the subject matter of legislation addressing violence against women, the following relationships are within its purview: "wives, live-in partners, former wives or partners, girl-friends (including girl-friends not living in the same house), female relatives (including but not restricted to sisters, daughters, mothers) and female household workers."[97]

The framework for model legislation to confront violence against women must also define and elaborate the duties of police officers, and how and when they must respond to incidents of domestic violence.[98] Legislation should also provide alternative venues for the victim, witness or reporter to file a complaint. For example, "a complaint alleging an act

92. *Id.* at 2.

93. UN Commission on Human Rights, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 1995/85: A Framework for Model Legislation on Domestic Violence*, UN Doc. E/CN.4/1996/53/Add. 2 (Feb. 2, 1996), at para. 2.

94. *Id.* at para. 2(b).

95. *Id.* at 5.

96. *Id.* at 6.

97. *Id.* at 7.

98. *Id.* at. 13-17.

of domestic violence in the judicial division where: (a) The offender resides; (b) The victim resides; (c) Where the violence took place; [or] (d) Where the victim is temporarily residing if she has left her residence to avoid further abuse."[99] Legislation should also have a provision elaborating on the victim's Rights so as to help, inter alia, acquaint the victim "with the legal remedies available to her during the initial stage when she complains of an infringement of her legal rights."[100] The legislation should also outline "the duties of the police and the judiciary in relation to the victim."[101]

Finally, legislation should clearly elaborate the role that the judiciary should play in adjudicating cases involving domestic violence. For example, the judiciary may issue an ex parte temporary restraining order, which "compel[s] the offender to vacate the family home," as well as "regulate the offender's access to [any] dependent children."[102] The judiciary may also issue protection orders—application for such orders "may be made by the victim, a relative, a welfare worker or person assisting the victim of domestic violence."[103]

In the section that follows, this Article will examine the second source of violence against women—trafficking and migration.

B. Trafficking and Migration

Special Rapporteur Ms. Ertük has noted that the SRVAW's work on trafficking "has significantly shifted the way in which the issue had conventionally been framed, in terms of de-linking it from prostitution, bringing out its linkages with migration, and putting human rights of the trafficked women in the center of approaches to trafficking."[104] In addition, Ms. Ertük noted:

> [t]he report on violence in the community places trafficking in the context of movement of persons within and across borders from South to North, as well as from impoverished and conflict-ridden

99. *Id.* at 18.
100. *Id.* at 21.
101. *Id.* at 21.
102. *Id.* at 29, (i) & (ii).
103. *Id.* at 33.
104. Ertük, *supra* note 2, at 13.

> areas of the South to areas with a concentration of capital and employment in the South, in the wake of reduced controls of exports and imports in the globalized market.[105]

In a 2000 report to the UN Commission on Human Rights, Special Rapporteur Radhika Coomaraswamy, noted that "there is no internationally agreed definition of trafficking" and that "[r]ather than clinging to outdated notions of the constituent elements of trafficking, which date back to the early nineteenth century, new understandings of trafficking derive from an assessment of the current needs of trafficked persons in general, and trafficked women in particular."[106] She also argued that new definitions of trafficking "must be specifically tailored to protect and promote the human rights of trafficked persons, with special emphasis on gender specific violations and protections."[107]

Trafficking, noted Ms. Coomaraswamy, "is a dynamic concept," whose "parameters . . . are constantly changing to respond to changing economic, social and political conditions" and "[a]though the purposes for which women are trafficked change and the ways in which women are trafficked the countries from which and to which they are trafficked change, the constituent elements remain the same."[108] She then noted that any definition of trafficking must recognize that the process is never consensual and that its "non-consensual nature . . . distinguishes [trafficking] from other forms of migration."[109] Thus, illegal migration must not be confused with trafficking—"[w]hile all trafficking is, or should be, illegal, all illegal migration is not trafficking."[110]

Trafficking is usually designed to provide human resources for, inter alia, "forced and/or bonded labor, including within the sex trade, forced marriage and other slavery-like practices."[111] Trafficked persons usually

---

105. *Id.*

106. UN Commission on Human Rights, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, on Trafficking in Women, Women's Migration and Violence Against Women, Submitted in Accordance with Commission on Human Rights Resolution* 1997/44, UN Doc. E/CN.4/2000/68, (Feb. 29, 2000), at 8 para. 10.

107. *Id.* at 8 para. 11.

108. *Id.* at 8 para. 12.

109. *Id.*

110. *Id.*

111. *Id.* at 8 para. 13.

end up being subjected to various positions of servitude and hence, a proper definition of trafficking must reflect the actual experiences of the victims and the fact that it is a nonconsensual activity.[112] In her report to the UN Commission on Human Rights in 2000, Special Rapporteur Ms. Coomaraswamy defined trafficking as follows:

> Trafficking in persons means the recruitment, transportation, purchase, sale, transfer, harbouring or receipt of persons:
>
> (i) by threat or use of violence, abduction, force, fraud, deception or coercion (including the abuse of authority), or debt bondage, for the purpose of:
>
> (ii)placing or holding such person, whether for pay or not, in forced labor or slavery-like practices, in a community other than the one in which such person lived at the time of the original act described in (i).[113]

This definition covers all the persons who are involved in the trafficking chain—those who secure and bring the trafficked person into the trafficking chain and those who receive/hold "the trafficked person in forced labour and profit from that labour."[114] Those trafficked persons, however, need not be taken across national borders; trafficking can take place "within, as well as across, national borders."[115] In her report, Ms. Coomaraswamy noted that "[a]though numerous separate abuses are committed during the course of trafficking, which themselves violate both national and international law, it is the combination of the coerced transport and the coerced end practice that makes trafficking a distinct violation from its component parts" and that without this important linkage, "trafficking would be legally indistinguishable from the

---

112. Beverly Balos, *The Wrong Way to Equality: Privileges Consent in the Trafficking of Women for Sexual Exploitation*, 27 HARV. WOMEN'S L. J. 137, 148 (2004) (noting that "[n]onconsent and the use of force or coercions by traffickers have emerged in recent international human rights documents as essential, yet controversial, elements of human rights violations in the context of trafficking").

113. UN Commission on Human Rights (2000), *supra* note 106, at 8 para. 13.

114. *Id.* at 9 para. 14.

115. *Id.*

individual activities of smuggling and forced labor or slavery-like practices, when in fact trafficking does differ substantively from its component parts."[116]

Trafficking has significant negative impact on women and girls, and in order to fully and effectively address this impact, trafficking's definition must focus on "forced labor or slave-like practices" instead of "narrowly focusing on prostitution or sexual exploitation."[117] In general, noted Ms. Coomaraswamy, there are certain elements that are common to all trafficking patterns, including: "(i) the lack of consent; (ii) the brokering of human beings; (iii) the transport; and (iv) the exploitative or servile conditions of the work or relationship."[118]

The first binding international legal instrument regulating trafficking was the International Agreement for the Suppression of the White Slave Trade, which "focused on the protection of victims rather than the punishment of perpetrators," but proved ineffective.[119] The League of Nations, which came into being on January 10, 1920, considered the "traffic in women and children" important enough to include the "general supervision over the execution of agreements with regard to the traffic in women and children" within its mandate.[120] The League of Nations adopted two anti-trafficking conventions—the Convention for the Suppression of Traffic in Women and Children (1921) and the International Convention for the Suppression of the Traffic in Women of Full Age (1933).[121]

In 1949, the United Nations consolidated all these treaties into the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, which remains to this day, as the international community's sole treaty on trafficking.[122] However, it is important to recognize the fact that the rights of trafficked people are not

116. *Id.* at 9 para. 15.

117. *Id*. at 9-10 para. 17.

118. *Id*. at 9-10 para. 17.

119. *Id*. at 10, para. 18; *See also* International Agreement for the Suppression of the White Slave Trade, May 18, 1904, 1 U.N.T.S. 83.

120. UN Commission on Human Rights (2000), *supra* note 106, at 10 para. 19.

121. International Convention for the Suppression of Traffic in Women and Children, Sept. 30, 1921, 9 U.N.T.S. 415; *See* also, International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 U.N.T.S. 431.

122. Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, Mar. 21, 1950, 96 U.N.T.S. 271.

protected solely by the 1949 Convention.[123] Other international human rights instruments impose obligations on UN Member States to protect the human rights of trafficked persons.[124] For example, the International Covenant on Civil and Political Rights ("ICCPR") prohibits several practices directly related to trafficking, including slavery, the slave trade, servitude, and forced labor.[125] According to Article 8 of the ICCPR, "[n]o one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited."[126] In addition, Article 8 stated that "[n]o one shall be held in servitude."[127] The Universal Declaration of Human Rights ("UDHR") also prohibits slavery, servitude, and the slave trade. Article 4 states that "[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."[128]

---

123. *See generally,* Katrin Corrigan, *Putting the Breaks on the Global Trafficking of Women for the Sex Trade: An Analysis of Existing Regulatory Schemes to Stop the Traffic*, 25 FORDHAM INT'L L. J. 151, 163, 186 (2001) (noting that the UN Convention on the Elimination of All Forms of Discrimination Against Women, as well as the Racketeer Influenced and Corrupt Organizations Act (United States) also protect the rights of trafficked people.

124. Other treaties and conventions that protect the rights of trafficked persons include the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime and the International Labor Organization's 1975 Migrant Workers (Supplementary Provisions) Convention. *See* Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 STAN. J. INT'L L. 1, 14, 23 (2004).

125. *See* International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 16, 1966), at art. 8.

126. International Covenant on Civil and Political Rights art. 8(1), Dec. 16, 1966, 999 U.N.T.S. 1057 [hereinafter ICCPR].

127. *Id.* at art. 8(1) and (3).

128. GA Res. 217A (III), at art. 4 (Dec. 10, 1948). Other international human rights instruments that impose a duty on States Parties to protect the rights of trafficked persons include the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; the Convention on the Protection of the Rights of Migrant Workers and Members of their Families (not yet in force); the Slavery Convention, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, and International Labor Organization Conventions No. 29 concerning Forced Labor and No. 105 concerning the Abolition of Forced Labor. *Id*.

Although currently, no "coherent definition" exists for trafficking under international law, international human rights instruments, however, "have included proscriptions on trafficking."[129] For example, CEDAW imposes an obligation on all States Parties "to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."[130] CEDAW Committee General Recommendation No. 19 identifies trafficking as a form of violence against women.[131]

According to General Recommendation No. 19, "[i]n addition to established forms of trafficking there are new forms of sexual exploitation, such as sex tourism, the recruitment of domestic labor from developing countries to work in developed countries, and organized marriages between women from developing countries and foreign nationals."[132] These practices, noted the CEDAW Committee, "are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity. They put women at special risk of violence and abuse."[133]

The Declaration on the Elimination of Violence against Women provides a definition for violence against women. According to Article 2, "[v]iolence against women shall be understood to encompass, but not be limited to the following . . . (b) [p]hysical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and women and forced prostitution."[134] The Rome Statute of the International Criminal Court classifies "enslavement" as a crime against humanity.[135] Enslavement is defined as, "the exercise of any or all

---

129. UN Commission on Human Rights (2000), *supra* note 106, at para. 27.

130. Convention on the Elimination of All Forms of Discrimination against Women art. 6, Dec. 18, 1979, 1249 U.N.T.S. 1.

131. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19: Violence Against Women ¶ 14, U.N. Doc. A/47/38 (1992). Other international human rights instruments that include proscriptions on trafficking include the Rome Statute of the International Criminal Court. *See* Rome Statute of the International Criminal Court art. 7(1)(c), 7(2)(c), July 17, 1998, 2187 U.N.T.S. 3.

132. Comm. on the Elimination of Discrimination Against Women, *supra* note 131, ¶ 14.

133. *Id.*

134. G.A. Res. 48/104, art. 2(b) (Dec. 20, 1993).

135. Rome Statute of the International Criminal Court, *supra* note 131, at art. 7(1)(c).

of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children."[136]

The United Nations Office on Drugs and Crime ("UNODC") is the "leading entity within the United Nations system to address the criminal elements of human trafficking."[137] According to UNODC, the crime of human trafficking consists of "three core elements: the act, the means, the purpose."[138] Trafficking consists of an "act"—the trafficker must do one of the following to a person: recruit, transport, transfer, harbor, and receive; *plus* "means"—and use one or more of the following methods: threat or use of force, coercion, fraud, deception, abuse of a position of vulnerability, giving payments or benefits, and abduction; *plus* "purpose"—for exploitation.[139]

The UNODC has noted that human trafficking has many forms, which include "exploitation in the sex, entertainment and hospitality industries, and as domestic workers or in forced marriages."[140] In addition, "[v]ictims are forced to work in factories, on construction sites or in the agricultural sector without pay or with an inadequate salary, living in fear of violence and often in inhumane conditions."[141] Finally, "[s]ome victims are tricked or coerced into having their organs removed" and "[c]hildren are forced to serve as soldiers or to commit crimes for the benefit of the criminals."[142]

Women and girls are especially vulnerable to trafficking.[143] Research by the Global Survival Network "has identified four types of situations that result in women's and girls' involvement in the sex trade."[144] Among

---

136. *Id.* at art. 7(2)(c).

137. UN, THE CRIME: UNDOC IS THE LEADING ENTITY WITHIN THE UNITED NATIONS SYSTEM TO ADDRESS THE CRIMINAL ELEMENTS OF HUMAN TRAFFICKING, https://www.unodc.org/unodc/en/human-trafficking/crime.html (last visited Aug. 12, 2022).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. UN OFFICE ON DRUGS & CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 25 (2022) (noting that "women and girls remain more detected victims of trafficking than men and boys").

144. UN Commission on Human Rights (2000), *supra* note 106, at 14 ¶ 36.

the first group are women and girls "who have been completely duped and coerced" and who "have no idea where they are going or the nature of the work they will be doing."[145] Group two is made up of "women who are told half-truths by their recruiters about their employment and are then forced to do work to which they have not previously agreed and about which they had little or no choice."[146] In addition, women and girls in the second group usually have "their movement and their power to change their situation . . . severely restricted by debt bondage and confiscation of their travel documents or passport."[147]

The third group consists of women who are fully informed of the nature of the work they are expected to perform but do not wish to do such work.[148] However, because they live in poverty and do not have any viable alternatives for self-actualization, they are forced by their economic circumstances to "relinquish control to their trafficker who exploits their economic and legal vulnerability for financial gain, while keeping them, often against their will, in situations of debt bondage."[149] Finally, is group four, which consists of women who are fully informed of the nature of the work they are to perform.[150] In addition, this group of women do not have any objection to performing such work, have control of their finances, and are relatively unrestricted in their movement.[151] The Global Survival Network notes that the situation in group four is the only one of the four typologies that does not qualify and cannot be classified as trafficking.[152]

Throughout their entire journey, as they are moved from one geographic location to another, whether within national boundaries or across international borders, "women are subjected to myriad forms of violence."[153] Women who are trafficked are more likely to be subjected to and suffer from violence, "particularly in the light of the atmosphere of impunity that exists in respect to violations committed by traffickers and

145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* ¶ 37.

the lack of rights, remedies and redress afforded to trafficked persons."[154] In addition to using general violence and threats of violence to control and subjugate migrant women who were trafficked, traffickers also employ certain specific forms of violence, such as rape and other forms of sexual violence, as weapons against these women.[155]

Research shows that regardless of whether they are "locked in a sweatshop or factory, or locked in a brothel, migrant women and trafficked women are often subjected to arbitrary and enforced deprivation of liberty at the hands of both non-State and State actors."[156] Some groups and individuals who advocate on behalf of trafficked women have compared the violence perpetrated against them to "torture and cruel or inhuman treatment in violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment."[157] Trafficked women often end up "in situations of forced labor or slavery-like practices, both of which are enforced by and constitute violence in their own right."[158] Such women face violent treatment on a daily basis and are usually unable to escape these violence-filled environments.[159]

The Special Rapporteur has expressed concern that governments around the world are equating "illegal migration, particularly illegal migration for prostitution, with trafficking in women."[160] While "[i]llegal migration is not trafficking per se," some trafficking, however, "is undertaken by means of illegal migration."[161] In similar manner, "the illicit smuggling of human beings is not per se trafficking . . . even though some traffickers may smuggle trafficking victims across borders."[162] Although the differences between illegal migration and

---

154. *Id.*
155. *Id.* ¶ 38.
156. *Id.* ¶ 39.
157. *Id.*
158. *Id.* ¶ 40.
159. Jennifer A. L. Sheldon-Sherman, *The Mission 'P': Prosecution, Prevention, Protection, & Partnership in the Trafficking Victims Protection Act*, 117 PENN. ST. L. REV. 443, 450 (2012) (noting that certain factors, such as isolation and coercion, as well as the physical threat of harm, "keep trafficking victims vulnerable, dependent, and unlikely to escape).
160. UN Commission on Human Rights (2000), *supra* note 106, at 17 ¶ 46.
161. *Id.*
162. *Id.*

trafficking may sometimes be "subtle," it is important when designing policy to deal with or address trafficking, that the distinction between the two practices must be made.[163]

It is important that laws designed to combat illegal migration, including the smuggling of migrants across international borders, not be used to exacerbate the problems that confront trafficked women. For example, immigration policies should not unnecessarily restrict the access of trafficked women to necessary legal assistance.[164] Thus, each State's immigration laws must be compatible with the State's obligations under international human rights law in general and international instruments directed at combatting trafficking in persons in particular.[165] Some governments, noted the Special Rapporteur, have responded to global calls to combat trafficking by creating profiles of certain groups of women and restricting their ability to migrate, either internally or externally.[166] For example, in Romania, the passports of sex workers in the city of Brăila were confiscated by the police, supposedly "to protect Romania's international reputation."[167]

In her 2000 report, to the UN Commission on Human Rights, Special Rapporteur Ms. Coomaraswamy noted that each State is responsible for all acts committed by its own actors, "be they immigration officials, border patrols or police."[168] In addition, each State has "a responsibility to provide protections to trafficked persons pursuant to the Universal Declaration of Human Rights and through ratification or accession to numerous international and regional instruments."[169] Unfortunately,

---

163. *Id.*

164. *Id.*

165. *Id.*

166. UN Commission on Human Rights (2000), *supra* note 106, at 17 ¶¶ 47-48.

167. *Id.* ¶ 48.

168. *Id.* ¶ 50.

169. *Id.* ¶ 50. These protections are found in the ICCPR; ICESCR; Convention on the Rights of the Child; CEDAW; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (not yet in force); the Slavery Convention; the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; and International Labor Organization Conventions No. 29 concerning Forced Labor and No. 105 concerning the Abolition of Forced Labor. *See* UN Commission on Human Rights (2000), *supra* note 106, at 18 (¶ 51).

studies by the Global Survival Network have found "cases in which the police were actively involved in trafficking" and others in which the police turned "a blind eye to trafficking and thus failed in their duty to provide protection to victims of trafficking."[170]

In 1999, the Global Alliance Against Traffic in Women, the Foundation Against Trafficking in Women, and the International Human Rights Group, released a study in which they noted:

> International human rights instruments impose a duty upon states to respect and ensure respect for human rights law, including the duty to prevent and investigate violations, to take appropriate action against the violators and to afford remedies and reparation to those who have been injured as a consequence of such violations.[171]

Special Rapporteur Ms. Coomeraswamy argued that "[t]hese duties combine to constitute the State's duty to act with due diligence 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."[172]

The due diligence standard has been well-articulated in international human rights instruments, as well as in the *Velásquez-Rodriguez* case.[173] The Inter-American Commission on Human Rights ("the Commission") submitted the *Velásquez-Rodgríguez* case to the Inter-American Court of Human Rights ("Inter-American Court") on April 24, 1986.[174] The Commission had alleged that the Government of Honduras ("Honduras") had violated Articles 4, 5, and 7 of the American Convention on Human Rights ("the American Convention") regarding the 1981 detention and

---

170. UN Commission on Human Rights (2000), *supra* note 106, at 18 ¶ 51.

171. Global Alliance Against Traffic in Women, *Human Rights Standards for the Treatment of Trafficked Persons*, at 3 (1999), https://www.gaatw.org/books_pdf/hrs_eng2.pdf.

172. *See* UN Commission on Human Rights (2000), *supra* note 106, at 18 ¶ 51 (quoting Velásquez-Rodriguez v. Honduras, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 4, ¶ 166 (July 29, 1988)).

173. *Id.* ¶ 1.

174. *Id.* ¶ 1.

subsequent disappearance of National Autonomous University of Honduras student, Angel Manfredo Velásquez Rodríguez.[175]

The Inter-American Court found unanimously that Honduras had violated, in the case of *Velásquez-Rodríguez*, the right to life, as set forth in Article 4 of the Convention, read in conjunction with Article 1(1) of the Convention.[176] The Court also held that Honduras' domestic legal remedies were ineffective and hence, did not bar the Court's jurisdiction to hear the case. With respect to the obligations of the State of Honduras under the American Convention, the Court held:

> [an] illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of *due diligence* to prevent violation or to respond to it as required by the Convention.[177]

In addition, the Inter-American Court held:

> This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages.[178]

Although the State is obligated to prevent the abuse of human rights, the Inter-American Court ruled that "the existence of a particular violation does not, in itself, prove the failure [by a State] to take preventive measures."[179] However, the Court noted:

---

175. *Id.* ¶¶ 3-4.
176. *Id.* ¶ 172 (emphasis added).
177. *Id.*
178. *Id.* ¶ 175.
179. *Id.*

> Subjecting a person to official, repressive bodies that practice torture and assassination with impunity is itself a breach of the duty to prevent violations of the rights to life and physical integrity of the person, even if that particular person is not tortured or assassinated, or if those facts cannot be proven in a concrete case.[180]

In her 2000 report to the Commission on Human Rights, Ms. Coomaraswamy noted that "[t]he root causes of migration and trafficking greatly overlap" and "[t]hat the lack of rights afforded to women serves as the primary causative factor at the root of both women's migrations and trafficking in women."[181] Although the laws of many countries, which include constitutions and statutes, guarantee these rights, women, however, "continue to be denied full citizenship because Governments fail to protect and promote the full rights of women."[182] In addition, in the communities in which women and girls live, they are subjected to customary and traditional practices that discriminate against them. These practices include FGM, son preference, female infanticide, forced and child marriage, and forced service in fetish shrines.[183]

Ms. Coomaraswamy noted that "[t]he most extreme and overt expression of such discrimination is physical and psychological violence against women."[184] This violence, argues the Special Rapporteur, is utilized as "a tool through which discriminatory structures are strengthened and the more insidious and subtle forms of discrimination experienced by women daily are reinforced."[185] In addition, when they fail "to protect and promote women's civil, political, economic and social rights, [g]overnments create situations in which trafficking flourishes."[186]

---

180. *Id.*

181. *Id.* at 19 ¶ 54.

182. *Id.*

183. John Mukum Mbaku, *International Human Rights Law and the Tyranny of Harmful Customary and Traditional Practices on Women in Africa*, 52(1) CAL. W. INT'L L. J. 1, 3 (2021) (examining the impact of customary and traditional practices on women's and girls' rights in Africa). *See also* Mbaku (2019), *supra* note 57, at 394 (examining the impact of traditional practices on the rights of children in Africa).

184. UN Commission on Human Rights (2000), *supra* note 106, at 19 (¶ 54).

185. *Id.*

186. *Id.*

Most importantly, Ms. Coomaraswamy noted that "[g]ender-based discrimination intersects with discriminations based on other forms of 'otherness', such as race, ethnicity, religion and economic status, thus forcing the majority of the world's women into situations of double or triple marginalization."[187]

In many countries, including those in Africa, women are discriminated against simply because they are women.[188] In addition, they are also subjected to discriminatory practices because they are "ethnic, racial or linguistic minorities" and as "ethnic, racial or linguistic minority women."[189] Discrimination based on ethnicity, race, and religion is often imbedded in the state and social structures of many countries, leading to a significant attenuation of the "rights and remedies available to women" and "increases women's vulnerability to violence and abuse, including trafficking."[190]

The Special Rapporteur has made a series of policy recommendations to deal with trafficking at both the international and national levels. International instruments, Ms. Coomaraswamy argued, should "ensure an unequivocal human rights standard on trafficking on women, since it is impossible to combat trafficking without providing protection to victims of trafficking."[191] At the state level, "measures that are designed to protect women by limiting their access to legal migration or increasing the requirements associated with such migration should be assessed in terms of the potential for discriminatory impact and the potential for increasing the likelihood that women consequently may be subjected to trafficking."[192] In addition, Ms. Coomaraswamy noted that all national and international programs to combat trafficking should be designed with the full and effective participation and cooperation of non-governmental organizations, and as much as possible, other members of civil society.[193]

---

187. *Id.* ¶ 55.

188. UN Women, Beijing Declaration and Platform for Action, ¶ 28, U.N. Doc. A/CONF. 177/20/Rev. 1 (Sept. 1995) (noting that throughout their lives, "women's daily existence and long-term aspirations are restricted by discriminatory attitudes, unjust social and economic structures, and a lack of resources").

189. UN Commission on Human Rights (2000), *supra* note 106, at 19-20 ¶ 55.

190. *Id.*

191. *Id.* ¶ 107.

192. *Id.* ¶ 111.

193. *Id.* ¶ 112.

C. Armed Conflict

Throughout history, "sexual brutality, enslavement, forced prostitution and forced pregnancy have marked armed conflicts."[194] However, "these crimes have long remained invisible in international criminal and humanitarian law."[195] Instead, they have usually been viewed as "an unfortunate outcome of war," and in some circles, they have been "popularly explained in terms of aberrant behavior by men under harsh conditions of war and separation from their families and communities."[196] Conflicts in Sudan's Darfur Region, the Democratic Republic of Congo ("DRC"), Liberia, and Rwanda, "as well as accounts of scores of other conflicts around the world, conclusively demonstrate that sexual violence is not an outcome of war, but that women's bodies are an important site of war, which makes sexual violence an integral part of wartime strategy."[197] Ms. Yakin Ertük, in her role as the UN Special Rapporteur, "established a strong link between wartime violence and patriarchal gender hierarchies," and in her mission report on the DRC, she cautioned "against addressing sexual violence associated with war in isolation from gender-based discrimination that women experience in times of 'peace.'"[198] Thus, in this context, the SRVAWs have argued that "it is important that the law addressing sexual violence in armed conflict recognizes the violence for what it is, and addresses the barriers posed by notions of female sexuality rather than reinforcing them."[199] Article 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 treats violence against women in times of war as a crime of honor and not as a crime of violence.[200] Article 27 states: "[w]omen shall be especially protected against any attack on their

194. Ertük, *supra* note 2 at 15.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 16; *See also* Yakin Ertük (Special Rapporteur on Violence Against Women, Its Causes and Consequences), *Addendum: Mission to the Democratic Republic of Congo*, UN Doc. A/HRC/7/6/Add. 4 (Feb. 28, 2008).

199. Ertük, *supra* note 2 at 16.

200. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 27, Aug. 12, 1949, 75 U.N.T.S. 287.

honor, in particular against rape, enforced prostitution, or any form of indecent assault."[201]

Special Rapporteur Ms. Coomaraswamy noted that "[b]y using the honor paradigm, linked as it is to concepts of chastity, purity and virginity, stereotypical concepts of femininity have been formally enshrined in humanitarian law."[202] Criminal sexual assault, the SRVAWs argued, "in both national and international law, is linked to the morality of the victim" and not to the behavior of the assailant.[203] Most importantly, the SRVAWs argued, "[w]hen rape is perceived as a crime against honor or morality, shame commonly ensues for the victim, who is often viewed by the community as 'dirty' or 'spoiled'" and, as a result, "many women will neither report nor discuss the violence that has been perpetrated against them."[204]

In 1998, Ms. Coomaraswamy presented her report on violence against women in times of armed conflict to the UN Commission on Human Rights.[205] She started her report by noting that "[v]iolence against women during times of armed conflict has been a widespread and persistent practice over the centuries" and that "[t]here has been an unwritten legacy that violence against women during war is an accepted practice of conquering armies."[206] However, the international community, since the end of World War I, has drafted and adopted several laws that have provided various levels of protection for women during times of armed conflict. Codified as the laws of war or humanitarian law, they "play a significant part in the training of military personnel throughout the world" and "set forth standards of individual criminal responsibility for soldiers who derogate from the standards and confer universal jurisdiction on certain international delicts."[207]

---

201. *Id.*

202. Ertük, *supra* note 2 at 16.

203. *Id.*

204. *Id.*

205. Radhika Coomaraswamy (Special Rapporteur on Violence Against Women, Its Causes and Consequences), *Addendum: Report of Mission to Rwanda on the Issues of Violence Against Women in Situations of Armed Conflict*, UN Doc. E/CN.4/1998/54 (Jan. 26, 1998).

206. *Id.* ¶ 8.

207. *Id,* ¶ 10.

Over the years, the international community has struggled to adopt standards for the protection and respect of human dignity in armed conflict. The Geneva Conventions and their Additional Protocols, which form the core of international humanitarian law, were designed to protect "people not taking part in hostilities and those who are no longer doing so."[208] Negotiated in the aftermath of World War II, the 1949 Geneva Conventions consist of four conventions—the first one protects wounded and sick soldiers on land during war; the second protects wounded, sick and shipwrecked military personnel at sea during war; the third protects prisoners of war; and the fourth provides protection to civilians, including those in occupied territory.[209] These conventions were "promulgated in reaction to *international armed conflict and world wars*, and thus were primarily designed to set standards applicable during times of international armed conflict."[210] Article 3—common to the Geneva Conventions—applies humanitarian legal standards to internal armed conflict.[211]

Non-state actors, such as "paramilitary troops and guerilla organizations" have become very important actors in the internal affairs of many States, including those in Africa.[212] For example, in Africa, non-state groups such as al-Shabaab, Boko Haram, Al-Qaeda in the Islamic Maghreb ("AQIM"), and the Janjaweed, have become very important

---

208. International Committee of the Red Cross, *The Geneva Conventions and Their Commentaries*, https://www.icrc.org/en /war-and-law/treaties- customary-law/geneva-conventions (last accessed Jan. 30, 2023).

209. The Geneva Conventions and their Additional Protocols are "international treaties that contain the most important rules limiting the barbarity of war. They protect people who do not take part in the fighting (civilians, medics, aid workers) and those who can no longer fight (wounded, sick and shipwrecked troops, prisoners of war)." International Committee of the Red Cross (ICRC), *The Geneva Conventions of 1949 and Their Additional Protocols: Overview*,(Oct. 29, 2010), https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm#:~:text=The%201949%20Geneva%20Conventions,in%201864%2C%201906%20and%201929 (last accessed Aug. 14, 2022).

210. Coomaraswamy, *supra* note 205, ¶ 15 (emphasis added).

211. *Id.* Article 3 common to the Geneva Conventions addresses "conflicts not of an international character" and applies humanitarian legal principles to them. *See, e.g.*, Geneva Convention Relative to the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 75 U.N.T.S. 135.

212. Coomaraswamy, *supra* note 205, ¶ 16.

players in the internal affairs of countries in West and East Africa.[213] The role that non-state actors, such as AQIM and al-Shabaab, play in the internal affairs of African States "poses challenges under international law, which was conceptualized to govern States and their actors and agents."[214] In the *Velásquez Case*, the Inter-American Court of Human Rights set forth "the standard of State responsibility for non-State, paramilitary operatives."[215] Specifically, the Inter-American Court established a "due diligence" standard under which States are required and expected to "prevent, prosecute and punish offenders who violate the right of others, whether they are acting as official agents of the State or as paramilitaries."[216]

Although it is generally believed that international law is not quite clear on "the means by which to hold non-State actors accountable for the human rights violations they commit," the Special Rapporteur agreed with international human rights experts that "non-State actors conducting war are likewise bound by common article 3" of the Geneva Conventions.[217] Hence, "non-State actors contesting State power must respect international humanitarian law" and that

> [s]ince women are often the victims of violence perpetrated by non-State actors during armed conflict, for example forced marriages by non-State actors in Algeria and in Kashmir, it is imperative that the international community evolve unequivocal

213. *See, e.g.*, STIG JARLE HANSEN, AL-SHABAAB IN SOMALIA: THE HISTORY AND IDEOLOGY OF A MILITANT ISLAMIST GROUP, 2005-2012 (2013) (examining the evolution of the extremist group al-Shabaab and its impact on Somalia and its neighbors); UNDERSTANDING BOKO HARAM: TERRORISM AND INSURGENCY IN AFRICA (Hussein Solomon & James J. Hentz eds., 2017) (presenting a series of essays that examines the evolution of Boko Haram and its terrorist activities in West Africa); ANDRY LE SAGE, THE EVOLVING THREAT OF AL QAEDA IN THE ISLAMIC MAGHREB—AQIM, (2017) (examining AQIM and its activities).

214. Coomaraswamy, *supra* note 205, ¶ 16.

215. *Id.; See also* Velásquez-Rodriguez v. Honduras, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 4, ¶ 166 (July 29, 1988) ¶¶ 172-75.

216. Coomaraswamy, *supra* note 205, ¶ 16. *See also* Velásquez-Rodriguez, ¶ 172.

217. Coomaraswamy, *supra* note 205, ¶ 17.

> standards which ensure human rights protection to victims who live in areas not under the control of formal State authorities.[218]

While there are several cases of violence against women during times of armed conflict, this article will mention only a few. The Algerian Civil War, which took place from December 26, 1991 to February 8, 2002, was one of the most violent conflicts in the world during this period.[219] In March 1994, the Armed Islamic Group, one of the two main Islamist insurgent groups in Algeria "issued a statement classifying all unveiled women who appear in public as potential military targets."[220] To ensure that all Algerian women took the threat against them seriously, "gunmen on a motorbike shot and killed two unveiled high school female students who were standing at the bus station waiting to go home."[221]

The 1991-2002 Algerian Civil War was extremely violent and brutal and both parties engaged in the gross violation of the human rights of both men and women. However, "the armed Islamic opposition reserve[d] particularly harsh treatment for women who [did] not conform to their strict dictates, including unveiled women, professional women, and independent, single women living alone."[222] In areas under their control, the armed Islamic opposition engaged in "forced marriages and other forms of abduction of women."[223] However, as "non-State actors during armed conflict, they [were] nonetheless governed by [international] humanitarian law."[224]

On January 26, 2021, Tinhinane Laceb, an Algerian television journalist, was killed by her own husband.[225] According to Ms. Laceb's

---

218. *Id.*

219. *Id.* ¶ 21.

220. *Id.* ¶ 22. *See also* Lauren Vriens, *Armed Islamic Group (Algeria, Islamists)*, COUNCIL ON FOREIGN REL., https://www.cfr.org/backgrounder/armed-islamic-group-algeria-islamists (last updated May 27, 2009, 8:00 AM).

221. Coomaraswamy, *supra* note 205, ¶ 22; *see also* Karima E. Bennoune, *The War Against Women in Algeria*, MS. MAGAZINE, Sept./Oct. 1995, at 22.

222. Coomaraswamy, *supra* note 205, ¶ 23.

223. *Id.*

224. *Id.*

225. Farid Sait, *Husband Arrested in Murder of Algerian Television Journalist*, ZENGER NEWS (Jan. 29, 2021), https://www.zenger.news/2021/01/29/husband-arrested-in-murder-of-female-algerian-journalist/.

father, Djafer Laceb, "his daughter died as a result of an argument with her husband, who insisted she quit her job at Tamazight TV4."[226] Two days earlier, on January 24, 2021, a forty-five year-old mother of five children, Warda Hafedh, "was hit in the head three times with a hammer and stabbed in the heart five times," and brutally murdered "in front of her six-year-old daughter."[227] Her murderer was her spouse.[228] In October 2020, "the charred body of Chaïma, 19, was found in a deserted petrol station in Thenia, 80 km (50 miles) east of the capital Algiers."[229] It was reported that a man had kidnapped Chaïma, raped, tortured, and burned her to death.[230]

The group *Féminicides Algérie*, "which tracks such killings, says 38 women have been killed on account of their gender in the country since the start of the year."[231] In 2019, *Féminicides* had recorded the murders of sixty women and believed that the number was most likely much higher since most such murders usually go unreported to the authorities.[232] According to *Féminicides-dz*, a website that was created by two human rights activists to track and keep a record of femicides in Algeria, "75 women from all backgrounds and ages (up to 80 years old) died at the hands of their intimate partners, fathers, brothers, brothers-in-law, sons or strangers in 2019, and another 54 in 2020."[233] On January 3, 2022, in Oum el Bouaghi, a young woman in her thirties was murdered by her

---

226. *Id.*

227. Dalia Ghanem, *Algeria: War Against Women*, HUM. RIGHTS WITHOUT FRONTIERS INT'L (Jul. 30, 2021), https://hrwf.eu/algeria-war-against-women/.

228. *Id.*

229. *Chaïma: Algeria Women s Protest Over Teen's Rape and Murder*, BBC NEWS (Oct., 2020), https://www.bbc.com/news/world-africa-54465180.

230. *Girl, 19, Kidnapped, Raped and Burned to Death in Algeria*, MIDDLE E. MONITOR (Oct. 5, 2020, 11:47 AM), https://www.middleeastmonitor.com/20201005-girl-19-kidnapped-raped-and-burned-to-death-in-algeria/.

231. *Chaïma: Algeria Women Protest Over Teen's Rape and Murder*, *supra* note 229.

232. *Id.*

233. Ghanem, *supra* note 227.

neighbor.[234] She had refused his marriage proposal and so he killed her, burned her body, and then buried it as a form of revenge.[235]

Since it gained independence in 1847, Liberia has fought two extremely brutal civil wars—the First Liberian Civil War began in 1989 and lasted until 1996, and the Second Liberian Civil War was fought from 1999 to 2003.[236] In 1994, a survey was conducted in Monrovia (the capital of Liberia) and its environs by "a collaborative team of Liberian health workers and a US physician" to "document women's reproductive health needs and their experiences of violence, including rape and sexual coercion, from a soldier or fighter during the first 5 years of the Liberian civil war."[237]

According to the survey results, "[o]ne hundred (49%) of [the] 205 participants reported experiencing at least 1 act of physical or sexual violence by a soldier or fighter."[238] The girls and women who participated in the survey "reported being beaten, tied up, or detained in a room under armed guard (17%); strip-searched 1 or more times (32%); and raped, subjected to attempted rape, or sexually coerced (15%)."[239] Those who were at a significantly increased risk for physical and sexual violence were "[w]omen who were accused of belonging to a particular ethnic group or fighting faction or who were forced to cook for a soldier or fighter."[240]

---

234. *Liste Féminicides 2022*, FÉMINICIDES ALGÉRIE, https://feminicides-dz.com/feminicides/feminicides-2022/liste-des- feminicides-2022/ (last visited Aug. 15, 2022) (the website lists 28 femicides in Algeria so far as Aug. 2022).

235. Note that femicide or feminicide is a hate crime which is broadly defined as the international killing of women or girls because they are female. *Id.*; *see, e.g.*, Sydney Bay, Comment: *Criminalization is Not the Only Way: Guatemala's Law Against Femicide and Other Forms of Violence Against Women and the Rates of Femicide in Guatemala*, 30 WASH. INT'L L. J. 369, 369 (2021) ("Femicide is the murder of a woman because of her gender").

236. *See, e.g.*, EDMUND HOGAN, LIBERIA'S FIRST CIVIL WAR: A NARRATIVE HISTORY (2022) (providing a historical overview of Liberia's first civil war); *see also* GENOCIDE & PERSECUTION: LIBERIA (Noah Berlatsky ed., 2014) (examining Liberia's first and second civil wars).

237. Shana Swiss et al., *Letter from Liberia: Violence Against Women During the Liberian Civil Conflict*, 279 JAMA 625, 625 (1998).

238. *Id.*

239. *Id.*

240. *Id.*

The researchers reported that, "[o]f the 106 women and girls accused of belonging to an ethnic group or faction, 65 (61%) reported that they were beaten, locked up, strip-searched, or subjected to attempted rape, compared with 27 (27%) of the 99 women who were not accused."[241] In addition, "[w]omen and girls who were forced to cook for a soldier or fighter were more likely to report experiencing rape, attempted rape, or sexual coercion than those who were not forced to cook."[242] Finally, "[y]oung women (those younger than 25 years) were more likely than women 25 years or older to report experiencing attempted rape and sexual coercion."[243]

Similar atrocities were committed against girls and women during the Rwandan Civil War, which took place during the period April 7, 1994 to July 15, 1994.[244] The Interahamwe, the paramilitary group that was the main perpetrator of the Rwandan Genocide, raped, tortured, and killed many women and girls, most of whom were Tutsi.[245] Although rape had become a pervasive part of Rwanda's civil conflict, the International Criminal Court for Rwanda ("ICCR") "initially failed to include the charge of rape in indictments."[246] However, it was only after "a concerted international effort by women's non-governmental organizations [that] the prosecutor [began] charging perpetrators with sexual violence."[247]

Special Rapporteur Radhika Coomeraswamy noted that "the framework for the protection of women from sexual violence during armed conflict is based on international humanitarian law, which includes treaty law, customary international law, and the practice of international war crime tribunals."[248] Although the first conventions to regulate warfare in the modern era were the Hague Conventions of 1907, noted Ms.

---

241. *Id.*

242. *Id.*

243. *Id.*

244. Emily Amick, *Trying International Crimes on Local Lawns: the Adjudication of Genocide Sexual Violence Crimes in Rwanda's Gacaca Courts*, 20 COLUM. J. GENDER & L. 1, 1 (2011) (noting that during the Rwandan Genocide, about 250,000 women were raped).

245. *Id.* at 5 (noting that most of the rape victims during the Rwandan Genocide were Tutsi women and their Hutu women who were married to Tutsi men).

246. Coomaraswamy, *supra* note 205, ¶¶ 50-52.

247. *Id.* ¶ 52.

248. *Id.* ¶ 59.

Coomeraswamy, the primary framework for governing international humanitarian law are the Geneva Conventions of 1949.[249] Article 27 of the Fourth Geneva Convention—the Geneva Convention Relative to the Protection of Civilian Persons in Time of War—provides protections for women in time of war.[250] It states as follows: "Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault."[251]

Although the Geneva Conventions govern primarily international armed conflict, Article 3, common to all the Four Geneva Conventions, provides protections for individuals in internal conflicts.[252] In the case *Nicaragua v. United States of America*,[253] the International Court of Justice ("ICJ") held that Article 3 common to the Geneva Conventions is "an accepted part of customary international law in addition to being a treaty provision and thus binds all parties to a conflict, whether State or a non-State actors, irrespective of whether they are a party to the Geneva Conventions."[254]

Article 147 of the Fourth Geneva Conventions enumerates situations of grave breaches of the Convention.[255] According to Article 147:

> Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive

249. UN Commission on Human Rights (2000), *supra* note 106, at 21 ¶¶ 59 & 60.

250. *Id.* ¶ 60.

251. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 75 U.N.T.S. 287.

252. *Id.* at art. 3.

253. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27).

254. Coomaraswamy, *supra* note 205, ¶ 62. *See also id.* at 14.

255. Geneva Convention (IV), *supra* note 251, at art. 147.

> destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.[256]

Neither common Article 3 nor the grave breaches enumerated in Article 147 include sexual violence.[257] Recent cases brought before the International Criminal Tribunal for the Former Yugoslavia ("ICTY") "have defined sexual violence as torture, inhuman punishment, great suffering or serious injury."[258] To clarify and explain the "status of rape under [International Humanitarian Law], the ICRC issued an *Aide-Mémoire* in 1992, stating that the grave breach [of the] regime in Article 147 GCIV 'obviously not only covers rape, but also any other attack on a woman's dignity.'"[259]

Two additional protocols were added to the Four Geneva Conventions in 1977, and these protocols prohibit violence against women. These are: (1) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 8 June 1977; and (2) Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.[260] A third protocol was added in 2005: (3) Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Addition of an Additional Distinctive Emblem (Protocol III), 8 December 2005.[261]

Article 4 of Protocol II provides *fundamental guarantees*: According to Article 4(2): Without prejudice to the generality of the foregoing, the

---

256. *Id.*

257. *Id.* at arts. 3 & 147.

258. UN Commission on Human Rights (2000), *supra* note 106, at 22 para. 64.

259. THE 1949 GENEVA CONVENTIONS: A COMMENTARY 362 (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015). *See also* INTERNATIONAL COMMISSION OF THE RED CROSS (ICRC), AIDE-MÉMOIRE (Dec. 3, 1992) at para. 2. GCIV = Fourth Geneva Convection.

260. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977 [hereinafter Protocol II].

261. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Addition of an Additional Distinctive Emblem, Dec. 2005 [Hereinafter Protocol III].

following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:

> a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
>
> b) collective punishments;
>
> c) taking of hostages;
>
> d) acts of terrorism;
>
> e) *outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault*;
>
> f) slavery and the slave trade in all their forms;
>
> g) pillage;
>
> h) threats to commit any of the foregoing acts.[262]

Protocol I Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts has a similar provision.[263] Other areas of international human rights law, besides the Geneva Conventions and the Additional Protocols, "prohibit violence against women, including sexual violence."[264] For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as follows:

> . . . the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him [or her] or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having

262. Protocol II, *supra* note 260, at art. 4(2) (emphasis added).
263. Protocol I, *supra* note 260, at art. 75(1).
264. UN Commission on Human Rights (2000), *supra* note 106, at 23 para. 66.

> committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[265]

Although rape has historically not been recognized in both national and international instruments as torture, it has gained recognition in many international forums in recent years as a form of torture.[266] In fact, as early as 1992, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment "clearly identified rape as a form of torture."[267] In his first report to the UN Commission on Human Rights, Special Rapporteur Pieter Kooijmans included rape in his enumeration of "Types and methods of torture."[268] In oral testimony introducing his annual report to the UN Commission on Human Rights, Professor Kooijmans declared:

> A recent general recommendation of the Committee on the Elimination of Discrimination Against Women had stated that gender-based violence which impaired or nullified enjoyment by women of human rights and fundamental freedoms under general international law or under specific human rights conventions constituted discrimination within the meaning of article 1 of the specific Convention. *Since it was clear that rape or other forms of sexual assault against women held in detention were a particularly ignominious violation of the inherent dignity and*

---

265. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention].

266. Shvini Jayapalan et al., *A Qualitative Study to Explore Understanding and Perception of Sexual Abuse Among Undergraduate Students of Different Ethnicities*, 69 WOMEN'S STUD. INT'L FORUM 26, 26 (2018) (noting that sexual violence, which includes rape and is a form of "social and human rights violation" has "gained international recognition over the past three decades").

267. UN Commission on Human Rights (2000), *supra* note 106, at 23 para. 67.

268. UN Commission on Human Rights, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report by the Special Rapporteur, Mr. P. Kooijmans, appointed pursuant to Commission on Human Rights resolution 1985/33*, U.N. Doc. E/CN.4/1986/15, at 28-29 (Feb. 19, 1986).

> *right to physical integrity of the human being, they accordingly constituted an act of torture*.[269]

Sir Nigel Rodley, who was Amnesty International's first legal officer, one of the architects of the UN Convention against Torture, the UN Special Rapporteur on Torture (1993-2001), and a globally-recognized human rights lawyer, recognized rape as a form of torture.[270] In a statement in honor of Sir Rodley after his death in 2017, the Human Rights Institute at Columbia Law School noted that in addition to playing a central role in the drafting of the UN Convention against Torture, the human rights pioneer had "produced path-breaking work recognizing rape and sexual violence against women as torture."[271]

By the mid-1990s, regional human rights regimes had begun to take notice of the work of advocates for women's rights, especially with respect to rape and other forms of violence against women.[272] For example, by 1995, the Inter-American Commission on Human Rights had determined that rape constituted torture in violation of Article 5(2) of the American Convention on Human Rights (Pact of San Jose, Costa Rica).[273] In the case of *Raquel Martín de Mejía v. Perú*, the Inter-American Commission on Human Rights ("IACHR") determined that rape constituted torture, and

---

269. U.N. Comm'n on Hum. Rights, *Summary Record of the 21 Meeting, Held at the Palais des Naitons, Geneva, on Tuesday*, U.N. Doc. E/CN.4/1992/SR. 21, at para. 35. (Feb. 21, 1992) (emphasis added).

270. Geoffrey Robertson & Ivor Crewe, *Sir Nigel Rodley Obituary*, GUARDIAN, Feb. 2, 2017, https://www.theguardian.com/law/2017/feb/02/sir-nigel-rodley-obituary.

271. Human Rights Institute, *Columbia Law School and the Human Rights Institute Mourn the Loss of Human Rights Pioneer Sir Nigel Rodley*, COLUMBIA L. SCH. (N.Y.), (Jan. 26, 2017), https://web.law.columbia.edu/human-rights-institute/about/press-releases/sir-nigel-rodley-death.

272. *E.g.*, the Maputo Protocol, which was drafted in Lomé, Togo, in March 1995, recognized rape as a form of violence against women. *See* African Union, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)*, Jul. 11, 2003, at art. 11.

273. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 at art. 5.2 ("No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.").

that is was a violation of Article 5 of the American Convention on Human Rights.[274]

In 1997, the European Court of Human Rights, which had heretofore characterized rape as a form of inhuman treatment or a breach of the right to privacy, finally held that the rape of a female detainee constituted torture within the meaning of Article 3 of the European Convention on Human Rights. In *Aydin v. Turkey*, a case decided by the European Court of Human Rights, the Court held as follows:

> Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. *Against this background the Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention*.[275]

Both the ICTY and the International Criminal Tribunal for Rwanda ("ICTR") indicted "individuals for rape as a form of torture."[276] In addition, other human rights instruments besides the UN Convention on Torture have provisions "that have a bearing on the concept of sexual violence during times of armed conflict" and these include the Convention on the Prevention and Punishment of the Crime of Genocide; the Slavery Convention; the ICCPR; the ICESCR; and the CEDAW.[277]

---

274. Raquel Martín de Mejía v. Perú, Case 10.970, Inter-Am. Comm'n H.R. Report No. 5/96, OEA/Ser.L/V/II.90 doc. 7 at 157 (1996).

275. Aydin v. Turkey, App. 23178/94, at para. 83, 86 (Sep. 25, 1997) https://hudoc.echr.coe.int/fre#{%22languageisocode%22:[%22ENG%22],%22appno%22:[%2223178/94%22],%22documentcollectionid2%22:[%22CLIN%22],%22itemid%22:[%22002-6215%22]} (emphasis added).

276. UN Commission on Human Rights (2000), *supra* note 106, at 23 para. 67.

277. *Id.*

In her report to the UN Commission on Human Rights in 1998, Ms. Coomaraswamy, the Special Rapporteur on violence against women at that time, made some recommendations on how the international community could deal with violence against women in times of armed conflict. First, Ms. Coomaraswamy argued that "[e]xisting humanitarian legal standards should be evaluated and practices revised to incorporate developing norms on violence against women during armed conflict. The Torture and Genocide Conventions and the Geneva Conventions, in particular, should be re-examined and utilized in this light."[278]

Second, given the fact that peacekeeping has become a critical part of the UN's activities, "peacekeepers should be given necessary training in gender issues before they are sent to troubled areas. Offenses committed by peacekeepers should also be considered international crimes and they should be tried accordingly."[279] Third, "[t]he international community should have a special fund and project that has as its primary focus the provision of comprehensive services to post-conflict societies, from economic reconstruction to psychological counseling and social rehabilitation. Such a program should also include training in human rights and democratic governance."[280]

Fourth, "[t]he international legal responsibility of non-State actors should be clarified under international human rights and humanitarian law so that violations by non-State actors [are not met] with impunity."[281] In addition, Ms. Coomaraswamy noted that the statute of the "International Criminal Court should explicitly incorporate provisions on violence against women, both substantially and procedurally."[282] She further stated that "[i]n order for the ICC to be effective in ensuring justice for female victims of war crimes, a gender perspective must be integrated into all areas of the ICC statute," including articulating a definition of genocide that is gender-sensitive and "includes rape and other acts of sexual violence such as forced impregnation, forced sterilization and sexual mutilation."[283] Finally, Ms. Coomaraswamy argued that the Rome Statute of the ICC should have "[u]nequivocal language [that condemns] rape,

278. *Id.* at para. 95.
279. *Id.* at para. 96.
280. *Id.* at para. 97.
281. *Id.* at para. 98.
282. *Id.* at para. 99.
283. *Id.* at para. 100(a).

enforced prostitution and other forms of sexual violence as grave breaches and serious violations of the laws and customs of war."[284]

Ms. Coomaraswamy's recommendations also imposed obligations on States, which she argued, "should make every effort to end impunity for criminal acts under international humanitarian law that occur within their borders and by their security forces."[285] In addition, she recommended that "[a]ll States should ratify the relevant international instruments of human rights and humanitarian law including the [ICCPR], the [UN Torture Convention], the [CEDAW] and the International Convention on the Elimination of All Forms of Racial Discrimination."[286]

Finally, Ms. Coomaraswamy argued that "[e]very State should cooperate with international agencies to apprehend those who have been indicted by international tribunals dealing with war crimes,"[287] and, in addition, "amend its penal law, codes of military conduct and other specialized procedures to ensure that they conform with international human rights and humanitarian law."[288] With respect to non-State actors, Ms. Coomaraswamy recommended that they "should act within the bounds of international humanitarian and human rights law, recognizing that they are liable for individual crimes against international humanitarian law and that, under universal jurisdiction, they may be prosecuted for such crimes in any court of law."[289] In addition to acting within the bounds of international law, non-governmental organizations should also "make every effort to work with Governments to prevent, punish and prosecute violations of international human rights and humanitarian law."[290]

284. *Id.* at para. 100(b).
285. *Id.* at para. 101.
286. *Id.* at para. 102.
287. *Id.* at para. 103.
288. *Id.* at para. 104.
289. *Id.* at para. 109.
290. *Id.* at para. 110.

II. CASE LAW ON VIOLENCE AGAINST WOMEN IN AFRICA

A. Introduction

Many African countries have laws against domestic violence, particularly violence against women and girls.[291] However, these laws are often not enforced. In 2015, Kenya promulgated the Protection Against Domestic Violence Act, No. 2.[292] The Act defines domestic violence as

> (a) abuse that includes—(i). child marriage; (ii) female genital mutilation; (iii) forced marriage; (iv) forced wife inheritance; (v) interference from in-laws; (vi) sexual violence within marriage; (vii) virginity testing; (viii) widow cleansing; (b) damage to property; (c) defilement; (d) depriving the applicant of or hindering the applicant from access to or a reasonable share of the facilities associated with the applicant's place of residence; and (e) economic abuse; (f) emotional or psychological abuse; (g) forcible entry into the applicant's residence where the parties do not share the same residence; (h) harassment; (i) incest; (j) intimidation; (k) physical abuse; (l) sexual abuse; (m) stalking; (n) verbal abuse; (o) any other conduct against a person, where such conduct harms or may cause imminent harm to the safety, health, or well-being of the person.[293]

Human rights activists in Kenya have noted that passage of the law against domestic violence was motivated and enhanced by "a particularly dramatic incident of a common problem—one that is not unusual across Africa"—wife beating.[294] In December 1998, Felix Nthiwa Munayo, a

---

291. Elizabeth Barad et al., *Gender-based Violence Laws in sub-Saharan Africa*, CYRUS R. VANCE CENTER FOR INT'L JUST. & CTR. FOR REPROD. RTS (2007) https://reproductiveright s.org/gender-based- violence-laws-in-sub-saharan-africa/ (last accessed Jan. 31, 2023).

292. Protection Against Domestic Violence Act, No. 2 (2015) [hereinafter PADVA].

293. *Id.* § 3.

294. Mary Kimani, *Taking on Violence Against Women in Africa*, AFR. RENEWAL: SPECIAL ED. ON WOMEN (Feb. 22, 2012), https://www.un.org/africarenewal/magazine/special-edition-women-2012/taking-violence-against- women-africa.

married Kenyan police officer, returned home from work quite late and demanded that his wife serve him meat for dinner.[295] However, there was no meat in the house for his wife, Betty Kavata, to serve Munayo for dinner.[296] Furious, Munayo brutally beat his wife, paralyzed her, and severely damaged her brain.[297] Five months later, just 28 years old, she died from the injuries inflicted on her by her husband.[298]

However, unlike other domestic abuse situations in Kenya, Ms. Kavata's case received significant coverage from the media. "Images of the fatally injured woman and news of her death generated nationwide debate on domestic violence."[299] After "five years of protests, demonstrations and lobbying by non-governmental organizations ("NGOs"), as well as outraged men and parliamentarians," the Government of Kenya finally "passed a family protection bill criminalizing wife-beating and other forms of domestic violence."[300]

Wife beating and other forms of violence against women are a global problem that affects millions of women in virtually all countries.[301] In Africa, violence against women includes wife beatings, forced marriage, dowry-related violence, marital rape, sexual harassment, intimidation at work and in educational institutions, forced abortion, forced sterilization, trafficking, and forced prostitution.[302]

Some types of violence, such as FGM, affect not just women, but also girls. FGM, for example, causes significant "bleeding and infection, urinary incontinence, difficulties with childbirth and even death" to many

---

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *See, e.g.*, Linda R. Keenan, *Domestic Violence and Custody Litigation: The Need for Statutory Reform*, 13 HOFSTRA L. REV. 407 (1985) (examining and explaining the pervasiveness of the problem of wife beating in the United States); *see also* Judith Armatta, *Getting Beyond the Law's Complicity in Intimate Violence Against Women*, 33 WILLIAMETTE L. REV. 774 (1997) (examining the extent of wife beating in several countries around the world, including Brazil, Costa Rica, Mexico, Pakistan, Russia, South Africa, the United States, and many others).

302. *Id.*

girls and women.[303] Child marriage is a heinous type of violence that deprives young girls of the opportunity to obtain an education and the training that they need to evolve into productive and contributing members of their communities.[304] In addition, child marriage also subjects girl children to significant levels of violence and suffering at the hands of their much older husbands and other members of their husbands' families.[305]

One of the most important incidents of mass violence against women and girls in Kenya occurred in the aftermath of the 2007 presidential election.[306] Shortly after Mwai Kibaki, who had been declared winner of the December 2007 election, was inaugurated as president of the Republic of Kenya, Kenya was pervaded by ethnic-induced violence, which resulted in the massacre of over 1,000 people, the internal displacement of hundreds of thousands of people, and the destruction of a lot of property.[307] In addition to these atrocities, "[t]housands more women, men, and children *were raped or suffered other horrific forms [of] sexual violence and brutality*."[308] For many years, many survivors of these

303. *Id.*

304. John Mukum Mbaku, *International Law and Child Marriage in Africa*, 7 INDON. J. INT'L & COMP. L. 101 (2020) (noting that girl-children who are forced into child marriage, are deprived of the opportunity to attend school and acquire the skills that they need to function as productive adults and contributing members of their communities).

305. *Id.* (examining child marriage in Africa and its impact on girl children).

306. HUMAN RIGHTS WATCH, *"I Just Sit and Wait to Die": Reparations for Survivors of Kenya's 2007-2008 Post- Election Sexual Violence* (Feb. 15, 2016) https://www.hrw.org/report/2016/02/15/i-just-sit-and-wait- die/reparations-survivors-kenyas-2007-2008-post-election (examining the extent of violence against girls and women, including rape, in Kenya, in the aftermath of the 2007 presidential elections).

307. JOHN MUKUM MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES: A CONSTITUTIONAL POLITICAL ECONOMIC APPROACH 6 (2018); Yvonne M. Dutton & Tessa Alleblas, *Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya*, 91 ST. JOHN'S L. REV. 105, 108 (noting that "in 2007 and 2008, Kenya experienced an unprecedented level of elite-driven election-related violence that left more than 1,000 dead and displaced").

308. *Constitutional Petition No. 122 Seeks to Hold the Kenyan Government Accountable for Sexual Violence in the Post-Election Period*, PHYSICIANS FOR HUM. RTS. (Aug. 19, 2022) https://phr.org/issues/sexual-violence/program-on- sexual-violence-in-conflict-zones/advocacy/public-interest-litigation/ [hereinafter Physicians for Human Rights] (emphasis added).

insidious crimes were forced "to live with [the] severe physical and psychological consequences of the violence [that] they [had] endured."[309]

However, in 2013, a petition was finally brought before the High Court of Kenya in Nairobi (Constitutional and Human Rights Division) that offered the opportunity for the courts to finally deliver justice to these victims and hold the government of Kenya accountable for post-election sexual violence.[310] The petition, officially known as *Constitutional Petition No. 122 of 2013*, was initiated on February 20, 2013 by six female and two male survivors.[311] This case will be examined in the subsequent section.

B. *Coalition on Violence Against Women & 11 Others v. Attorney General of the Republic of Kenya & 5 Others (High Court of Kenya)*

The official release of the results of Kenya's 2007 general elections were followed by widespread violence and demonstrations and, during this period of significant levels of unrest throughout most of the country, "several women, men and children were targeted for attack and were subjected to [various] forms of Sexual and Gender Based Violence ("SGBV") including rape, gang rape, sodomy, defilement, forced pregnancy, forced circumcision and mutilation or forced amputation of their penises."[312] The petitioners[313] brought action against the respondents[314] "for their failure to anticipate and prepare adequate and

309. *Id.*

310. *Id.*

311. Coalition on Violence Against Women & 11 Others v. Attorney General of the Republic of Kenya & 5 Others (2020) L.L.R. (H.C.K.) (Kenya).

312. *Id.* ¶ 13.

313. The petitioners were the Coalition on Violence Against Women (1st); Independent Medico-Legal Unit (2nd); the Kenyan Section of the International Commission of Jurists (3rd); Physicians for Human Rights (4th); 6 females, named JWM, PKK, SMM, CNR, LGS, and SKO (5th-10th); 2 males named DOJ & FOO (11th & 12th). *Id.* at 16.

314. The respondents were the Attorney General of the Republic of Kenya (1st); the Director of Public Prosecutions of the Republic of Kenya (2nd); the Independent Policing Oversight Authority (3rd); the Inspector General of the National Police of the Republic of Kenya (4th); the Minister for Medical Services of the Republic of Kenya (5th); the Minister of Public Health and Sanitation of the Republic of Kenya (6th). *See id.* at Introduction.

lawful policing responses to the anticipated civil unrest that contributed to the SGBV, and the failure to provide effective remedies to the victims of SGBV which violated the fundamental rights of the 5th to 12th petitioners and other victims."[315] The rights alleged to have been violated included "the right to life; the prohibition of torture, inhuman and degrading treatment; the right to security of the person; the right to protection of the law; the right to equality before the law and freedom from discrimination; the right to information; and the right to remedy and rehabilitation."[316]

The petitioners averred that the first, second, third, and fourth respondents "had failed to investigate or take meaningful steps towards ensuring the redressing of gross human rights violations perpetrated against the victims."[317] Thus, the petitioners requested that the High Court make a declaratory order:

> to the effect that the right to life, the prohibition of torture, inhuman and degrading treatment, the right to security of the person, the right to protection of law, the right to equality and freedom from discrimination, the right to information, and the right to remedy were violated in relation to the petitioners 5 to 12 (both inclusive) and other victims of SGBV during the PEV, as a result of the failure of the Government of Kenya to protect those rights.[318]

Among the issues that the High Court was required to adjudicate was "[w]hether the failure by the police to investigate a rape report and make arrests amounted to a violation of the right to life, security of the person and protection from torture, inhuman and degrading treatment or punishment and [the] right to appropriate remedy."[319] The High Court started its analysis of the case by noting that the rights to life, protection from torture, and security of the person were guaranteed,

---

315. Coalition on Violence Against Women (2020), para. 14 & Case Summary.
316. *Id.* ¶ 14.
317. *Id.*
318. *Id.* ¶ 5.
319. *Id.*

> under sections 70, 71, and 74 of the retired Constitution [of Kenya], and [were] also protected by Articles 3 and 5 of the Universal Declaration of Human Rights (UDHR); Articles 6, 7 and 9 of the International Covenant on Civil and Political Rights (ICCPR); Articles 4, 5 and 6 of the African Charter on Human and Peoples' Rights (Banjul Charter); and Article 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).[320]

Next, the Court cited to the UN Human Rights Committee's General Comment No. 31, which noted that each State Party to the ICCPR had an obligation to prevent the violation of the rights guaranteed by the ICCPR.[321] Specifically, each State Party must protect its citizens from threats from State actors, as well as non-State actors.[322] The Court then stated that the State "had to respect the right to life by refraining to engage in conduct which would arbitrarily deprive the right."[323] In addition, the Court noted that:

> [s]exual violence [was recognized] as an infringement on the right to life under Article 4 of the Maputo Protocol as it expressly state[d] that States, in protecting and [realizing] the right of women to life, and the integrity and security of their person, should "*enact and enforce laws to prohibit all forms of violence against women[,] including unwanted or forced sex*".[324]

Rape, the Court argued, "had elements of torture" and these included "the severe infliction of pain or suffering for a number of purposes including intimidation or discrimination."[325] The Court then noted that the CEDAW

320. Coalition on Violence Against Women (2020), at para. 109.

321. *Id.* ¶ 111. Specifically, the UN Human Rights Committee stated that "[a] general obligation is imposed on States Parties to respect the [ICCPR] rights and to ensure them to all individuals in their territory and subject to their jurisdiction." U.N. Human Rights Committee, *General Comment No. 31[80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev. 1/Add. 13, para 3 (May 26, 2004).

322. *Supra* note 321.

323. Coalition on Violence Against Women (2020), at para. 112.

324. *Id*. ¶ 113.

325. *Id*. ¶ 115.

Committee, in its General Recommendation No. 19, had acknowledged "that gender-based violence violate[d] the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment and the right to liberty and security of person."[326] Article 9 of the ICCPR, the Court argued, imposed an obligation on the State "to protect the right to security of the person of non-detained persons."[327]

During their appearance before the Court, petitioners 5, 6, and 9 testified that they had been raped by General Service Unit ("GSU") Officers.[328] Although the fifth and ninth petitioners did not report the attack on them to the police, "they [were] certain that they [had] identified their violators as GSU officers due to their uniform."[329] The testimony that they presented indicated that various State actors "were involved in acts of sexual violence against the citizenry" and that these officers were directly involved in the violation of the rights of the petitioners.[330]

After analyzing the petitioners' and the respondents' submissions, and using international human rights law, particularly, the ICCPR, the Banjul Charter, the Maputo Protocol, and the CEDAW, as a tool to interpret the Constitution, the High Court ruled in favor of four survivors of PEV in Kenya. Specifically, the Court found that the Government of Kenya was responsible for the "failure to conduct independent and effective investigations and prosecutions of SGB-related crimes during the post-election violence" and that this failure "is a violation of the positive obligation on the Kenyan State to investigate and prosecute violations of the rights to life; the prohibition of torture, inhuman and degrading treatment; and the security of the person of the 5th, 6th, 8th and 9th petitioners."[331] The Court also issued a declaratory order stating:

---

326. *Id.; see also* U.N. Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 19, adopted at the Eleventh Session*, A/47/38 (1992).

327. *General Recommendation No. 19*, *supra* note 326, at 8.

328. Coalition on Violence Against Women & 11 Others v. Attorney General of the Republic of Kenya & 5 Others (2020) L.L.R. (H.C.K.) (Kenya), at para. 118. General Service Unit (GSU) is a paramilitary win of the Kenya Police Service.

329. *Id.*

330. *Id.*

331. *Id.* ¶ 172(a). (SGBV refers to 'sexual and gender-based violence').

> to the effect that the right to life; the prohibition of torture, inhuman and degrading treatment; the right to security of the person; the right to protection of the law; the right to equality and freedom from discrimination; and the right to remedy were violated in relation to the 5th, 6th, 8th and 9th petitioners during the 2007-2008 postelection violence, as a result of the failure of the Government of Kenya to protect those rights.[332]

As progressive as this judgment was, especially in respect to government accountability for sexual violence in Kenya, critics argued that the High Court had only recognized harms suffered by four out of the eight survivors/petitioners.[333] Thus, about a year after the judgment in *Coalition on Violence Against Women & 11 Others* was delivered, survivors of the 2007/2008 election-related violence in Kenya and civil society organizations filed a partial appeal, "asserting that a High Court decision delivered on December 10, 2020 failed to recognize the Government of Kenya's responsibility to survivors previously denied redress for the state's failure to protect them from sexual violence perpetrated by non-state actors."[334] According to Naitore Nyamu-Mathenge, Kenya head at Physicians for Human Rights:

> partial justice is an injustice. While [the 2020 judgment] was a milestone victory for survivors of sexual violence, we find that the High Court's original ruling did not go nearly far enough to recognize the trauma experienced by four of the eight survivors, as well as the Government of Kenya's legal obligation to prevent and respond to post-election sexual violence.[335]

---

332. *Id.*¶ 172(b).

333. Physicians for Human Rights, *supra* note 308.

334. *Id*.; *see also Survivors of Post-Election Sexual Violence in Kenya Appeal Elements of Recent Ruling, Seek Justice and Redress for All Survivor-Petitioners,* PHYSICIANS FOR HUM. RTS. (Nov. 11, 2021), https://phr.org/news/survivors- of-post-election-sexual-violence-in-kenya-appeal-elements-of-recent-ruling-seek-justice-and-redress-for-all-survivor-petitioners.

335. Physicians for Human Rights, *supra* note 308.

C. *Rapula Molefe v. The State (Court of Appeal of Botswana)*

This case was an appeal brought to the Court of Appeal of Botswana at Lobatse by Rapula Molefe who had been convicted of defilement in Magistrates Court.[336] Molefe had subsequently appealed both "his conviction and sentence" to the High Court but the appeal was dismissed by Walia J.[337] The latter also denied the appellant leave to appeal to the Court of Appeal.[338] Molefe then brought an application before the Court of Appeal to consider the leave to appeal, as well as his conviction and sentence.[339]

Writing for the majority, Justice Tebbutt noted that the appellant—Rapula Molefe, was charged before the Principal Magistrate at Molepolole with rape.[340] It was alleged that on September 9, 2000, Molefe had had sexual "intercourse with a girl, Phomolo Kekobelwe, without her consent."[341] At the time of the alleged rape, the child was under eight years old.[342] She testified that "on the day in question the appellant called her while she was playing with two friends and told her to undress."[343] After she had undressed, the appellant then allegedly raped her.[344] She added that she did not tell her mother immediately of the molestation because the "appellant had told her that he would kill her if she told anyone."[345]

Subsequently, the mother reported the matter to the police, who then took the child for medical examination and the physician who examined her confirmed that she "had been sexually abused."[346] In an "unsworn statement," the appellant averred that "he had been at work on that day, which was a Saturday."[347] However, the child insisted that "it was the

336. Molefe v. The State, 55-05 Ct. App. 1 para. 7. (Bots.).
337. *Id.* para. 10.
338. *Id.*
339. *Id.*
340. *Id.* para. 2.
341. *Id.*
342. Evidence adduced before the Court showed that she was born on Nov. 10, 1992. *Id.*
343. *Id.* para. 3
344. *Id.*
345. *Id.*
346. *Id.*
347. *Id.* para. 4.

appellant who had abused her."[348] Having determined from the evidence presented before the Court by the child and supported by the findings of the physician who had examined her, that "there had been penetrative sexual intercourse with the child," the trial magistrate then noted that the next issue that had to be determined was whether "the complainant consented to such intercourse or not."[349]

The trial magistrate then acquitted the appellant of rape.[350] However, since the child was under the age of 16 years, the magistrate invoked the provisions of § 192 of the Criminal Procedure and Evidence Act (Cap 08: 02) and "found the appellant guilty of defilement in terms of Section 147 of the Penal Code and sentenced him to 12 years imprisonment."[351] Section 192 of the Criminal Procedure and Evidence Act states as follows:

> When a person is charged with rape and the court is of opinion that he is not guilty of that offence but that he is guilty of an offence under one of the sections 146, 147, 150, 168 and 246 of the Penal Code (relating to indecent assault on females, defilement of girls under 16 years of age, procuring defilement by threats etc., incest by males and common assault, respectively), he may be convicted of that offence although he was not charged with it.[352]

Section 147(1) of the Penal Code of Botswana states that "[a]ny person who unlawfully and carnally knows any person under the age of 16 years is guilty of an offense and on conviction shall be sentenced to a minimum term of 10 years' imprisonment or to a maximum term of life imprisonment."[353] After Molefe was convicted of defilement and sentenced by the Magistrates Court, the appellant appealed to the High Court, but his appeal was rejected. He then applied to the Court of Appeal, arguing that "the trial magistrate had erred in convicting him of defilement" and that since the trial magistrate had acquitted him of rape, "the court could not have convicted him of defilement because an eight-

348. *Id.*
349. *Id.* paras. 5 & 6.
350. *Id.* para. 7
351. *Id.*
352. Criminal Procedure and Evidence Act (Cap 08: 02) (Bots.) § 192.
353. Penal Code (Cap 08–01) (Bots.) § 147.

year-old is presumed to be incapable of consenting to sexual intercourse."[354]

Convinced that the appellant's "contention merited the attention of [the] Court [of Appeal]," Justice Tebbutt granted the appellant leave to appeal. The learned justice noted that in *Ketlwaeletswe v. The State*, which was decided by the Court of Appeal at Lobatse, the Court was called upon to decide the following question, which had been referred to it, in terms of Section 15 of the Court of Appeal Act, by Walia J: Where a man has sexual intercourse with a young girl deemed incapable of consenting to the act, is the proper charge rape or defilement?[355]

The Court then cited to the writings of Carpsovius, "a leading writer on Roman-Dutch law, which is, of course, also the common law of Botswana, that under Roman-Dutch law a girl below the age of 12 years is irrebuttably presumed to be incapable of consenting to sexual intercourse."[356] Justice Tebbutt noted that this statement "was written in 1772 and was expressly stated to be the law in South Africa in *R v. Z*."[357] The Court of Appeal, noted Justice Tebbutt, held that "a girl (or also a boy) under the age of 12 years—the limit being the completion of the child's twelfth year, . . . is irrebuttably presumed to be incapable of consenting to sexual intercourse and that—[w]here a man has sexual intercourse with a young girl deemed incapable of consenting to the act the proper charge is rape."[358]

The Court noted, however, that a few questions arise from the Court of Appeal's decision in *Ketlwaeletswe*. The first question is whether, "where it is established that a child with whom an accused person has had sexual intercourse is below the age of twelve years, the element of intention or mens rea is inapplicable and need not be proved by the State."[359] The second question is whether "in such circumstances an accused person

354. Molefe v. The State, 55-05 Ct. App. 1 para. 11. (Bots.).

355. *Id.* para. 13. *See also Ketlwaeletswe v. The State*, CLCLB–066–06 (Court of Appeal, Bots., 2007).

356. Molefe, 55-05 Ct. App. 1 para. 13. (Bots.).

357. *Id. See also R v. Z* 1960 (1) SA 739 (A).

358. Molefe, 55-05 Ct. App. 1 para. 13. (Bots.).

359. *Id.* para. 14.

can be convicted of defilement."[360] The appellant in the case at bar raised both questions.[361]

Justice Tebbutt then noted that "[r]ape is a crime of which intention is an element" and that "[t]here must be an intention to have unlawful carnal connection with a woman without her consent."[362] In rape cases then, intention must "be proved as an essential element of the State case."[363] The Court then cited to several cases from South Africa dealing with *mens rea* as an element of the State's case.[364] After examining the South African cases, Justice Tebbutt concluded that it is apparent that "the essential elements of intention and consent while inter-related in cases of rape, are separate and distinct concepts."[365]

Justice Tebbutt then stated that while "[c]onsent by the complainant may be absent," however, in order for "an accused person who is charged with raping her to be convicted of doing so he must be proved to have had the intention to rape her in that he knew that she had not consented or was aware of the possibility that she had not consented but proceeded with the act of intercourse reckless whether she had consented or not."[366]

With respect to recklessness, the Court noted that:

> in the context of the criminal law on the part of the doer of an act [recklessness] can be established where there is something in the circumstances that would have drawn the attention of the ordinary prudent individual to the possibility that his act may cause criminal consequences but having recognized such risk, the doer goes on to do it . . . or aptly put colloquially as "couldn't care less."[367]

With respect to the case at bar, the question that the Court had to answer was: How should the Court apply these authorities in the case where the complainant is a child whose proven age is below the age of twelve years

360. *Id.*
361. *Id.*
362. *Id.* para. 16.
363. *Id.* para. 16.
364. *Id.* para. 17-19.
365. *Id.* para. 20.
366. *Id.*
367. *Id.* para. 21.

and hence, is incapable of giving consent? First, argued Justice Tebbutt, in order for the Court to "secure the conviction of an accused person charged with raping such child," it must establish "the essential element of intention or *mens rea*."[368] Furthermore, he argued that the State "must prove that the person knew that the child complainant had not consented or was reckless whether the child had consented or not."[369]

But how can this knowledge be proven? The accused must have known that "the child was under the age of twelve" or "that there was a possibility that the child was under that age but had carnal connection with her reckless whether she was under that age or not."[370] The Court then cited to *R v. Z* where Ramsbottom JA held that:

> [i]n such a case, too, the necessary knowledge can be proved in many ways, and if the Crown proves that the accused knew that there was a possibility that the child was under the age of 12 and had intercourse reckless whether she was under the age or not, the necessary *mens rea* will have been proved.[371]

However, noted Justice Tebbutt, it may be "the case that because of the size and apparent maturity of the child, either physically or by its behavior and conduct, that the accused person avers that he or she had a reasonable belief that the child was over the age of twelve."[372] In such a case, argued Tebbutt JP, "the onus still rests on the State to prove from all the relevant facts that the accused could not reasonably have had such a belief" and that "[t]he onus does not shift to the accused to prove the reasonable belief."[373] Finally, if the State fails to prove the absence of such belief, "it will also have failed to establish the necessary *mens rea* and would be unable to secure a conviction for rape."[374]

Nevertheless, argued Justice Tebbutt, the State will still be able to "secure a conviction for defilement unless the accused person is able to

368. *Id.* para. 22.
369. *Id*.
370. *Id.*
371. *Id.* para. 23.
372. *Id.* para. 24.
373. *Id.*
374. *Id.* para. 24.

invoke the provisions of Section 147(5) of the Penal Code."[375] Section 147(5) states as follows:

> It shall be a sufficient defense to any charge under this section if it appears to the court before whom the charge is brought that the person so charged had reasonable cause to believe and did in fact believe that the person was of or *above the age of 16 years* or was such charged person's spouse.[376]

Section 147(1) of the Penal Code provides that "any person who unlawfully and carnally knows any person under the age of 16 years is guilty of an offense."[377] The Court then noted that an essential element of the crime of rape is "*lack of consent* on the part of the complainant" (i.e., the victim).[378] Consent, noted the Court, would apply equally to a victim or complainant under the age of 16 years, either because (1) the complainant is under the age of twelve years and hence is legally incapable of consenting; or (2) the complainant, who is "between the ages of 12 and 16 years has, in fact, not consented to the sexual act."[379] Thus, noted Tebbutt JP, "[d]efilement would therefore be an offense where despite the child consenting to, and being a willing participant in the act, is under the age of sixteen years."[380]

The Court noted that Section 147(1) was designed to serve as a:

> safeguard against the notorious sexual vulnerability of young children and teenagers under the age of 16 both for their protection against persons who may seek to exploit that vulnerability, as well as for their own good in preventing them from engaging in sexual activity, particularly in the light of the present-day prevalence of sexually transmitted diseases."[381]

Therefore, noted the Court, where:

---

375. *Id.* para. 25.
376. Penal Code (Cap 08–01) (Botswana, 1986), at § 147(5) (emphasis added).
377. *Id.* at § 147(1).
378. Molefe v. The State, 55-05 Ct. App. 1 para. 25. (Bots.) (emphasis added).
379. *Id.*
380. *Id.*
381. *Id.* para. 26.

> an accused person has carnal knowledge of a child under the age of twelve and the State does not discharge the onus of proving that the accused could not have had a reasonable belief that the child was over the age of sixteen, the court can still, even while acquitting the accused of rape, under the provisions of Section 192 of the Criminal Procedure and Evidence Act, convict him of defilement, unless the accused can convince the court that there exist grounds for believing that the child, whose proved age was under twelve, was of or above the age of sixteen.[382]

However, none of this applies if the State proves that the complainant did not consent.[383]

Justice Tebbutt then noted that since at the time the crime was committed, the victim was a child under the age of twelve years and therefore was incapable of giving consent, the magistrate had "erred in acquitting the appellant of rape."[384] However, noted Tebbutt JP, the magistrate was not in error when he convicted the appellant of defilement, even though he was not charged with that crime.[385]

The appellant, noted Tebbutt JP, had argued that he should not have been convicted of defilement and that the trial magistrate had "erred in rejecting his alibi" and again "in convicting him on the evidence of the child which, he submitted was uncorroborated."[386] The honorable justice noted that the defense of alibi had been brought up during the appellant's appeal before the High Court and had been carefully considered by Walia J, who subsequently held that "the State had successfully dislodged the defense."[387] Tebbutt JP then concluded that "Walia J's reasoning is sound and I agree with it."[388]

Justice Tebbutt then stated that after thoroughly reviewing the proceedings in the courts *a quo* and the appellant's presentation before the Court of Appeal, he had concluded that "the appellant despite being found not guilty of rape, was correctly convicted of defilement contrary to

382. *Id.* para. 28.
383. *Id*.
384. *Id.* para. 29.
385. *Id.*
386. *Id.* para. 30.
387. *Id.* para. 31.
388. *Id.* para. 32.

Section 147(1) of the Penal Code. His appeal against his conviction must therefore fail."[389] Tebbutt JP also noted that the appellant had appealed the twelve-year sentence imposed on him by the trial magistrate. In handing out that sentence, stated Justice Tebbutt, the trial magistrate had reminded the appellant of the "gravity of the offense" and that the appellant had "taken advantage of the trust and innocence of a very young child to satisfy his lust."[390] The trial magistrate also stated that, children, such as the victim, "needed to be protected" and that "such excesses as the appellant had committed could not be condoned."[391] Tebbutt JP concluded that since the trial court had not "materially misdirected itself" and since the sentence was not "so excessive as to create a sense of shock," there "can be no justification, therefore, for [the Court of Appeal] to interfere with [the sentence]."[392]

Finally, the Court of Appeal held as follows: "(a) the appeal against the conviction and sentence is dismissed" and "(b) the conviction and sentence of 12 years imprisonment, effective from 22 April 2003 are confirmed."[393]

D. *Tshabalala v. The State; Ntuli v. The State (Constitutional Court of South Africa)*

This was a very important case in the fight against the crime of rape in South Africa. The subject matter of the case was the "doctrine of common purpose" and whether it applied to the common law crime of rape, and if not, whether there was any distinction between rape and other crimes to which the doctrine of common purpose applied.[394] The applicants, who had been convicted of rape in the High Court of South Africa, Gauteng Local Division, Johannesburg, had argued that rape could only be committed by a male using his own genitalia, and not by "an individual who is merely present when the offense is committed and by his conduct . . . either promotes, encourages or facilitates the successful commission of the offense."[395]

389. *Id.* para. 34.
390. *Id.* para. 35.
391. *Id.*
392. *Id.* para. 36.
393. *Id.* para 42.
394. *Tshabalala v. The State; Ntuli v. The State* [2019] ZACC 48 (CC S. Afr.).
395. *Id.* para 2.

Writing for the majority in the Constitutional Court ("CC"), Mathopo AJ began his analysis of the case by citing to the Supreme Court of Appeal's decision in *S v Chapman*:

> Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.[396]

Justice Mathopo then noted that the facts in the case at bar "demonstrate that for far too long rape has been used as a tool to relegate the women of [South Africa] to second-class citizens, over whom men can exercise their power and control, and in doing so, strip them of their rights to equality, human dignity and bodily integrity" and that "[t]he high incidence of sexual violence suggests that male control over women and notions of sexual entitlement feature strongly in the social construction of masculinity in South Africa."[397]

Regarding the case at bar, Mathopo AJ stated that the two principal issues for the CC to decide were (1) whether the doctrine of common purpose applied to the common law crime of rape; and (2) if not, whether there is any rational basis for a distinction between the common law crime of rape and other crimes where the doctrine applies.[398] In their application to the CC, the applicants had argued that:

> under the common law, the crime of rape is an instrumentality offense which, by its nature, can only be committed by a male using his own genitalia, and not by an individual who is merely

396. *S v Chapman* [1997] ZASCA 45; 1997 (3) SA 341 (SCA), paras 3-4.
397. *Tshabalala* [2019] para 1.
398. *Id.* para 2.

> present when the offense is committed and by his conduct (through his association or active participation) either promotes, encourages or facilitates the successful commission of the offense.[399]

The trial court—the High Court of South Africa, Gauteng Division—disagreed with the arguments presented by the applicants and subsequently "convicted them together with the other co-accused of various charges, including the common law crime of rape on the basis of the application of the doctrine" of common purpose.[400] Mathopo AJ then stated that South African courts, including the High Court and the Supreme Court of Appeal, have applied the doctrine of common purpose in different ways.[401] While some courts "have found the doctrine inapplicable in crimes of an instrumental nature, committed by a group of persons with a mutual objective intended to produce a specific result against a targeted victim," other South African courts "have found the doctrine capable of application in the same context given that the requirements of the doctrine are met."[402]

The facts in the case, noted Mathopo AJ, were "comprehensively set out by the High Court."[403] He then proceeded to provide an overview of these facts. On September 20, 1998, late at night, a group of young men "went on a rampage in the Umthambeka section of the township of Tembisa in Gauteng."[404] During their violent rampage, which lasted into the early hours of the next morning, the young men "forced their way into several homes located on nine separate plots, in a neighborhood inhabited by the marginalized and vulnerable members of our society."[405] The attackers committed various crimes, including "the rape of eight female occupants, some of whom were raped repeatedly, by several members of the group."[406] The fact that among the victims was a child of fourteen

---

399. *Id.*
400. *Id.* para 3.
401. *Id.*
402. *Id.*
403. *Id.* para 5.
404. *Id.*
405. *Id.*
406. *Id.* para 6.

years and a woman who was visibly pregnant, noted the Mathopo AJ, "did not deter the group."[407]

The perpetrators were eventually apprehended and charged and on August 13, 1999, they were brought before the High Court in Johannesburg.[408] Justice Mathopo then reviewed the case's litigation history.[409] On November 23, 1999, Mr. Tshabalala, Mr. Ntuli and the other co-accused "were found guilty of eight counts of rape respectively, seven of which were imposed on the basis of the application of the doctrine" of common purpose.[410] The Court noted that both Mr. Tshabalala and Mr. Ntuli were identified at the scene of the crime by credible witnesses.[411] The applicants' argument that "the common law crime of rape is not an offense for which an individual can be convicted through the application of the doctrine" of common purpose was rejected by the High Court.[412] The applicants had argued that:

> the crime of rape is an instrumentality offence which, by its nature, can only be committed by a male using his own genitalia, and not by an individual who is merely present when the offence is committed and by his conduct (through his association or active participation) either promotes, encourages or facilitates the successful commission of the offence.[413]

In its determination that the doctrine applied to the common law crime of rape, the High Court had carefully evaluated the evidence presented and determined that "the group [had] acted as a 'cohesive whole' moving from one home to another at different times, and that the violence was committed in a systematic pattern."[414] To support its findings, the High Court had held that "the fact that blankets were placed over the other members of the homes when the women and children were raped, and that some members of the group were posted outside as guards, inexorably

---

407. *Id.*
408. *Id.* para 7.
409. *Id.* paras 8-12.
410. *Id.* para 8.
411. *Id.*
412. *Id.* para 9.
413. *Id.* para 2.
414. *Id.* para 10.

pointed to one conclusion, that the attacks were not spontaneous but were planned."[415] Thus, reasoned the High Court, "a common purpose must have been formed before the attacks began and the rapes were executed pursuant to a prior agreement in furtherance of a common purpose."[416]

> Mathopo AJ then reminded the CC of the factual findings made by the High Court: The factual findings made by the High Court were based on inferential reasoning or circumstantial evidence that the applicants (a) were at the scene of the crimes with the group; (b) were identified by some of the witnesses at the scene and also at the identification parade; (c) must have known, or were aware of, the group's modus operandi (mode of operation) to commit the crimes; and (d) did not disassociate themselves from the actions of the group.[417]

After a very long trial, noted Justice Mathopo, the High Court found the applicants guilty and sentenced them to "effective life sentences."[418] After the sentences were imposed, Mr. Tshabalala and Mr. Ntuli then sought leave from the High Court to appeal the convictions and the sentences.[419] On May 11, 2000, the High Court denied the applicants' leave to appeal.[420] On August 26, 2009, nine years after the High Court rendered its decision, Mr. Tshabalala "petitioned the Supreme Court of Appeal for leave to appeal his convictions and sentences."[421] Although Mr. Ntuli claimed that he had also petitioned the Supreme Court of Appeal for leave to appeal his convictions and sentences, Mathopo AJ noted that "the Registrar of the Supreme Court of Appeal" never received any application from or on behalf of Mr. Ntuli.[422] On September 11, 2009, Mr. Tshabalala's application for leave to appeal was dismissed.[423] However, on

---

415. *Id.*
416. *Id.*
417. *Id.* para 11.
418. *Id.* para 12.
419. *Id.*
420. *Id.*
421. *Id.*
422. *Id.*
423. *Id.*

November 28, 2012, Mr. Phetoe, who was a co-accused number seven, "was granted leave to appeal his convictions and sentence to a Full Court of the High Court."[424]

With respect to Mr. Phetoe's application, the Full Court noted that because the State had failed to "prove beyond a reasonable doubt that each member of the group had raped the eight complainants, the convictions of rape based on the application of the doctrine stood to be set aside."[425] The Full Court held further that "the doctrine cannot be applied to crimes that can be committed only through the instrumentality of a person's own body, or part thereof, and not through the instrumentality of another."[426] Concluding that Mr. Phetoe's association "with group members who were terrorizing and raping the complainants rendered him liable as an accomplice," the Full Court "altered his conviction to one of being an accomplice in respect of the common law crime of rape, and sentenced him to one term of life imprisonment."[427] Not satisfied with the Full Court's decision, Mr. Phetoe "successfully applied for and was granted special leave to appeal to the Supreme Court of Appeal on 7 November 2016."[428]

The Supreme Court of Appeal disagreed with the High Court that there was a prior agreement to commit the crimes charged. It subsequently reversed the findings of the High Court "on the application of the doctrine and of the Full Court on the finding that he was an accomplice."[429] The Supreme Court of Appeal then "set aside the convictions and sentences relating to all the convictions on common law rape, save for the conviction in respect of count nine."[430]

Encouraged by Mr. Phetoe's success at the Supreme Court of Appeal, Mr. Tshabalala applied to the CC in December 2018 for leave to appeal against his convictions and sentences.[431] After receiving Mr. Tshabalala's

---

424. *Id.*
425. *Id.* para 13.
426. *Id.*
427. *Id.*
428. *Id.* para 14.
429. *Id.* para 16.
430. *Id.*
431. *Id.* para 17.

application, the CC called on Mr. Tshabalala and the respondent[432] to address two questions:

> 1. Whether an accused can be convicted of common law rape on the basis of common purpose; and
>
> 2. whether the Supreme Court of Appeal decision in the case of the applicant's co-accused, *Phetoe v S* [2018] ZASCA 20; 2018 (1) SACR 593 (SCA) was correct, and, if correct, whether there is anything to distinguish the convictions that the applicant puts in dispute from those of which his co-accused, Mr. Phetoe, was absolved.[433]

In its directions regarding these two questions, the CC also invited the remainder of the co-accused, which included Mr. Ntuli, as well as civil society organizations, to file written submissions addressing one or both questions.[434] Mr. Ntuli, who was unaware of either Mr. Tshabalala's or Mr. Phetoe's appeals, "applied directly to [the CC] for leave to appeal."[435] The Commission for Gender Equality and the Center for Applied Legal Studies applied to be admitted as amicus curiae and were so admitted.[436]

Mathopo AJ began an analysis of the merits of the appeal by noting that the Court is being called upon to "determine whether a co-accused can be convicted of the common law crime of rape on the basis of the doctrine in circumstances where he did not himself penetrate the victim."[437] He then proceeded to review South African case law dealing with this issue.[438] Specifically, he reviewed "some of the conflicting decisions of various divisions of the High Court" of South Africa.[439] After discussing various cases dealing with the doctrine and its application to the common law crime of rape, the CC held that "[i]n light of the divergent decisions

---

432. *Id.* para 18. In this case, the Respondent is the State of South Africa. *See id.* para 1.
433. *Id.* para 18.
434. *Id.* para 19.
435. *Id.*
436. *Id.* para 20.
437. *Id.* para 22.
438. *Id.*
439. *Id.*

[on the application of the doctrine] and the uncertainty in our law, this is an arguable point of law which founds this Court's jurisdiction."[440]

Mathopo AJ then continued his analysis of the case at bar by noting that:

> [g]iven the scourge of rape in [South Africa], in particular group rape, a resolution of this issue will have an impact beyond the present litigation and will not only affect the immediate parties, but it will give decisive direction to cases of a similar nature and is therefore a matter of general public importance.[441]

In addition, Mathopo AJ noted that it is in the interest of justice for the Court to hear a matter of general importance.[442] Justice Mathopo noted that the applicants did not "take issue with the procedural fairness of the trial before the High Court."[443] Their objection, noted the learned justice, was with the application of the doctrine of common purpose to the common law crime of rape, a crime which the applicants argue, requires "the unlawful insertion of the male genitalia into the female genitalia."[444]

On their submission, the applicants argued that "it is simply impossible for the doctrine to apply, as by definition, the causal element cannot be imputed to a co-perpetrator."[445] The applicants supported their submissions by citing to a learned treatise,[446] and "a number of decisions, many of which were extensively relied upon by the Full Court, namely *Gaseb*, *Saffier*, *Kimberley* and *Phetoe.*"[447] Finally, argued the applicants, "the benefit which accrued to Mr. Phetoe when his convictions

---

440. *Id.* para 30.
441. *Id.* para 31.
442. *Id.* para 31.
443. *Id.* para 33.
444. *Id.*
445. This argument is referred to as the "instrumentality argument." *See id.*
446. *Id.* para 35 n.16.; *See also* C. R. SNYMAN, CRIMINAL LAW 269 (LexisNexis, Durban 2008).
447. *Tshabalala v. The State; Ntuli v. The State* [2019] ZACC 48 (CC S. Afr.) at paras 1, 5; *see also S v Gaseb* 2001 (1) SACR 438 (NmS); *S v Saffier* 2003 (2) SACR 141 (SE); *S v Kimberley* 2004 (2) SACR 38 (E); *S v Phetoe* [2018] ZASCA 20; 2018 (1) SACR 593 (SCA).

and sentences were set aside should also apply to them because their positions are similar."[448]

In addition to endorsing the factual findings of the High Court "that there was prior agreement on the part of the group, and that a common purpose must have been formed before the attacks commenced," the respondent and the amici also supported the High Court's findings that "all the offenses were committed in close proximity of each other and within a short space of time."[449] To strengthen their case for the application of the doctrine to the common law crime of rape, the respondent cited to *Jacobs v. S*, a case dealing with murder by common purpose, where Theron J held as follows,"[t]he operation of the doctrine does not require each participant to know or foresee in detail the exact way in which the unlawful results are brought about. The State is not required to prove the causal connection between the acts of each participant and the consequence, for example, murder."[450] Also in *Jacob v. S*, Froneman J declared:

> There is no dispute here about the content of the common law. Where there is a prior agreement between parties to a common purpose there need not be presence or participation by each when the fatal assault is administered. Where no prior agreement is established presence at or before the fatal blow is necessary. Where the time of the fatal blow cannot be established then a finding of murder cannot follow—at most a finding of attempted murder or some other form of assault.[451]

In addition to arguing that the application of the doctrine "is not out of the ordinary but is in keeping with modern international standards," the respondent also relied on the practice of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.[452] The respondent then cited to Article 25(3)(a) and (d) of the International Criminal Court, which deals with individual criminal responsibility and common purpose.[453] This article states that:

---

448. *Tshabalala* [2019] at para 36.
449. *Id.* paras. 37-38.
450. *Jacob v S* [2019] ZACC 4; 2019 (1) SACR 623 (CC); 2019 (5) BCLR 562 (CC), para 70.
451. *Id.* at para 106.
452. *Tshabalala* [2019] at para. 40.
453. *Id.* at para. 40.

> In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person—
>
> (a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
>
> . . .
>
> (d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either—
>
> (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) be made in the knowledge of the intention of the group to commit the crime.[454]

The respondent then submitted to the CC that the "above principles apply with equal force to the doctrine where participation in the common purpose has been proved through prior agreement or conspiracy."[455] The Commission for Gender Equality, the first amicus curiae, made two primary submissions—the first one is that South African law "already allows for the doctrine to apply to common law rape and that the courts that have failed to apply the doctrine, offended the principle of stare decisis."[456] Mathopo AJ noted that two Appellate Division cases had been

454. Rome Statute of the International Criminal Court, 2187 U.N.T.S. 3 (July 17, 1998), art. 25(3)(a), (d).

455. *Tshabalala* [2019] at para. 41.

456. *Id.* para. 42.

relied upon to deal with this point and that he had already dealt "with the import of these cases."[457]

The second argument raised by the Commission for Gender Equality is "that the instrumentality approach is fundamentally flawed" for at least two reasons—first, "there is no reason as to why the use of one's body should be determinative in the case of rape but not in the case of assault and murder";[458] and second, "[i]f the argument of the applicants were to prevail, the doctrine of common purpose would apply arbitrarily" and it would also apply "in the case where an inanimate object is used in commission of the crime, but not a body part, and for no principled reason. Such an approach according to the Commission defies logic and common sense."[459] Most importantly, argued the Commission, the instrumentality approach "is not in keeping with the expanded definition of rape under [South Africa's Criminal Law (Sexual Offense and Related Matters) Amendment Act, 2007 ("SORMA")]."[460]

The second amicus curiae, the Center for Applied Legal Studies ("CALS"), sought to adduce evidence from academic studies "that detail the psychological experience of victims of sexual violence and the risk factors associated with rape."[461] Their evidence, which "pertained to understanding the patriarchal roots of the common law concerning rape and sexual violence," was not admitted by the CC.[462] The CALS argued that "rape is the assertion of power and the exertion of this power is gendered as it is typically exerted by men at the expense of women."[463] Mathopo AJ proceeded to provide an overview of the doctrine of common purpose, which has been defined by Jonathan M. Burchell as follows: "[w]here two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls

---

457. The two Appellate Division cases were: *R v Mkwanazi* 1948 (1948) (4) SA 686 (A) and *K v Minister of Safety and Security* [2004] ZASCA 99; [2005] 3 All SA 519 (SCA). Mathopo AJ had dealt with the import of these cases in paragraphs 27-28. *See id.*

458. *Id.* para 43.

459. *Id.*

460. *Id.* SORMA is the Criminal Law (Sexual Offenses & Related Matters) Amendment Act 32 of 2007 (S. Afr.).

461. *Id.* para 44.

462. *Id.*

463. *Id.*

within their common design. Liability arises from their 'common purpose' to commit the crime."[464]

As elaborated by Snyman, "the essence of the doctrine [of common purpose] is that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others."[465] Snyman notes further that "[t]hese requirements are often couched in terms which relate to consequence crimes such as murder."[466] Mathopo J then argued that "the liability requirements of a joint criminal enterprises fall into two categories"—the first "arises where there is a prior agreement, express or implied, to commit a common offense."[467] With respect to the second category, "no such prior agreement exists or its proved" and "the liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind."[468]

Justice Mathopo then noted that "[a]fter a careful analysis of the facts, the High Court found that the applicants were part of the group that moved from one plot to another as per their arranged sequence."[469] In addition, Justice Mathopo noted that, the High Court had found that "the group members must have been aware or associated themselves with the criminal enterprise" and that "[t]hey must have hatched a plan before then, that they would invade different households" and must have "[i]ncluded in that plan or understanding . . . the rapes of the complainants."[470] Finally, "[n]o member of the group disassociated himself from the violent actions perpetuated by others in the group" and the "[t]he conduct of the other perpetrators was therefore imputed on the applicants."[471]

Mathopo AJ then closely examined the facts of the crime as determined by the High Court and argued first, that "[it] cannot be suggested and it is

---

464. JONATHAN M. BURCHELL, PRINCIPLES OF CRIMINAL LAW 477, 393 (2nd ed. Juta, Cape Town, 2016).

465. SNYMAN, *supra* note 446, at 276.

466. *Id.*

467. BURCHELL, *supra* note 464, at 393.

468. *Id.* at 403.

469. *Tshabalala v. The State; Ntuli v. The State* [2019] ZACC 48 (CC S. Afr.) at para. 50.

470. *Id.*

471. *Id.*

difficult to fathom that the rape of the complainants [was] unexpected, sudden or independent acts of one or more of the perpetrators which the others neither expected nor were aware of even after it happened."[472] Second, argued Justice Mathopo, "[i]t is also not probable that they were unaware of what was happening or about to happen" and that "[h]ow the complainants were ordered to cover their heads and not look at the perpetrators is consistent with the notion that they were part of the criminal enterprise."[473] Third, "[i]t is necessary that the relationship between rape and power must be considered when analyzing whether the doctrine applies to the common law crime of rape."[474] Fourth, noted Mathop AJ, to "[c]haracterize it simply as an act of a man inserting his genitalia into a female's genitalia without her consent is unsustainable" and that "[i]n instances of group rape, as in [the case at bar], the mere presence of a group of men results in power and dominance being exerted over women victims."[475]

Justice Mathopo then cited to Langa CJ's concurrence in *Masiya v. Director of Public Prosecution*, when he stated:

> Today rape is recognized as being less about sex and more about the expression of power through degradation and the concurrent violation of the victim's dignity, bodily integrity and privacy. In the words of the International Criminal Tribunal for Rwanda the "essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion."[476]

With respect to the facts of the case at bar, as determined by the High Court, "various households were robbed of their personal belongings, occupants attacked gratuitously and in some instances women were raped

---

472. *Id.* para 51.

473. *Id.*

474. *Id.*

475. *Id.*

476. *Id.*; *see also Masiya v. Director of Public Prosecution (Center for Applied Legal Studies & Anolther as Amici Curiae)* [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCR 827, para 78.

indiscriminately."[477] Despite the fact that one of the women complainants was "visibly pregnant," she was still raped.[478] In addition, a 14-year old girl who was one of the complainants, was also raped.[479] The Court concluded that the "cavalier attitude" of the perpetrators "demonstrates callousness" on their part and that "[t]o jettison the sound doctrine as the applicants urge us to, would do a grave injustice to direct and indirect victims of gender-based violence."[480] This, argued Justice Mathopo, would "give power to men or perpetrators who have raped women with impunity in the knowledge that the doctrine would not apply to them."[481]

The Court noted that the applicants had relied on the Snyman approach to support their argument but that this approach was flawed.[482] Such an approach, argued Mathopo AJ, "[p]erpetuates gender inequality and promotes discrimination. There is no reason why the use of one's body should be determinative in the case of rape but not in the case of other crimes such as murder and assault."[483] The instrumentality argument, which the applicants had invoked, argued Justice Mathopo, "has shortcomings because it seeks to absolve other categories of accused persons from liability, who may not have committed the deed itself (penetration) but contributed towards the commission of the crime by encouraging persons who fail to exclude themselves from the actions of the perpetrators."[484] Allowing "accused persons in similar positions as the applicants, and the other co-perpetrators to escape liability on the basis of common purpose is unsound, unprincipled and irrational."[485]

The instrumentality argument, reiterated Mathopo AJ, "has no place in our modern society founded upon the Bill of Rights."[486] In addition to the

---

477. *Tshabalala v. The State; Ntuli v. The State* [2019] ZACC 48 (CC S. Afr.) at para 52.

478. *Id.*

479. *Id.*

480. *Id.*

481. *Id.*

482. *Id.* para 53; *see also* SNYMAN, *supra* note 446, at 265 (elaborating the Snyman approach).

483. *Tshabalala v. The State; Ntuli v. The State* [2019] ZACC 48 (CC S. Afr.) at para 53.

484. *Id.*

485. *Id.*

486. *Id.* para 54.

fact that such an approach to the adjudication of rape cases "ignores the fact that rape can be committed by more than one person for as long as the others have the intention of exerting power and dominance over the women, just by their presence in the room," it is "embedded in a system of patriarchy where women are treated as mere chattels."[487] After noting that the perpetrators had overpowered their victims "by intimidation and assault" and that there was evidence that they had meticulously planned the crime, including making certain that the victims could not escape, the learned justice declared that the applicants' argument "has no merit."[488]

Justice Mathopo then cited to *S v. Safatsa*, a case that dealt with "common purpose in the context of a murder charge."[489] In *Safatsa*, Botha JA declared the following: "In my opinion these remarks constitute once again a clear recognition of the principle that in cases of common purpose the act of one participant in causing the death of the deceased is imputed, as a matter of law, to the other participants."[490] Justice Botha further stated:

> This remark [proving causation] has given rise to the question whether, in relation to cases of common purpose, some kind of causal connection is required to be proved between the conduct of a particular participant in the common purpose and the death of the deceased before a conviction of murder can be justified in respect of such a participant. In my view the clear answer is: No.[491]

Mathopo JA then noted that the "object and purpose" of the doctrine of common purpose is to "overcome an otherwise unjust result which offends the legal convictions of the community, by removing the element of causation from criminal liability and replacing it, in appropriate circumstances, with imputing the deed (*actus reus*) which caused the death (or other crime) to all the co-perpetrators."[492] And, by "[p]arity of

487. *Id.*
488. *Id.* para 55.
489. *Id.* para 55; *see also S v. Safatsa* [1987] ZASCA 150; 1988 (1) SA 868 (A).
490. *Tshabalala v. The State; Ntuli v. The State* [2019] ZACC 48 (CC S. Afr.) at para 55; *see also Safatsa* [1987], at 898.
491. *Tshabalala* [2019] at para. 55.
492. *Id.* para 56.

reasoning," argued Mathopo AJ, "there is no reason why the doctrine [of common purpose] cannot apply with equal force to the common law crime of rape."[493]

According to the evidence presented in the High Court, "[t]he applicants knowingly and with the requisite intention participated in the activities of the group and fully associated with its criminal designs."[494] It would then be quite disingenuous, argued Justice Mathopo, for the applicants to argue that since they did not "physically penetrate the complainants," they should not be convicted of the crime of rape based on the doctrine of common purpose.[495] However, stated Mathopo AJ, the applicants' argument "loses sight of the fact that the main object of the doctrine is to bring into the net and criminalize collective criminal conduct and in the process address societal needs to combat crime committed in the course of joint enterprises."[496]

The behavior of the perpetrators, argued Justice Mathopo, must be considered in determining whether the doctrine of common purpose should apply in the common law crime of rape. For example, during the commission of the crime, some of the perpetrators "wanted to penetrate one of the complainants simultaneously."[497] One can only imagine the level of humiliation and trauma suffered by the complainant at the time. The fact that only one of them succeeded in penetrating the complainant does not mean that the one who did not succeed because he was unable to get an erection should be used as justification to allow him to escape culpability for the rape.

As argued by Mathopo AJ, there is no reason or rationale to treat the man who penetrated the victim differently from the one who tried but did not succeed because he could not get an erection.[498] The perpetrators who did not penetrate the complainant did not disassociate themselves from the one who did.[499] However, by their conduct and presence, they furthered a common purpose and no evidence was adduced at trial to negate the fact that the "perpetrators were all complicit and acted in cahoots" and, as

493. *Id.*
494. *Id.* para. 57.
495. *Id.*
496. *Id.* para. 57.
497. *Id.* para. 58.
498. *Id.* para. 59.
499. *Id.*

argued by Mathopo AJ, Snyman's approach "would defeat common sense and logic."[500]

Since South African courts have applied the doctrine of common purpose to crimes of murder, common assault, or assault with intent to do grievous bodily harm, Justice Mathopo wonders why "it is irrational and arbitrary to make a distinction when a genital organ is used to perpetrate the rape."[501] Victims of rape and other forms of sexual abuse, noted Mathopo AJ, should be afforded the "constitutional principles of equality, dignity, protection of bodily and psychological integrity."[502] Justice Mathopo then paused analysis of the case to review legislation that has been enacted to deal with significant increases in violent crimes, which include rape and the abuse of women in South Africa.[503]

These legislative enactments include the Criminal Law Amendment Act No. 105 of 1997 and the SORMA.[504] Mathopo AJ noted that these legislative enactments are important because they have radically changed the definition of rape.[505] For example, noted Justice Mathopo, in SORMA's definition of the crime of rape, "instrumentality is no longer a requirement," and that "rape now encompasses more than instrumentality of male genitalia inserted into female genitalia."[506]

Given the fact that rape and other forms of violence against women and girls have become a pandemic in South Africa, Mathopo AJ noted that the Constitutional Court

> would be failing in its duty if does not send out a clear and unequivocal pronouncement that the South African Judiciary is committed to developing and implementing sound and robust legal principles that advance the fight against gender-based

500. *Id.* para. 59; *see also* SNYMAN, *supra* note 446, at 265 (elaborating the Snyman approach).

501. *Tshabalala v. The State; Ntuli v. The State* [2019] ZACC 48 (CC S. Afr.) at para. 60

502. *Id.*

503. *Id.* para. 61.

504. *Id.* para. 62.

505. *Id.*

506. *Id.*

> violence in order to safeguard the constitutional values of equality, human dignity and safety and security.[507]

One way that South African courts can protect women against sexual violence, argued Justice Mathopo, "is to dispose of the misguided and misinformed view that rape is a crime purely about sex."[508]

In conclusion, noted Mathopo AJ, "the High Court's application of the doctrine [of common purpose] cannot be faulted and "accordingly," [t]he applicants' appeal must therefore fail."[509] With respect to the *Phetoe* decision, Justice Mathopo noted that since the State did not cross-appeal the decision of the Supreme Court of Appeal, the Constitutional Court could not "pronounce on the correctness" of the Supreme Court of Appeal's decision in *Phetoe*.[510] In addition to ruling that "the doctrine of common purpose applies to the common law crime of rape" and that "the applicants were rightly convicted by the High Court," Justice Mathopo also dismissed the appeals of Tshabalala and Ntuli.[511] In the concurring opinion, Khampepe J indicated that she fully agreed with Mathopo AJ's "reasoning and outcome."[512] She then stated that "[t]here is neither legal nor normative reason that would justify the exclusion of the application of the doctrine of common purpose to the common law crime of rape."[513]

During the hearing before the CC, the Commission for Gender Equality "drew attention to the fact that South Africa has acceded to multiple binding international instruments, which include[] CEDAW."[514] Justice Victor noted that CEDAW "condemns discrimination against women in all its forms and obliges States Parties to take all appropriate measures to eliminate discrimination against women by any person, organization or entity."[515] In addition, noted Justice Victor, CEDAW also compels "the modification of social and cultural patterns of conduct to remove stereotypical gender roles" and "[a]ll this . . . has become part of customary

---

507. *Id.* para. 63.
508. *Id.* para. 63.
509. *Id.* para. 64.
510. *Id.* para. 65.
511. *Id.* para. 66-67.
512. *Id.* para. 69.
513. *Id.* para. 69.
514. *Id.* para. 90.
515. *Id.* para. 93.

international law."[516] Finally, Victor J made references to the CEDAW Committee's General Recommendation No. 35 on gender-based violence against women, and the Maputo Protocol, which was "promulgated to supplement and provide focus on the rights of women and to protect them against all forms of violence."[517]

She then noted that the "infusion of [South Africa's] international obligations, into [the country's] law in relation to sexual offenses is manifest if regard be had to the preamble of SORMA where it is stated: 'Whereas several international legal instruments, including the United Nations Convention on the Elimination of all Forms of Discrimination Against Women, 1979, and the United Nations Convention on the Rights of the Child, 1989, place obligations on the Republic towards the combating and, ultimately, eradicating of abuse and violence against women and children.'"[518] As was made clear in Mathopo AJ's judgment, enactment of SORMA "marked the elimination of instrumentality in [South Africa's law] on rape" and represents "an additional justification for extending the doctrine of common purpose in the common law crime of rape."[519]

The international instruments, argued Justice Victor, "illustrate the universal importance of protecting and enhancing domestic laws that protect the most vulnerable members of [South African society]."[520] Finally, noted Victor J, "[t]he common law crime of rape is one that has to be developed to meet the obligations imposed by international law."[521] The international instruments, which include CEDAW and the Maputo Protocol, impose an obligation on the State, including its courts, "to develop the domestic laws to ensure that women are protected from sexual violence."[522] In her conclusion, she declared that South Africa's "constitutional duty and international obligations provide the legal and logical basis to confirm the application of the doctrine [of] common purpose to the common law crime of rape."[523]

---

516. *Id.*
517. *Id.* para. 93-95.
518. *Id.* para. 97.
519. *Id.*
520. *Id.* para. 98.
521. *Id.*
522. *Id.*
523. *Id.* para. 99.

During post-election violence in Kenya following the 2007 presidential elections, more than 1,000 people were killed, hundreds of thousands more were internally displaced, and thousands of women, men and children were sexually brutalized.[524] For many years, however, the victims of these insidious crimes were denied the opportunity to seek justice. In 2013, the High Court of Kenya at Nairobi finally offered the opportunity for the victims to get justice.[525] The petition accepted by the High Court was known as *Constitutional Petition No. 122 of 2013* and was brought by six female and two male survivors of sexual brutality.[526]

After thoroughly analyzing the petitioners' and the respondents' submissions and applying international human rights laws—notably the ICCPR, the Banjul Charter, the Maputo Protocol, and CEDAW—as a tool to interpret the country's Constitution, the High Court held that by failing to expeditiously investigate and prosecute those who were alleged to have committed sexual and gender based violence, the Government of Kenya had failed to protect the right to life, as well as the right of citizens not to be subjected to inhuman and degrading treatment.[527] However, after noting that the judgment was a milestone victory for survivors of sexual violence, critics argued that the High Court's ruling did not go far enough, especially with respect to the Government of Kenya's legal obligation to prevent and respond to post-election sexual violence.[528]

In *Molefe v. The State*, the Court of Appeal of Botswana was called upon to hear an appeal against the conviction and sentence of twelve years imprisonment handed Rapula Molefe by the Magistrates Court for the rape of a child—a girl under eight years of age.[529] The issue that the Court of Appeal was required to decide was whether Molefe, who had had sexual intercourse with a girl deemed incapable of consenting to the act, should be charged with rape or defilement.[530] Tebbut JP, writing for the Court of Appeal, made references to the gravity of the offense—the fact that the appellant had taken advantage of the trust and innocence of a very young

524. Coalition on Violence Against Women & 11 Others v. Attorney General of the Republic of Kenya & 5 Others (2020) L.L.R. (H.C.K.) (Kenya), at para. 13.

525. *Id.*

526. *Id.*

527. *Id.* para. 172(a).

528. Physicians for Human Rights, *supra* note 308.

529. Molefe v. The State, 55-05 Ct. App. 1 para. 2. (Bots.).

530. *Id.* para. 13.

child to satisfy his lust, and that the trial court had not "materially misdirected itself."[531] The Court of Appeal then dismissed the appeal against the conviction and sentence and then confirmed the conviction and sentence of twelve years imprisonment.[532]

Tshabalala v. The State provided the Constitutional Court of South Africa the opportunity to address the doctrine of common purpose and whether it could be applied to the adjudication of the common law crime of rape.[533] Additionally, the Court was asked to determine whether there was any distinction between rape and other crimes to which the doctrine of common purpose applied.[534] Writing for the CC, Mathopo AJ noted that rape is a very serious offense and one which constitutes "a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim."[535] The CC then held that the High Court's application of the doctrine of common purpose cannot be faulted and that the appeal must therefore fail.[536]

III. DEALING FULLY AND EFFECTIVELY WITH VIOLENCE AGAINST WOMEN IN AFRICA: LESSONS FROM CASE LAW

Violence against women—or gender-based violence, which includes several types of abuse ranging from physical, sexual, and emotional violence to FGM and trafficking—have reached pandemic levels in some regions of the world, including many countries in Africa.[537] For example, in sub-Saharan Africa, the rate of violence against women is significantly higher than the global average.[538] A 2020 study determined that about

---

531. *Id.* para. 36.

532. *Id.* para. 42.

533. *Tshabalala v. The State; Ntuli v. The State* [2019] ZACC 48 (CC S. Afr.) at para. 2.

534. *Id.* para. 2.

535. *Id.* para. 3-4.

536. *Id.* para. 64.

537. Denisse Córdova Montes et al., *Symposium Report: Gender Justice and Human Rights Symposium Holistic Approaches to Gender Violence*, 30 U. MIAMI INT'L & COMP. L. REV. 217 (2022) (noting that "[g]ender-based violence (GBV) is a pandemic hat is globally ubiquitous and pervasive, despite decades of efforts to address it through the criminal justice, public health, education, and social welfare sectors").

538. *See, African Women Tell of Experiences of Violence*, DW NEWS, Nov. 25, 2011, https://www.dw.com/en/african- women-tell-of-experiences-of-violence/a-59928442

44% of African women have been subjected to gender-based violence.[539] Throughout the African continent, survivors of such violence face a dauting task of recovering from the trauma but also from the stigma imposed on them by the communities that they live in because of the horrific experience.[540]

Over the years, the international community has recognized VAW as a violation of women's human right and have developed and adopted human rights standards that are responsive to "contemporary challenges and emerging issues with respect to gender-based violence."[541] As part of the effort to fight VAW, the UN created the position of SRVAW.[542]

Over the years, the SRVAWs have produced reports that have identified the main sources of violence against women and these include (1) violence in the family; (2) trafficking and migration; (3) armed conflict; and (4) customary and traditional practices (e.g., FGM and child marriage) that harm women and girls.[543] In addition, the reports of the SRVAWs have also revealed the importance of international and regional human rights instruments (e.g., the ICCPR, CEDAW, UDHR, Banjul Charter, Maputo Protocol) to the fight to eradicate VAW and enhance the protection of the rights of women and girls.[544]

(noting that "[t]he rate of [sexual] violence in sub-Saharan Africa is higher than the global average").

539. Muluken Dessalegn Muluneh et al., *Gender Based Violence against Women in Sub-Saharan Africa: A Systematic Review and Meta-Analysis of Cross-Sectional Studies*, 17 INT'L J. ENV'T RSCH. PUB. HEALTH 17, 17 (2020).

540. Jessica Penwell Barnett et al., *Stigma as Social Control: Gender-Based Violence Stigma, Life Chances, and Moral Order in Kenya*, 63 SOCIAL PROBLEMS 447 (2016) (noting the stigma associated with gender-based violence in Kenya). *See also* Sabine Schmitt et al., *To Add Insult to Injury: Stigmatization Reinforces the Trauma of Rape Survivors—Findings From the DR Congo*, 13 POP. HEALTH 100719 (2021) (noting that the stigma associated with rape exacerbates the trauma suffered by victims).

541. Ertük, *supra* note 2, at 10.

542. *Gender Violence & Human Rights: Seeking Justice in Fiji, Papua New Guinea, and Vanuatu*, AUSTL. NAT'L. U. PRESS (Aletta Biersack, Margaret Jolly & Martha Macintyre eds., 2016) (noting that in 1994, the UN Commission on Human Rights created a "special rapporteur" position devoted to dealing with violence against women with the hope of eradicating, not just discrimination, but also violence, against women).

543. Ertük, *supra* note 2, at 10, 13, 15, 19.

544. *Id.* at 40.

The protection of the human rights and fundamental freedoms of women and girls is the responsibility of national governments.[545] While it is important for African countries to ratify and domesticate all the relevant international and regional human rights instruments and create rights that are justiciable in domestic courts, it is equally important that they have governing processes that are willing and have the capacity to protect women from all forms of sexual violence.[546] As noted in *Tshabalala v. The State; Ntuli v. The State*, the responsibility to address and deal fully and effectively with rape and other forms of gender violence should fall on all branches of government—executive, legislative, and judicial.[547]

Of course, having a judicial system that is independent enough and has the capacity to prosecute and bring to justice all perpetrators of violence against women and girls is key to protecting women and girls against rape and gender-based violence.[548] This Article has reviewed cases from Kenya, Botswana, and South Africa that deal with violence against women. Each of the cases examined makes a contribution to the struggle to protect the human rights and fundamental freedoms of women and girls and adds to the continent's emerging human rights jurisprudence, particularly as concerns preventing various forms of violence against women. Below, this Article will draw lessons from each case and show how other African countries can use them to improve the protection of women and girls against all forms of violence, regardless of their source.

In a study released in 2016, the international NGO, Human Rights Watch, reported that on "January 25, 2008, during the explosion of post-election violence in Kenya, four men beat and brutally gang-raped Apiyo P., a 53-year-old mother of five."[549] The report also noted that "survivors of rape and other sexual violence continue to experience significant physical and psychological trauma and socio-economic hardship,

545. Mbaku (2022), *supra* note 89, at 208 (emphasizing that the national government holds the primary responsibility for making sure that the rights of women and girls are protected).

546. *Id.* at 223 (emphasizing the importance of an effective governing process to the enforcement of human rights).

547. *Tshabalala v. The State; Ntuli v. The State* [2019] ZACC 48 (CC S. Afr.) at para. 78.

548. Mbaku (2022), *supra* note 89, at 223.

549. HUMAN RIGHTS WATCH, *supra* note 306.

worsened by the Kenyan government's failure to provide medical care, psychosocial support, monetary compensation, and other redress."[550]

During the period December 2007 to February 2008, following the disputed re-election of incumbent president Mwai Kibaki, there erupted significant levels of violence, which included "patterns of police use of excessive force against protestors as well as ethnic-based killings and reprisals by supporters aligned to both the ruling and opposition parties."[551] In addition to the killing of more than a thousand people and the displacement of more than 600,000 people, there was widespread destruction and looting of homes and other properties.[552] In addition, there was widespread "sexual violence against women and girls—and to a lesser extent, men and boys."[553]

Human Rights Watch has noted that "[b]ased on testimonies, reports from human rights groups, and hospital data, an official commission of inquiry into the post-election violence estimated that at least 900 cases of sexual violence occurred," but that "this is likely an underestimate given the reluctance of survivors to report, the stigma attached to sexual violence in Kenya, and fears of retaliation."[554] Those perpetuating these insidious crimes included militia groups, humanitarian workers, and members of Kenya's security forces, according to witnesses and survivors."[555]

Advocates for women's and girls' rights have long argued that rape is "about both power and violence" and not about sex.[556] It is argued further that "[r]apists use sex organs as the locus of their violence, but rape isn't about sex, at least not in the sense of being motivated by sexual attraction or an uncontrollable sexual urge,"[557] it is about "the urge to control and

---

550. *Id.* at 4.
551. *Id.*
552. *Id.*
553. *Id.*
554. *Id.*
555. *Id.*
556. Jill Filipovic, *Rape is About Power, Not Sex*, GUARDIAN (UK), Aug. 29, 2013, https://www.theguardian.com/commentisfree/2013/aug/29/rape-about-power-not-sex.
557. *Id.*

dominate, and that it could also be driven by hatred and hostility towards women."[558]

Human Rights Watch's report on post-election violence in Kenya seems to support this view of rape.[559] The NGO reports that "[m]en raped women old enough to be their great-grandmothers, children as young as three, pregnant women, women who had just given birth, and breast-feeding mothers."[560] In addition, "[m]any women were raped in the presence of other family members including young children" and that "[s]ome were raped together with other female family members or in groups with other women from their communities by the same perpetrators."[561] Finally, reported Human Rights Watch, "[s]ometimes family members were forced to rape their own relatives."[562]

For many years after the attacks, victims felt extremely frustrated, not just because they had been sexually violated but also because the government had failed to expeditiously investigate their cases, prosecute the perpetrators, and provide them (i.e., the victims) a satisfactory level of justice.[563] Kenyan authorities appeared to show "apathy and reluctance to initiate genuine, credible, and effective measures to investigate, prosecute, and punish perpetrators of the violence, especially those who organized and financed it and members of state security forces who committed serious abuses."[564]

However, in 2013, a group of petitioners, made up of NGOs that advocate for the rights of women, as well as eight victims,[565] brought legal action against the government of Kenya

---

558. Farah Aqel, *The Psychology of a Rapist*, DW NEWS (Jul. 9, 2020), https://www.dw.com/en/the-psychology-of-a- rapist/a-54814540.

559. HUMAN RIGHTS WATCH, *supra* note 306, at 4-7.

560. *Id.* at 6.

561. *Id.*

562. *Id.*

563. *Id.* at 6-7.

564. *Id.* at 7.

565. The petitioners were Coalition on Violence Against Women, Independent Medico-Legal Unit, Kenyan Section of the International Commission of Jurists, Physicians for Human Rights, and eight victims—six females and two females. The Kenyan Human Rights Commission appeared as an interested party; the Kenyan National Commission on Human Rights, Katiba Institute, the Constitution & Reform Education Consortium, and the Redress Trust appeared as amicus curiae. *See* Coalition on Violence Against Women & 11

> for [its] failure to anticipate and prepare adequate and lawful policing responses to the anticipated civil unrest that contributed to the [SGBV], and the failure to provide effective remedies to the victims of SGBV which violated the fundamental rights of the 5th to 12th petitioners and other victims.[566]

After thoroughly examining submissions of the petitioners, as well as those of the respondents and the amicus curiae, and utilizing international human rights law as an interpretive tool, the High Court ruled in favor of four survivors of post-election violence in Kenya.[567] Specifically, the High Court held that the Government of Kenya was responsible for the "failure to conduct independent and effective investigations and prosecutions of SGBV-related crimes during the post-election violence."[568] In addition, noted the Court, the failure of Kenya to expeditiously investigate and bring to justice the perpetrators of PEV in Kenya represented "a violation of the positive obligation [imposed] on the Kenyan State" by international human rights law and the national constitution to protect human rights.[569]

Coalition on Violence Against Women & 11 Others v. Attorney General of the Republic of Kenya & 5 Others is important for several reasons. First, it dealt with an issue that has become pervasive throughout many countries in Africa—post-election violence.[570] Second, the case involved rape by marauding gangs, who found motivation for their insidious crimes in frustration from losing an election, as well as long-simmering ethnic rivalries and hatred.[571] Third, the High Court was called upon to adjudicate a case involving sexual violence, which remains one of the most important forms of violence against Africa's women and girls, and to a

---

Others v. Attorney General of the Republic of Kenya & 5 Others (2020) L.L.R. (H.C.K.) (Kenya) at paras. 1-5.

566. *Id*. para. 14 & Case Summary.

567. *Id.* para. 172(a).

568. *Id*. para. 172(a).

569. *Id*. para. 172(a) & (b).

570. Nnanta N. Elekwa & Okechukwu Eme, *Post-election Violence in Africa: A Comparative Case of Kenya and Zimbabwe*, 72 INDIAN J. POL. SCI. 833 (2011).

571. Coalition on Violence Against Women & 11 Others v. Attorney General of the Republic of Kenya & 5 Others (2020) L.L.R. (H.C.K.) (Kenya), at para. 172(a).

lesser extent men and boys.[572] Finally, the Court was called upon to perform a very important function in Kenya's separation-of-powers governance system—to determine whether the executive branch had failed to perform one of its most important constitutional functions, which is to enforce the laws and do so expeditiously, fairly, and as prescribed by the constitution.[573]

In its ruling, the High Court declared that the Government of Kenya had failed to perform its constitutional function and in doing so, it had failed some of its citizens. National laws, including the constitution, guarantee citizens certain rights. However, those laws and the rights that they guarantee become simply mere parchment barriers if they are not enforced. Hence, *Coalition on Violence Against Women & 11 Others v. Attorney General of the Republic of Kenya & 5 Others* is important for at least one reason—the case illustrates how national courts can serve as a check on the executive and make sure that the government is performing its constitutional functions, which include enforcing the laws and protecting the rights of citizens and doing so in an expeditious and fair manner.

Coalition on Violence Against Women & 11 Others v. Attorney General of the Republic of Kenya & 5 Others also reminds Africans of why they should seek to develop political systems based on ideas and ideologies (e.g., democracy and the rule of law; inclusive development) instead of ethno-linguistic and religious identities. Post-election violence in Kenya and many other countries in Africa is related to the fact that most voters see candidates for elected office, not as representatives of the country, but as ethnic leaders. Kenya, like many other African countries, was founded by bringing together, through colonialism, ethnic groups that had their own cultures, customs, traditions, and laws and institutions to form a single political and economic unit, which eventually gained independence from its colonizer, Great Britain, on December 12, 1963.[574]

---

572. WORLD HEALTH ORGANIZATION, GLOBAL STATUS REPORT ON VIOLENCE PREVENTION (2014) (noting the pervasiveness of sexual violence as one of the most important forms of violence against women and girls).

573. Coalition on Violence Against Women (2020), at para. 14.

574. *See, e.g.*, John Mukum Mbaku, *How Kenya's Judiciary Can Break the Cycle of Electoral Violence*, THE CONVERSATION, May 16, 2022, https://theconversation.com/how-kenyas-judiciary-can-break-the-cycle-of-electoral-

However, since multiparty competition returned to Kenya, the country's politicians have not been able to establish political parties that are based on ideas about such issues as poverty alleviation, wealth creation, and human development.[575] Instead, what passes for political parties are ethnic coalitions, which do not have platforms that appeal to the median voter.[576] Instead, these coalitions source most of their support from "their ethnic bases instead of developing more broadly appealing programs" and attracting support from across ethnocultural divides.[577]

Thus, if an individual who is running for national office loses an election, the loss is considered by his or her ethnic supporters (i.e., members of the collation) as their loss and a win for their political enemies (who are usually a coalition of other ethnic groups).[578] For example, in 2007, Raila Odinga, a Luo, lost the presidential election to Mwai Kibaki, a Kikuyu. Members of Odinga's coalition, which was made up of Luo, Luhya, and Kalenjin ethno-linguistic groups, reacted to the loss with extreme violence, a lot of it directed at the Kikuyu, the dominant group in Kibaki's political coalition.[579] It was this ethnic anger and frustration that produced the carnage that pervaded Kenya from December 2007 until

---

violence-182710 (noting the importance of ethnicity to Kenyan elections and its political system).

575. Zipporah Nyambura, *Kenya: Politics Split on Ethnic Divide*, DW NEWS, Oct. 26, 2017 (emphasizing the tribal nature of Kenya's post-independence political parties).

576. Sebastian Elischer, *Ethnic Coalitions of Convenience and Commitment: Political Parties and Party Systems in Kenya*, Working Paper No. 68, GIGA, Feb. 1, 2008 (noting the prevalence of ethnicity in political parties in Kenya).

577. Mbaku, *How Kenya's Judiciary Can Break the Cycle of Electoral Violence, supra* note 574; *see also* MBAKU (2018), *supra* note 307 (providing an overview of the role of ethnicity in political economy in post-independence Africa).

578. *See Police Fire Teargas at Angry Backers of Kenya Vote Loser*, REUTERS, Mar. 9, 2013, https://www.reuters.com/article/us-kenya-elections-kisumu/police-fire-teargas-at-angry-backers-of-kenya-vote- loser-idUSBRE9280A020130309 (Feb. 2, 2023) (noting the anger of Odinga's fellow Lou ethnics for his loss in the 2013 presidential election). *See also, Kenya Faces Ethnic Tensions as Fresh Vote Approaches*, NEWS24, Sep. 2, 2017, https://www.news24.com/news24/kenya-faces-ethnic-tensions-as-fresh-vote-approaches-20170902 (noting that "[a]ngry Luo were rampaging in the streets in protest over the loss of their opposition candidate, Raila Odinga").

579. Katy Migiro, *Kenya's 2007/8 Post-Election Violence Still Haunts Journalists, Study Says*, REUTERS, Sept. 24, 2015, https://www.reuters.com/article/us-kenya-media-trauma/kenyas-2007-8-post-election-violence-still-haunts- journalists-study-says-idINKCN0RP00Y20150925 (last visited Feb. 2, 2023) (noting the impact of post-election violence on Kenya and Kenyans).

February 2008 and which became the subject of *Coalition on Violence Against Women & 11 Others v. Attorney General of the Republic of Kenya & 5 Others*.[580]

In a recent report by the *World Population Review*, Botswana tops the list of countries with the highest rape rates in the world.[581] The Court of Appeal (Botswana) case *Molefe v. The State* dealt with one of the worst forms of rape—the rape of a child.[582] Most societies consider rape to be an insidious and deplorable act, condemn it and reserve severe punishment for its perpetrators.[583] However, these same societies continue to struggle with how to punish those people who rape children.[584] Thus, *Molefe v. The State* provides important lessons on how to confront child rape. In this case, Rapula Molefe was charged with the *rape of a child* but was convicted in Magistrates Court of the *defilement of a child* under the age of sixteen years.[585]

In sentencing Molefe, the magistrate "pointed to the gravity of the offense and that it was becoming all too common" and that Molefe had taken "advantage of the trust and innocence of a very young child to satisfy his lust."[586] The magistrate noted further that children, such as the one in the case at bar, "needed to be protected and such excesses as the appellant had committed could not be condoned" and that "[a]lthough the appellant, 27 years old, was relatively young and a first offender, those

580. Mohammed Yusuf, *Kenyan Court Awards Compensation to Victims of 2007 Election Violence*, VOA NEWS, Dec. 11, 2020, https://www.voanews.com/a/africa_kenyan-court-awards-compensation-victims-2007-election- violence/6199467.html (last visited Feb. 2, 2023) (reporting the decision by a Kenyan court to award damages to the victims of the 2007/2008 post-election violence).

581. *Rape Statistics by Country 2022*, WORLD POPULATION REVIEW, https://worldpopulationreview.com/country- rankings/rape-statistics-by-country (last visited Aug. 28, 2022).

582. *See generally* Molefe v. The State, 55-05 Ct. App. 1 (Bots.).

583. *See, e.g., The Insidious Reality of Rape Culture*, WOMEN STATS PROJECT (Jun. 13, 2017) https://womanstats.wordpress.com/2017/06/13/the-insidious-reality-of-rape-culture/ (last visited Feb. 2, 2023) (examining the insidious nature of rape).

584. *See* Karen McVeigh, *Belgium & Greece Among Countries Failing Women on Rape Laws, Says Study*, GUARDIAN, Mar. 5, 2017, https://www.theguardian.com/global-development/2017/mar/06/women-un-member-states-failed-by- rape-laws-sexual-violence-study-equality-now (last visited Feb. 2, 2023) (noting the failure of many countries to prosecute perpetrators of rape).

585. *See generally,* Molefe, 55-05 Ct. App. 1 (Bots.).

586. *Id.* para. 35.

circumstances merited a more severe sentence than the mandatory minimum one of 10 years."[587] The magistrate then sentenced Molefe to twelve years in prison.[588]

Dissatisfied with his conviction and sentence, Molefe appealed to the Court of Appeal.[589] The main issue in the appeal was "whether a person who has unlawful carnal knowledge of another person who, because of the latter's age, is deemed incapable of consenting to the act, is charged with rape under Section 141 of the Penal Code, can be convicted of defilement in terms of Section 147 of the Penal Code."[590]

An important lesson from *Molefe v. The State* is the failure of the Court of Appeal to definitively answer the following question: If a man has sexual intercourse with a child who is deemed incapable of consenting to the act, is the proper charge rape or defilement?[591] This is a very important question that either the High Court or the Court of Appeal should have addressed. In the deliberations in *Molefe v. The State*, Justice Tebbutt, writing for the Court of Appeal, made clear that the victim was a child under the age of twelve years and hence, was incapable of giving consent.[592] Justice Tebbutt then concluded that the trial magistrate was in error for acquitting the appellant of the crime of rape.[593] However, the learned justice still accepted the alternative judgment handed down by the magistrate.[594]

The Court of Appeal's decision in *Molefe v. The State* was delivered in July 2008.[595] However, earlier in 2007, a similar case to *Molefe* had been brought before the Court of Appeal—*Ketlwaeletswe v. The State*.[596] In *Ketlwaeletswe*, the appellant was found guilty in the Magistrates Court of the rape of a ten year old girl and subsequently sentenced to ten years in prison.[597] The appellant then appealed to the High Court and the matter

587. *Id.*
588. *Id.* para. 35-36.
589. *Id.* para. 10.
590. *Id.* para. 1.
591. *Id.* para. 13.
592. *Id.* para. 29.
593. *See generally, id.*
594. *Id*. para. 42.
595. *Id*. para. 42.
596. *Ketlwaeletswe v. The State*, CLCLB–066–06 (Court of Appeal, Bots., 2007).
597. *Id.* para. 1.

came before Walia J.[598] Writing for the Court of Appeal, Zietsman J.A. noted that before considering the merits of the case, Walia J reserved for consideration in terms of Section 15 of the Court of Appeal Act, the following question: [W]here a man has sexual intercourse with a young girl deemed incapable of consenting to the act, is the proper charge rape or defilement?[599]

Zietsman J.A. noted that in considering this important question, Walia J determined that there were conflicting High Court decisions on this point and decided that it was important for the High Court to make a final decision on the matter.[600] Zietsman J.A. began the analysis of the question by examining the definition of rape provided by Section 141 of the Penal Code of Botswana.[601] Justice Zietsman then compared the definition of *rape* to that of *defilement* as provided for in Section 147(1) of the Penal Code.[602] The learned justice then declared that based on an examination of Section 141 of the Penal Code, it is clear that "the essential element of the offense [of rape] is a lack of consent on the part of the victim."[603] However, Justice Zietsman noted that lack of consent is not an element in the definition of the crime of defilement.[604]

Justice Zietsman then concluded that "where a girl under the age of 16 years is the complainant, the offense is rape if it is proved that she did not consent to the sexual intercourse" and that if it is determined that she did

---

598. *Id.*

599. *Id.* para. 2.

600. *Id*.

601. *Id.* para. 4. Section 141 of the Botswana Penal Code defines rape as follows: "Any person who has unlawful carnal knowledge of another person, or who causes the penetration of a sexual organ or instrument, of whatever nature, into the person of another for the purposes of sexual gratification, or who causes the penetration of another person's sexual organ into his or her person, without the consent of such other person, or with such person's consent if the consent is obtained by force or means of threats or intimidation of any kind, by fear of bodily harm, or by means of false pretences as to the nature of the act, or, in the case of a married person, by personating that person's spouse is guilty of the offence termed rape." Botswana Penal Code § 141.

602. *Ketlwaeletswe v. The State*, CLCLB–066–06, 3 (Court of Appeal, Bots., 2007). According to Bots. Penal Code § 147(1), "Any person who unlawfully and carnally knows any person under the age of 16 years is guilty of an offence and on conviction shall be sentenced to a minimum term of 10 years' imprisonment or to a maximum term of life imprisonment"; Botswana Penal Code § 147(1).

603. *Id.* at 3.

604. *Id.* at 3.

consent, then "the offense is defilement."[605] However, Section 192 of the Criminal Procedure and Evidence Act provides, inter alia, "that a person on a charge of rape can, if the rape is not proved, be found guilty of defilement of a girl under 16 years of age."[606] Such a situation will obtain if the State has failed to prove that the sexual intercourse in question took place without the consent of the girl.[607]

But, is the offense rape if the complainant is a girl who, "because of her young age, is deemed incapable of consenting to the sexual intercourse"?[608] To answer this question, Justice Zietsman examined some case law from the courts of Botswana. First, the learned justice cited to *Sethunthwane Keidilwe v. The State*,[609] where Chief Justice Nganunu held that:

> The offense of rape includes the ingredient of a lack of consent on the part of the victim of that offense. Where the victim is not capable of giving or withholding the consent under the law then the ingredient of consent cannot be constituted. The offense thus committed by a sexual act with a girl under age cannot be rape.[610]

According to the learned Chief Justice, since "a girl who is under age cannot give her consent to sexual intercourse the correct charge should be defilement and not rape."[611] However, Justice Zietsman also cited to the contrary view provided by Chinhengo J in *Boitumelo v. The State*[612] who concluded that "where a man ravishes a girl who is unable to give consent there has been sexual intercourse without consent and the crime committed is rape."[613] Justice Zietsman then concluded that the decision reached by Chinhengo J is the correct one.[614]

---

605. *Id.* at 23.
606. *Id.* at 3.
607. *Id.*
608. *Id.*
609. *Sethunthwane Keidilwe v. The State*, Criminal Appeal No. 181/2000 (Unreported) (HC).
610. *Ketlwaeletswe v. The State*, CLCLB–066–06, 4 (Court of Appeal, Bots., 2007).
611. *Id.* at 4.
612. *Boitumelo v. The State* 2005(1) BLR 317.
613. *Ketlwaeletswe*, CLCLB–066–06, 4-5 (Court of Appeal, Bots., 2007).
614. *Id.* at 5.

Justice Zietsman noted that in *Boitumelo*, Chinhengo J had dealt with three different age categories and had concluded that in the case where the victim is a girl "under the age of 8 years," such a child is "*doli incapax*"[615] and hence is "incapable of consenting to sexual intercourse."[616] Thus, "[a]ny man who has sexual intercourse with such a girl is accordingly guilty of rape."[617] In the case where the victim is a girl between the ages of 8 years and 14 years, declared Chinhengo J, the "offense is rape unless it is proved that the girl gave her consent" and that "[i]f such concern is proved the offense is defilement."[618] Finally, where the victim is a girl between the ages of 14 years and 16 years, "the offense is rape if her failure to consent to the sexual intercourse is proved."[619] However, declared Chinhengo J, "[i]f no such proof is forthcoming the offense is defilement."[620]

Justice Zietsman, however, did not agree with Chinhengo J's analysis in *Boitumelo*, arguing that it does not follow that "a girl who is *doli incapax* is for that reason also incapable of consenting to sexual intercourse."[621] The learned justice then stated that the answer "to the question whether, and if so when, a girl is to be considered incapable of consenting to sexual intercourse is, in my opinion, to be found in the Roman Dutch law which is the common law of [Botswana]."[622] The learned justice then cited to case law from South Africa, a jurisdiction in which Roman Dutch law is also the common law applied in its courts.[623] In *Socout Ally v. R*, [624] Innes CJ stated:

---

615. Under the doctrine of doli incapax, "a child under fourteen is exempt from criminal responsibility unless the prosecution can prove beyond reasonable doubt that, in addition to the mens rea, the child had a mischievous discretion (the understanding and judgment to discern between good and evil) and, at the time the offense was committed, know that what he was doing was seriously wrong." ROB ALLEN, CHILDREN & CRIME: TAKING RESPONSIBILITY, 29 (1996).

616. *Id*.

617. *Id.* at 5.

618. *Id.*

619. *Id.*

620. *Id.*

621. *Id.*

622. *Id.* at 6.

623. *Id.*

624. *See Socout Ally v. R* 1907 T.S. at 336.

> It seems clear that in regard to charges of rape upon children, the common practice in South African courts, both here and at the Cape, has been to adopt the rule laid down by Carpzovius, that a child under the age of twelve years is conclusively presumed *not to be able to consent* to the commission of the crime of rape upon her. After all, rape is only the most aggravated form of indecent assault; and I can see no ground of principle upon which we should draw any distinction, so far as the consent of a child under the age of twelve years is concerned, between a charge of rape and a charge of indecent assault.[625]

Justice Zietsman noted that South African courts were called again to adjudicate this question in *R v. Z*,[626] where the relevant portion of the judgment is as follows:

> A girl under the age of 12 years cannot legally consent to sexual intercourse. Should she consent then such sexual intercourse amounts to rape. Where an accused is charged with having had sexual intercourse with a girl under the age of 12 years it is necessary for the Crown, in order to prove intent, to prove that the accused actually knew that the complainant was under the age of 12 or at least that he had realized that possibility, and not heeded it, but had proceeded with the commission of the offence.[627]

After examining additional authorities from South Africa, Zietsman JA concluded that "[i]t has been accepted in South Africa that the statement of Carpzovius, a leading writer on the Roman-Dutch law, correctly sets out the position."[628] Continuing, Justice Zietsaman stated that he was

> not aware of any statute in Botswana that affects this principle of the common law which has been recognized in South Africa for a century and was affirmed again almost 50 years ago in the case of

---

625. *Ketlwaeletswe v. The State*, CLCLB–066–06, 6-7 (Court of Appeal, Bots., 2007); *see also id*, at 338 (emphasis added).

626. R v. Z 1960 (1) S.A. 739 (A).

627. *Ketlwaeletswe*, CLCLB–066–06, 8-9 (Court of Appeal, Bots., 2007).

628. *Id.* at 10.

> *R v. Z*, and my conclusion is that what is stated in the case of *R v. Z* is the law as it should be applied in [Botswana].[629]

The learned justice then held that:

> [t]he answer to the query raised by Justice Walia is that where a man has sexual intercourse with a young girl deemed incapable of consenting to the act the proper charge is rape.[630] A fortiori, where a man has sexual intercourse with such a young girl, and there is proof that in fact she did not consent to the act, he is guilty of rape.[631]

Since Justice Walia did not deal with the merits of the appellant's appeal before sending the matter to the Court of Appeal, Justice Zietsman referred the case back to Justice Walia for a finalization of the appeal.[632]

The Court of Appeal in *Ketlwaeletswe v. The State* decided the question of which crime "a man who has sexual intercourse with a young girl deemed incapable of consenting to the act" should be charged with in 2007—the judgment was delivered by the Court of Appeal sitting at Lobatse on July 24, 2007 and signed by Justice Zietsman, Justice Tebbutt, and Justice Grosskopf.[633] The case *Molefe v. State* was decided by Magistrates Court in 2003, when the Court of Appeal had not had the opportunity to settle the confusion between defilement and rape as relates to children who are legally incapable of granting consent to sexual intercourse.[634] In that case, the perpetrator, who had had sexual intercourse with a child under the age of eight years, was charged with rape.[635] The Magistrate argued that although the evidence adduced at the Court proved conclusively that the defendant had, indeed, had "penetrative sexual intercourse with the child," it could not be determined whether the

---

629. *Id.*
630. *Id.*
631. *Id*. at 11.
632. *Id.*
633. *Id.*
634. Molefe v. The State, 55-05 Ct. App. 1 para. 10. (Bots.).
635. *Id.*

child had consented or not.[636] The Magistrate then concluded that there could not be "a conviction of rape in the circumstances of this case."[637] The Magistrate acquitted the defendant of rape because the victim was under the age of sixteen years; he invoked Section 192 of the Criminal Procedure and Evidence Act and found the defendant guilty of defilement in terms of Section 147 of the Penal Code and sentenced him to twelve years imprisonment.[638]

In 2007, the Court of Appeal finally clarified the law relating to rape and defilement in the situation where a man had had sexual intercourse with "a young girl deemed incapable of consenting to the act."[639] In *Ketlwaeletswe v. The State*, the Court of Appeal held that "where a man has sexual intercourse with a young girl deemed incapable of consenting to the act[,] the proper charge is rape."[640] Additionally, the Court held that "[a] fortiori, where a man has sexual intercourse with such a young girl, and there is proof that in fact she did not consent to the act, he is guilty of rape."[641]

A year after it delivered its decision in *Ketlwaeletswe v. The State*, the Court of Appeal adjudicated the appeal of the sentence and conviction of Rapula Mofele in *Molefe v. The State*.[642] Its judgment in this case was delivered in July 2008 and signed by Justice Tebbutt, Justice Moore, and Justice Coulsfield.[643] Although the *Molefe* Court faulted the Magistrates Court for finding the defendant guilty of defilement instead of rape, it

---

636. *Id.* para. 6.

637. *Id.*

638. *Id.* para. 7. Section 147(1) of the Penal Code states as follows: "Any person who unlawfully and carnally knows any person under the age of 16 years is guilty of an offence and on conviction shall be sentenced to a minimum term of 10 years' imprisonment or to a maximum term of life imprisonment." Penal Code (Botswana), at § 147(1). Section 192 of the Criminal Procedure and Evidence Act states as follows: "When a person is charged with rape and the court is of opinion that he is not guilty of that offence but that he is guilty of an offence under one of the sections 146, 147, 150, 168 and 246 of the Penal Code (relating to indecent assault on females, defilement of girls under 16 years of age, procuring defilement by threats etc., incest by males and common assault, respectively), he may be convicted of that offence although he was not charged with it."

639. *Ketlwaeletswe v. The State*, CLCLB–066–06, 2 (Court of Appeal, Bots., 2007).

640. *Id.* at 11.

641. *Id.*

642. Molefe v. The State, 55-05 Ct. App. 1 para. 1-2. (Bots.).

643. *Id.* para. 42.

made no further comment on that decision.[644] Nevertheless, as made clear in *Ketlwaeletswe v. The State*, the law as it stands in Botswana is that a man who has sexual intercourse with a young girl deemed incapable of consenting to the act should be charged with rape.[645] Furthermore, if there is proof that she did not indeed consent, he should be found guilty of rape.[646] This is the lesson that should be taken from these two cases.

Within South Africa, "gender-based violence is a widespread problem of substantial concern" to "government and civil society alike."[647] This is due, inter alia, to the fact that "[s]ocial and economic conditions in the South African townships, exacerbated by a history of apartheid, have created a climate for violence against females."[648] Helen Moffett, a researcher who studies sexual violence in South Africa, has noted that:

> South Africa has the worst known figures for gender-based violence for a country not at war. At least one in three South African women will be raped in her lifetime. The rates of sexual violence against women and children, as well as the signal failure of the criminal justice and health systems to curtail the crisis, suggest an unacknowledged gender civil war.[649]

As late as 2017, South Africa was being referred to as the "rape capital of the world."[650] An article in *Huffpost* noted that in South Africa, "a

---

644. *Id.* para. 11.

645. *Ketlwaeletswe v. The State*, CLCLB–066–06, 11 (Court of Appeal, Bots., 2007).

646. *Id.*

647. Maghboeba Mosavel et al., *Perceptions of Gender-based Violence Among South African Youth: Implications for Health Promotion Interventions*, 27 HEALTH PROMOTION INT'L 323, 323 (2011); Romi Sigsworth, *'Anyone can be a Rapist . . .': an Overview of Sexual Violence in South Africa*, CTR. FOR STUD. VIOLENCE AND RECONCILIATION, Nov. 2009.

648. Mosavel et al., *supra* note 647, at 323.

649. Helen Moffet, *'These Women, They Force Us to Rape Them': Rape as Narrative of Social Control of Post- Apartheid South Africa*, 32 J. S. AFR. STUD. 129, 129 (2006).

650. *The Horrific Reality of South Africa's Rape Problem Will Shock You*, HUFFPOST, Sep. 1, 2017, https://www.huffingtonpost.co.uk/2017/08/31/the-horrific-reality-of-south-africas-rape-problem-will-shock- you_a_23192126/ (last visited Oct. 11, 2019). *See also* Babalola Abegunde, *Re-Examination of Rape and Its Growing Jurisprudence*

woman is raped in the country every 26 seconds."[651] In September 2019, hundreds of South Africans gathered outside the Johannesburg Stock Exchange to seek assistance from the country's large corporations in fighting gender inequality.[652] The gathering soon morphed into a protest against sexual violence.[653] In reporting the Johannesburg protest, the BBC noted that 41,000 women were raped in South Africa between April 2018 and September 2019.[654]

In South Africa, adolescents are particularly susceptible to gender-based violence.[655] Researchers have wondered whether the extremely high levels of sexual violence "are related to the factors contributing to the high levels of violence more generally in South African society, or whether there are additional factors contributing to this particular form of violence."[656] Sexual violence in South Africa and, indeed, in other countries, usually "exists on a continuum of severity and includes, *but is not limited to*:"[657]

> 1. Rape (within marriage or a dating relationship, by strangers, during armed conflict, gang rape);
>
> 2. Unwanted touching of a sexual nature;
>
> 3. Unwanted sexual advances, comments or sexual harassment, including demanding sex in return for favors;
>
> 4. Sexual abuse of mentally or physically disabled people and children;

---

under International Law, 6 J. POL. & L. 187, 194 (2013) (noting, inter alia, that "the rate of sexual violence in South Africa is among the highest in the world").

651. Abegunde, *supra* note 650.

652. BBC, *South Africa sexual violence protesters target stock exchange*, BBC NEWS, Sep. 13, 2019, https://www.bbc.com/news/world-africa-49687300 (last visited Oct. 11, 2019).

653. *Id.*

654. *Id.*

655. Mosavel et al., *supra* note 647, at 324.

656. Sigsworth, *supra* note 647, at 2.

657. *Id.* at 3.

> 5. Forced marriage or cohabitation, including the marriage of children;
>
> 6. Denial of the right to use contraception or to adopt other measures to protect against sexually transmitted diseases;
>
> 7. Forced abortion;
>
> 8. Violent acts against the sexual integrity of women, including female genital mutilation and obligatory inspections for virginity; and
>
> 9. Forced prostitution and trafficking of people for the purpose of sexual exploitation.[658]

Studies carried out among various subcultures in South Africa has revealed that some "Xhosa women . . . view [sexual] assault as an expression of love."[659] Some of the respondents made statements, such as: "I fell in love with him because he beat me up."[660] Sexual coercion, as part of "everyday love" has been found to be quite pervasive in many South African communities. In a study conducted by Katherine Wood and Rachel Jewkes in South Africa, they determined that among the teenagers that they interviewed, violence was "a regular feature of their sexual relationships."[661] They note that many experts who work in South African communities to educate teenagers about their sexual health often "fail to acknowledge sexual encounters as sites in which unequal power relations between women and men are expressed."[662] These power relations, it is argued, "determine women's ability—or inability—to protect themselves against sexually transmitted disease, pregnancy and *unwelcome sexual acts*."[663]

---

658. *Id.* at 3.
659. Mosavel, *supra* note 647, at 324.
660. *Id.*
661. Katherine Wood & Rachel Jewkes, *Violence, Rape, and Sexual Coercion: Everyday Love in a South African Township*, 5 GENDER & DEV. 41, 41 (1997).
662. *Id.* at 41.
663. *Id.*

In many South African communities, including the townships (which are a legacy of the dreaded apartheid system), "it is invariably men who determine the timing of sexual intercourse and its nature, including whether a woman should try to conceive, and whether or not condoms will be used."[664] In their study of violence, rape, and sexual coercion in South Africa, Wood and Jewkes determined that "teenage love affairs" always involved "penetrative intercourse."[665] One of the adolescent women that the researchers interviewed told them that "he told me that if I accept him as a lover we have to engage in sexual intercourse, and do the things that adults do."[666]

With respect to love, the interviewees, who were girls or adolescent women, told the researchers that if they accepted a request from a male person to establish a relationship, that agreement "to love," was usually "equated specifically with having penetrative intercourse and being available sexually."[667] Young girls were made to believe that "the purpose of love" was to have sex and that people "in love" had to have sex "as often as possible."[668] The researchers also determined that "[r]elationships [in many South African communities] were often contractual in nature, with the girl being expected to have penetrative sex when the man wanted it in exchange for presents of money, clothes, school fees, and food."[669] Many young girls in South Africa reported to researchers that

> men used violent strategies from the start of the relationship, forcefully initiating partners who often had no awareness about what the sex act involved: "he forced me to sleep with him in his home, he beat me, made me take off my clothes, then made me lie on the bed and forced himself on top of me. It was very painful."[670]

---

664. *Id.*
665. *Id.* at 42.
666. *Id.*
667. *Id.*
668. *Id.*
669. *Id.*
670. *Id.*

It is quite common, the researchers determined, for men to use physical assault to secure sex from their partners—they may beat the girls with "belts, sticks, and shoes, often until visibly injured: as one teenager said, 'they don't care, they'll hit you anywhere, face and all. You'll think they would at least avoid that, because your parents will see the bruises and the injuries, but they don't care.'"[671] Physical violence has become so integral to and commonplace in the sexual relationship in many South African communities that "women [who were interviewed by researchers] stated that many of their female peers saw it as an expression of love: some of the informants used phrases such as 'he forced me to love him,' and 'I fell in love with him because he beat me up.'"[672] As another interviewee noted: "I continue [to have sex with him] because he beats me up so badly that I regret I said no in the first place."[673]

It is true that violence against women, which includes rape, is a global problem. South Africa is considered to have one of the highest rates of gender violence of a country that is not currently at war.[674] The rape and murder of women and girls, either by someone known to them or a stranger, has emerged as one of the most important challenges to policymakers and civil society activists in post-apartheid South Africa.[675] A September 5, 2019 headline in *Aljazeera* is very revealing of the pervasiveness of the rape and murder of women and girls in South Africa.[676] The headline read: "Every 3 hours a woman is murdered in South Africa."[677]

On September 5, 2019, "more than 1,000 protesters gathered outside South Africa's parliament in Cape Town and marched to the Cape Town International Convention Center ("CTICC") where the World Economic Forum ("WEF") was being held. The protesters demanded that South African President Cyril Ramaphosa take action amid a growing crisis of

---

671. *Id.*

672. *Id.*

673. *Id.* at 43.

674. *Id.* at 44.

675. Ashraf Hendricks, *Every 3 Hours a Woman is Murdered in South Africa*, ALJAZEERA, Sep. 5, 2019, https://www.aljazeera.com/indepth/inpictures/3-hours-woman-murdered-south-africa-190905103533183.html (last visited Oct. 11, 2019).

676. *Id.*

677. *Id.*

violence against women."[678] Just a few days earlier, on August 24, 2019, a 19-year old first-year student at the University of Cape Town, Uyinene Mrwetyana, had been brutally raped, "bludgeoned with a scale, and murdered."[679] On September 2, 2019, the man who raped and killed Mrwetyana was arrested and subsequently "confessed in court to her rape and murder."[680]

An important emerging characteristic of South Africa's rape culture in particular and violence against women in general is gang-rape—often a large group of men and boys would rampage a neighborhood and attack and rape women and girls. These men would break down doors, falsely claim to be police officers, and force their way into homes and proceed to attack women, including children. Some of the men serve as security to prevent escape of the victims and others actually restrain the victims to facilitate the rapes.

For example, in August 2022, *The Guardian* newspaper reported that the police had arrested and detained dozens of men after they had allegedly gang-raped eight women on a music video shoot in South Africa."[681] On August 1, 2022, reporting on the same crime, the Voice of America ("VOA") stated that "[a] South African court [had begun] proceedings against more than 80 people arrested after the brazen gang rape of eight women."[682] The masked and armed men, are alleged to have attacked the women while they were filming a music video and proceeded to rape and brutalize them.[683] The crime took place in the mining area of Krugersdorp outside Johannesburg.[684] Of the eight women who were raped, the

678. *Id.*

679. *Id.*

680. *Id.*

681. Lizzy Davies, *South African Police Arrest More Than 120 After Gang-Rape of Eight Women*, GUARDIAN (UK), Aug. 3, 2022, https://www.theguardian.com/global-development/2022/aug/03/south-african-police-arrest-more-than-120-after-gang-rape-of-eight-women (last visited Aug. 23, 2022).

682. Kate Bartlett, *Brutal Gang Rape Shocks South Africa*, VOA NEWS, Aug. 1, 2022, https://www.voanews.com/a/brutal-gang-rape-shocks-south-africa-/6682434.html (last visited Aug. 23, 2022).

683. *Id.*

684. *Id.*

youngest was reported to be nineteen years old.[685] In its report, the VOA also noted that during the financial year 2020–2021, South Africa recorded more than 36,000 cases of rape.[686]

SORMA repealed the common law offense of rape and replaced it with a broader statutory offense, which is defined in § 3 as follows: "Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape."[687]

The Act then defines sexual penetration as:

> any act which causes penetration to any extent whatsoever by—
>
> (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
>
> (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
>
> (c) the genital organs of an animal, into or beyond the mouth of another person[.]

The question that is likely to come up during the trial of these men is what crime to charge those men who did not actually penetrate any of the eight women but who, nevertheless, had facilitated the crime, for example, by restraining the victims to prevent escape, including using the firearms that they had brought to the scene to intimidate the victims into submission. Specifically, advocates for these eight victims in particular and women and girls in general are likely to demand that the doctrine of common purpose, which has been applied to this broader statutory definition of rape, be applied to their case.

In *Tshabalala v. The State; Ntuli v. The State*, which was decided by the Constitutional Court of South Africa on December 11, 2019, the Court

---

685. *Id.*

686. *Id.*

687. Criminal Law (Sexual Offenses and Related Matters) Amendment Act, 2007 (S. Afr.), at § 3.

was called upon to rule on the proper application of the doctrine of common purpose to the common law crime of rape.[688] The applicants had argued that under the common law, the

> crime of rape is an instrumentality offence which, by its nature, can only be committed by a male using his own genitalia, and not by an individual who is merely present when the offence is committed and by his conduct (through his association or active participation) either promotes, encourages, or facilitates the successful commission of the offence.[689]

In the analysis of the case, Justice Mathopo, writing for the CC, said it would be quite disingenuous for individuals who had knowingly and "with the requisite intention participated in the activities of the group and fully associated with its criminal designs" to argue that since they did not "physically penetrate the complainants" they should not be charged with and convicted of the crime of rape based on the doctrine of common purpose.[690] Justice Mathopo noted that this argument "loses sight of the fact that the main object of the doctrine [of common purpose] is to bring into the net and criminalise collective criminal conduct and in the process address societal needs to combat crime committed in the course of joint enterprises."[691]

Justice Mathopo also argued that there is no rationale to treat the man who actually penetrated the victim differently from the ones who did not but who, "given their positive conduct and presence did not disassociate themselves from the conduct of the one who penetrated the complainant."[692] The justice then went on to state that "it is not only the male anatomy that is critical [in a case of rape], the presence of the co-perpetrators who encouraged and facilitated the commission of the crime is equally important."[693] The perpetrators, argued Justice Mathopo, "were

688. *Tshabalala v. The State; Ntuli v. The State* [2019] ZACC 48 (CC S. Afr.) at para. 2.

689. *Id*.

690. *Id.* para. 57.

691. *Id.*

692. *Id.* para. 59.

693. *Id.*

all complicit and acted in cahoots" and, "[t]here is nothing in the record to suggest any form of disassociation on their part."[694]

The doctrine of common purpose, noted Justice Mathopo, already applies or extends to "crimes of murder, common assault or assault with intent to do grievous bodily harm."[695] Hence, it would be "irrational and arbitrary to make a distinction when a genital organ is used to perpetrate the rape" and that "[i]t would be a sad day if courts were to countenance such an arbitrary distinction."[696] Justice Mathopo then noted that in 2017, South Africa's Parliament enacted SORMA "to address the concerns which were raised by society about violence against women and children."[697] In doing so, Parliament provided a definition for the crime of rape that now "encompasses more than instrumentality of male genitalia inserted into female genitalia" and as a consequence, "gave the definition of rape a wider meaning."[698]

The Constitutional Court then held that "the High Court's application of the doctrine [of common purpose] cannot be faulted."[699] The High Court had applied the doctrine of common purpose to a rape case and convicted the applicant—Jabulane Alpheus Tshabalala—and other co-accused perpetrators of various charges, including the common law crime of rape.[700] Although the Court in *Tshabalala v. The State; Ntuli v. The State* dealt with the doctrine of common purpose's applicability to the common law crime of rape, there is no reason why this doctrine should not be applied to rape as defined by statute, especially given the fact that rape, as defined by SORMA, no longer requires the "instrumentality of male genitalia inserted into female genitalia."[701] In fact, since the coming into effect of SORMA, rape in South Africa is now a crime defined by statute.[702]

---

694. *Id.*
695. *Id.* para. 60.
696. *Id.*
697. *Id.* para. 62.
698. *Id.*
699. *Id.* para. 64.
700. *Id.* para. 3.
701. *Id.* para. 62.
702. *Id.*

Tshabalala v. The State; Ntuli v. The State is a landmark case in South Africa's human rights jurisprudence because the Constitutional Court affirmed the applicability of the doctrine of common purpose to the crime of rape.[703] In the judgment, Justice Mathopo held that "for far too long rape has been used as a tool to relegate the women of this country to second-class citizens, over whom men can exercise their power and control, and in so doing, strip them of their rights to equality, human dignity and bodily integrity."[704] The Court, argued Mathopo AJ, had a duty to develop and implement "sound and robust legal principles that advance the fight against gender-based violence in order to safeguard the constitutional values of equality, human dignity and safety and security."[705] Finally, Mathopo held that the country must "dispose of the misguided and misinformed view that rape is a crime purely of sex" in order to fight against "the perpetuation of patriarchy and rape culture" in South Africa.[706]

Justice Khampepe wrote a separate concurring opinion in which she held that rape "at its core, is an abuse of power expressed in a sexual way" and is perpetuated against women and girls who are disempowered and degraded.[707] Additionally, she noted that, "[t]he origins of rape are anchored in the structured imbalance of power between men and women as social groups."[708] It was therefore important, noted Khampepe J, to disabuse South African society of the mischaracterization that rape is an act of sexual intercourse, which absent consent, is "committed by inhumane monsters."[709] However, those who rape are not "sexually deviant monsters with no self-control," noted Justice Khampepe.[710] Instead, those who rape are "fathers, brothers, uncles, husbands, lovers, mentors, bosses and colleagues."[711] In other words, many rapists are respected members of their communities.

---

703. *Id.*
704. *Id.* para. 1.
705. *Id.* para. 63.
706. *Id.*
707. *Id.* para. 73 (Khampepe J., concurring).
708. *Id.* para. 76.
709. *Id.* para. 70.
710. *Id.* para. 74.
711. *Id.*

Justice Victor also wrote a separate concurring opinion in which she engaged with feminist legal theory to establish that many of South Africa's rape laws were informed historically by sexist gender norms.[712] Specifically, she noted that "sexist gender norms were woven into the very fabric of rape law in the form of iniquitous obstacles to prosecution such as resistance and corroboration requirements."[713] She also noted that South Africa has "acceded to multiple binding international instruments, which include[] CEDAW" and the Maputo Protocol.[714] These instruments have imposed extensive obligations on States Parties, including South Africa, requiring them to take measures to eliminate discrimination against women, as well as protect women from all forms of violence.[715] Additionally, Justice Victor noted that these instruments, also impose an obligation on States Parties to modify or eliminate customary and traditional practices that enforce and promote "stereotypical gender roles" and harm women and girls.[716]

There were three separate concurring opinions and all of them delivered their judgments in the context of the power imbalance that exists within South African society and is re-enforced by patriarchal norms and approaches to rape that are informed by a history of domination of women by men.[717] By holding that the doctrine of common purpose applies to rape, the Constitutional Court was able to effectively recognize the indignities, discrimination, stigma, and humiliation suffered by women and girls who are subject to this insidious crime.[718]

Although the judgment in *Tshabalala v. The State; Ntuli v. The State* has significantly advanced South African jurisprudence on rape in particular and violence against women and girls in general, it alone, is not enough to radically alter the level of the indignities that women and girls suffer in South Africa on a daily basis.[719] For example, this judgment was delivered in 2019 and three years later, in August 2022, gang rapes were

712. *Id.*
713. *Id.* para. 81 (Victor J., concurring).
714. *Id.* para. 93.
715. *Id.* paras. 93-95.
716. *Id.* para. 93.
717. *Id.*
718. *Id.*
719. *Id.*

still occurring at an alarming rate throughout the country.[720] Thus, we must acknowledge the advice of Justice Khampepe in her concurring opinion that "[a]ddressing rape and other forms of gender-based violence requires the effort of the Executive, the Legislature and the Judiciary as well as our communities."[721] Essentially, an effective approach to fighting rape and other forms of violence against women and girls is one that is holistic and involves all branches of government, as well as civil society and its organizations.

IV. SUMMARY AND CONCLUSION

In a resolution in 1993, the UN General Assembly recognized that violence against women is a "manifestation of historically unequal power relations between men and women."[722] In many African countries, these unequal power relations have resulted in significant levels of discrimination against women in virtually all spheres of life—economic, social, and political—and has made it extremely difficult for women and girls to engage in self-actualizing activities. In fact, in many societies, including those in Africa, women and girls are often pushed into subordinate positions compared to men.

Since its establishment in 1945, the UN has made significant efforts to recognize and protect the rights of women and girls.[723] These efforts have included addressing sex discrimination in public and private areas (within the family, employment, development, health, education and the State), as embodied in the CEDAW.[724] Over the years, the UN has created special mechanisms to address violence against women. Besides CEDAW and the CEDAW Committee, the UN Human Rights Council has also created special mandates, which are held by independent experts referred to as

720. Bartlett, *supra* note 682, at 12.

721. *Tshabalala v. The State; Ntuli v. The State* [2019] ZACC 48 (CC S. Afr.) at para. 78.

722. UN General Assembly, *supra* note 1, at pmbl. (para. 6).

723. Ertürk, *supra* note 2, at 2.

724. *Id.* at 3. The CEDAW was adopted by the UN General Assembly in 1979 and is considered the most important human rights treaty for women. The implementation of the CEDAW is monitored by the CEDAW Committee. *See,* UN, *Introduction to the Committee: Committee on the Elimination of Discrimination Against Women*, https://www.ohchr.org/en/treaty-bodies/cedaw/introduction-committee (last visited Aug. 24, 2022) (providing an overview of the CEDAW Committee and how it functions).

Special Rapporteurs.[725] Each mandate holder acts independently of governments and plays an important and critical role in monitoring sovereign nations and democratically elected governments and policies.[726]

The Special Rapporteur is usually called upon by the UN to provide a report or advice on human rights from a thematic or country-specific perspective. For example, the first Special Rapporteur was appointed in 1982 with a mandate to monitor extrajudicial, summary, or arbitrary execution.[727] Aware that violence against women and girls was escalating around the world and that it was seriously undermining their human rights and fundamental freedoms, the UN established the mandate of the Special Rapporteur on Violence Against Women and Girls, its causes and consequences, "as the first independent human rights mechanism on the elimination of violence against women" and girls.[728] The creation of this mandate represented "an important benchmark within the global women's rights movement" for several reasons, the most important of which are that "it recognize[d] violence against women as a human right" and specifically "tasked the Special Rapporteur with ensuring that violence against women was integrated into the United Nations human rights framework and its mechanisms."[729] The first Special Rapporteur on violence against women was appointed on March 4, 1994.[730]

In 2009, former UN Special Rapporteur on violence against women, Ms. Yakin Ertürk, provided a critical review of fifteen years of the mandate (1994-2009).[731] In her summary report, she stated that the reports

---

725. The CEDAW Committee is the UN Committee on the Elimination of Discrimination against Women, which is the body of independent experts that monitors the implementation (by States Parties) of the CEDAW.

726. *Special Procedures of the Human Rights Council*, U.N. Office of the High Commissioner (last visited Aug. 24, 2022), https://www.ohchr.org/en/special-procedures-human-rights-council (explaining the UN Human Rights Council's Special Procedures).

727. UN Commission on Human Rights, *Report on the Thirty-Eighth Session: 1 February 1982-12 March 1982, Economic and Social Council Official Records, 1982, Supplement No. 2*, UN Doc. E/CN.4/1982/30.

728. *Special Rapporteur on Violence Against Women and Girls*, U.N. Office of the High Commissioner (last visited Aug. 24, 2022) https://www.ohchr.org/en/special-procedures/sr-violence-against-women (providing an overview of the mandate of the Special Rapporteur on violence against women and girls).

729. *Id.*

730. *Id.*

731. Ertürk, *supra* note 2, at 3.

of various Special Rapporteurs on violence against women during the period 1994-2009 had elaborated on the sources of violence against women and girls and these include violence in the family, violence in the community, and violence perpetrated or condoned by the State.[732]

Ms. Ertürk also noted that over the years, the international community has committed itself to addressing violence against women and girls and has done so through various instruments and mechanisms.[733] Some of these instruments include the UDHR, the ICCPR, CEDAW, and, at the regional level, the Banjul Charter, and the Maputo Protocol.[734] However, while the international community is very important to the effort to combat violence against women and girls, the responsibility to protect women and girls against the various forms of violence lies with national governments, as well as civil society and its organizations in individual countries.

First, each UN Member State must sign and ratify all the relevant international and regional human rights instruments, including CEDAW.[735] Then, through national legislation and/or other measures, the State must domesticate each international human rights instrument to create rights that are justiciable in domestic courts.[736] Second, the State must then provide itself with a judiciary system that is independent enough and has the capacity to fully and effectively enforce the rights guaranteed by international human rights instruments and the national constitution.[737] Of course, States must approach the issue of violence against women and girls from a holistic perspective; all branches of government (executive, legislative, and judicial), as well as civil society and its organizations, must work together to ensure that violence against women and girls is eradicated.[738]

Finally, each State must make certain that its laws, which include customary laws and traditional practices, are in conformity with the provisions of international human rights instruments. This calls for the elimination or modification of customary and traditional practices (e.g., forced and child marriage, female genital mutilation, wife inheritance,

732. *Id.* at 5.
733. *Id.* at 6.
734. *Id.*
735. *Id.* at 32.
736. *Id.* at 9.
737. *Id.* at 12.
738. *Id.*

denial of inheritance rights to girls and widows, and servitude service at fetish shrines by girls) that harm girls and women and violate their human rights and fundamental freedoms.[739]

In her report, the former UN Special Rapporteur on violence against women, Yakin Ertük, identified violence in the family, violence in the community, and violence perpetrated or condoned by the State as the most important sources of violence against women and girls.[740] What is quite noticeable in these sources of violence against women is that they are dominated by one specific form of violence—rape.[741] Within the family, the rape of women and girls is a major source of violence against women and girls.[742] Similarly, in various communities throughout Africa, sexual assault, which includes gang-rape, also represents a major source of violence against women and girls.[743] Finally, with respect to violence perpetrated or condoned by the State, rape has also emerged as a major source of violence against women and girls.[744] This type of rape often appears in situations of armed conflict involving regular armed forces, as well as non-state militias.[745]

Finally, trafficking and migration also expose women to significant levels of violence, including rape.[746] Traffickers use rape as a tool to control women and girls so that they can easily be channeled into forced and bonded labor, the sex trade, forced marriage, and various forms of slavery-like practices.[747] Dealing with this type of cross-border violence against women and girls requires the cooperation of international and

739. *See* Mbaku (2018), *supra* note 183 (examining the impact of customary laws and traditional practices on women and girls in Africa). *See also* Mbaku (2019), *supra* note 57 (examining the impact of customary laws and traditional practices on children in Africa).

740. Ertürk, *supra* note 2, at 4.

741. *Id*.

742. *Id*.

743. *Id*.

744. *Id*.

745. *Id*. at 16.

746. *Id*. at 13.

747. *Id*.

regional organizations (e.g., the UN and the African Union) and national governments.[748]

Considering that rape is a major form of violence against women and girls in Africa and the important role played by domestic courts in fighting this insidious crime, this article has taken a look at case law from a few African countries and how it has confronted rape. The hope is that by examining these cases, the article can draw attention to how these countries have dealt with the issue of rape.

In *Coalition on Violence Against Women & 11 Others v. Attorney General of the Republic of Kenya & 5 Others*, the Court was called upon to rule on a case involving the rape and molestation of women and girls within the context of post-election violence in Kenya.[749] Specifically, the case illustrated rape by ordinary Kenyans who had turned into opportunistic marauding violent gangs, angered by the loss of an election as well as long-simmering ethnic hatred.[750] Carrying various weapons, the gangs descended unto defenseless women and girls, raped and brutalized them repeatedly.[751] Unfortunately, the Government of Kenya appeared to have failed to perform its constitutional function at two levels—first it failed to prevent the violence, and second, it did not expeditiously investigate, identify the perpetrators, prosecute them according to law, and provide the victims with some level of justice.[752]

The atrocities committed against the petitioners in *Coalition on Violence Against Women & 11 Others v. Attorney General of the Republic of Kenya & 5 Others* took place during the period December 2007 to February 2008.[753] However, it was not until December 10, 2020 that these victims were able to get some justice from the High Court of Kenya at Nairobi.[754] In its judgment, the High Court declared that the Kenyan government had failed to perform its constitutional functions and in doing

748. *Id.*

749. Coalition on Violence Against Women & 11 Others v. Attorney General of the Republic of Kenya & 5 Others (2020) L.L.R. (H.C.K.) (Kenya).

750. *Id.*

751. *Id.*

752. *Id.*

753. *Id.*

754. *Id.*

so, it had failed to protect the rights of some of its citizens as guaranteed by the constitution and various international human rights instruments to which Kenya is a State Party.[755]

The Court's decision in *Coalition on Violence Against Women & 11 Others v. Attorney General of the Republic of Kenya & 5 Others* illustrates how national courts can serve as a check on the exercise of government power and force the government to be accountable to citizens.[756] The case also illustrates the fact that in order for African countries to confront violence fully and effectively against women and girls, including rape, they must provide themselves with governing processes undergirded by separation of powers with checks of balances.[757] A critical part of this governing model is an independent judiciary—one that is not only independent, but has the capacity to perform its constitutional functions—and a robust and politically active civil society.

While it is true that the responsibility for recognizing and protecting the rights of women and girls against all forms of violence, including rape, is the purview of all branches of government and civil society, one cannot underemphasize the importance of courts, which are in a position to legally sanction the executive for failing to expeditiously investigate cases of violence against women and girls and bring the perpetrators to trial, as well as provide the victims with some level of justice.

In *Molefe v. The State*, the Court of Appeal of Botswana ("CAB") was called upon to deal with one of the most important forms of violence against women and girls—the rape of a child. Read together with the decision in another CAB case, *Ketlwaeletswe v. The State*, two important lessons can be drawn for Africa's emerging jurisprudence on violence against women in general and on rape in particular.[758] First, when it comes to rape involving children, each country must, through its laws, make explicit, the difference between *rape* and *defilement*; and second, each country should have laws that explicitly designate an age of consent for sexual intercourse. The age of consent is the age at which an individual is considered legally old enough to consent to sexual activity involving that person. Thus, sexual activity with an individual who is not legally capable

755. *Id.*

756. *Id.*

757. *Id.*

758. Molefe v. The State, 55-05 Ct. App. 1 (Bots.).

of granting consent may result in prosecution for statutory rape or the equivalent in the law of the jurisdiction.

In *Tshabalala v. The State; Ntuli v. The State*, the CC was called upon to rule on whether the doctrine of common purpose can be applied to the crime of rape.[759] This case was particularly important because of the pervasiveness of gang-rape in South Africa and other parts of the continent.[760] The main issue to be considered is the culpability of individuals who are present at the scene of a rape, aid in the commission of the crime, but do not physically penetrate the victims.[761]

Tshabalala v. The State; Ntuli v. The State is a landmark case in South Africa's and Africa's human rights jurisprudence because it affirmed the applicability of the doctrine of common purpose to the crime of rape.[762]762 Writing for the majority, Justice Mathopo held that rape has been used for a very long time as a tool to exploit women and relegate them to the economic, political, and social periphery.[763] The Court, argued Justice Mathopo, has a duty to develop and implement robust and effective legal principles that advance the recognition and protection of women's and girls' rights and effectively protect them against all forms of violence.[764]

The three separate concurring opinions emphasized that rape is an abuse of power in a sexual way and is perpetuated against women and girls who are disempowered and degraded.[765] The disempowerment of girls and women has been made possible by various structures within society, including, for example, patriarchal structures that discriminate against women.[766] In her concurrent opinion, Justice Khampere noted that rapists are not necessarily sexual deviants and monsters with no self-control.[767]

---

759. *Tshabalala v. The State; Ntuli v. The State* [2019] ZACC 48 (CC S. Afr.).
760. *Id*.
761. *Id*.
762. *Id*.
763. *Id*. para. 63.
764. *Id*.
765. *Id*.
766. *Id*.
767. *Id*. para. 72.

Rather, she argued, those who rape are actually fathers, brothers, uncles, husbands, and often respected members of their communities.[768]

The struggle to combat violence against women and girls, including rape in Africa, is a work-in-progress. This is evident by the fact that despite all the efforts that have been made in South Africa, which include new legislation and important decisions by the courts, gang-rape remains pervasive. Hence, South Africa and other countries in the continent, must heed to the advice of Justice Khampepe in her concurring opinion that fully and effectively addressing all forms of violence against women and girls requires the efforts of all branches of government, as well as civil society and its organizations. While the government is important, civil society is also critical, especially in changing or modifying customary laws and traditional practices that make various forms of violence against women and girls acceptable within many communities.

Finally, the international community is an important player in the effort to eradicate violence against women. International and regional human rights instruments, such as CEDAW, the UDHR, the Banjul Charter, the Maputo Protocol, and the ICCPR provide minimum standards for the recognition and protection of the rights of women and girls, below which no country should go. In addition, the international community can help in the fight against violence against women that is associated with trafficking and migration. The UN, through the mechanism of the Special Rapporteur on violence against women and girls, its causes and consequences, has been able to contribute significantly to a more enhanced understanding of the depth and breadth of the problem and how to fully confront it. Also, the reports of the Special Rapporteurs serve as important resources for countries that are seeking ways to combat violence against women and girls and improve opportunities for them to engage in self-actualizing activities.

768. *Id*. para. 74.