

**VIOLENCE AGAINST WOMEN  
IN  
SOUTH AFRICA**

**The State Response to Domestic Violence and Rape**

**Human Rights Watch / Africa  
Human Rights Watch Women's Rights Project**

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Human Rights Watch/Africa division was established in 1988 to monitor and promote the observance of internationally recognized human rights in sub-Saharan Africa. Peter Takirambudde is the executive director; Janet Fleischman is the Washington director; Alex Vines is the research associate; Kimberly Mazyck is the associate; Alison DesForges, Bronwen Manby, Binaifer Nowrojee and Michele Wagner are consultants. William Carmichael is the chair of the advisory committee and Alice Brown is the vice chair.

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# 1

## INTRODUCTION

The Reconstruction and Development Programme (RDP) must focus on the reconstruction of family and community life by prioritising and responding to the needs of ... women and children who have been victims of domestic and other forms of violence.<sup>1</sup>

It has been a year and a half since the multiracial elections of April 1994 marked the end of the apartheid system in South Africa. An "interim" constitution that will be in effect for two years has established South Africa's first justiciable bill of rights, in a country previously characterized by legislated inequality and severe human rights abuses.<sup>2</sup> The African National Congress (ANC), the foremost group

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<sup>1</sup> The Reconstruction and Development Programme of the Government of National Unity (RDP) sets out the policy goals and strategies of the new government. The original RDP document forms the basis of the policies of the new government, and has been succeeded by a white paper which sets out RDP priorities in greater detail. Government of South Africa, *The Reconstruction and Development Programme*, (Johannesburg: African National Congress, 1994), section 2.13.15.

<sup>2</sup> The text of the interim constitution was agreed to at the multiparty negotiations that led to a new government, and was passed by the old (all-white) parliament as the Constitution of the Republic of South Africa Act (Act No.200 of 1993). It came into effect on the first day of the elections and will remain in effect until a final constitution is adopted during 1996 by the National Assembly and Senate, elected in April 1994, sitting jointly as a constitutional assembly.

in the struggle to end racial oppression, is the majority party in the government of national unity that will rule the country for five years until the next general elections. As the leader of the new government, the ANC has reaffirmed its pledge to respect human rights and uphold the rule of law.

A key element of the new dispensation in South Africa is a formal commitment to gender as well as racial equality. During the lead up to the 1994 elections, the ANC published a policy document known as the Reconstruction and Development Programme (RDP) which states that a "key focus throughout the RDP is on ensuring a full and equal role for women in every aspect of our economy and society." The interim constitution guarantees gender equality and prohibits discrimination on the basis of sex,<sup>3</sup> and also provides for the creation of bodies to monitor the government's respect for human rights, including a Human Rights Commission and a Commission for Gender Equality. In addition, South Africa now ranks seventh in the world for the number of women in its parliament.<sup>4</sup>

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<sup>3</sup> The preamble to the interim constitution declares that "[a]ll South Africans will be entitled to a common South African citizenship in a sovereign and democratic state in which there is equality between men and women." The bill of rights (Chapter 3) also guarantees equality before the law to "all persons," and states that "no person shall be unfairly discriminated against, directly or indirectly [on the grounds of] gender [or] sex."

<sup>4</sup> Of the 400 members of the national assembly, there are 106 women. Six members of the cabinet are women: Minister for Health Nkosazana Zuma; Minister for Public Enterprises Stella Sigcau; Minister for Housing Sankie Nkondo; Deputy Minister for Arts, Culture,

Despite these changes, South African women remain second class citizens. Economic, social and legal inequalities persist. Women are subject to widespread violence that prevents them from enjoying the other rights that they are ensured by the interim constitution. Although reliable national statistics are not readily available, both domestic violence<sup>5</sup> and sexual assault are pervasive in South Africa and are directed almost exclusively against women, often in places in which they should be safe and by men they know and should be able to rely on. South African women's organizations estimate that perhaps as many as one in every three South African women will be raped and one in six South African women is in an abusive

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Science and Technology Brigitte Mabandla; Deputy Minister for Agriculture Thoko Msane; and Deputy Minister for Welfare Geraldine Fraser-Moleketi.

<sup>5</sup> The term "domestic violence" is used in this report to refer to violence between spouses or sexual partners, not necessarily occurring at home — although in practice the majority of such violence will occur in the home. In addition, although this report often distinguishes domestic violence from rape for the purposes of examining the criminal justice system's distinct treatment of these abuses, it in no way means to suggest that domestic violence does not include rape.

domestic relationship. These are issues of immediate concern to South African women across the political and racial spectrum.

South African women victims<sup>6</sup> of violence, regardless of race, continue to face a judicial and police system which is often unsympathetic and hostile to women seeking redress. Although new legal procedures for obtaining protection have been introduced, the efforts to transform the police from enforcers of apartheid into "community" police have in most cases not yet led to improved protection and recourse for women victims of violence. A dearth of support services further exacerbates the effects of violence against South African women.

South African women of all races continue to complain of mistreatment at the hands of police officers taking statements; prosecutors and magistrates in court; district surgeons (government doctors) who examine them; or court clerks who issue forms to abused women for an interdict (restraining order). Women victims of violence frequently experience indifferent or hostile treatment from police officers when they attempt to report abuse. Ignorance of the laws protecting women from domestic violence, including the 1993 Prevention of Family Violence Act, is common in many police stations and among court clerks. The act itself does not address violence by non-live in and same sex partners and does not cover the verbal and emotional abuse.

The state's response has also been problematic with respect to rape. Existing rape laws narrowly define this crime as occurring only between a man and a woman and involving the penetration of the penis into the vagina. Acts of forced oral or anal sex, or penetration by foreign objects are not considered rape. Moreover, while the government acknowledges that the number of reported rapes is only a fraction of the total, the number of prosecutions is even smaller. Police are

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<sup>6</sup> There is an ongoing debate over the use of the word "victim" to describe women who have experienced domestic abuse or rape. Many find this term disempowering and believe that the word "survivor" more aptly describes their struggle to deal with both the violence and the law enforcement system. Both terms are used interchangeably in this report in the recognition that battered and raped women are both victims and survivors. Of course some victims do not survive.

often unaware of the procedures to follow when a rape is reported, and state medico-legal services are often substandard and can compromise medical evidence crucial to corroborating allegations of sexual abuse. In some cases, poor medico-legal work has also resulted in the denial to women the legal right to abortion in cases of pregnancy resulting from rape. In the courts, judges often discount the testimony of rape survivors and hand down lenient sentences to rapists.

The apartheid policies of the past continue to have an effect on women who are victims of domestic violence and rape. The legacy of violence that underpinned the apartheid state has led to extremely high levels of violence throughout society — including in the home. State racism and sexism has prejudiced black women in particular in their interactions with police and judicial authorities. In the rural areas, where black women have the least education and work under the worst conditions, access to redress against perpetrators of violence is even more limited. In the townships, inaction by the police has led to a dangerous reliance on young "comrades" to mete out vigilante justice against alleged perpetrators of violence, including violence against women, undermining the rule of law.

The South African government, at the highest policy-making levels, has expressed a commitment to addressing these forms of violence against women. However, violence against women has not achieved the sort of high-level political attention that the more general political violence, for example, has been given both during the transition period and under the new regime. Although there are a number of encouraging initiatives, there is, to date, no coordinated national strategy to address the problems in the criminal justice, law enforcement, health and welfare systems in a systematic fashion. Policy changes have yet to be implemented consistently across government departments. The government attributes this lack of progress both to the fact that it is overwhelmed in trying to address all the problems caused by apartheid, and to entrenched attitudes in society which condone violence against women. These are valid points. However, lasting political and social transformation towards a democratic South Africa cannot be achieved without systematically addressing the violence inflicted on South African women by men.

The South African women's movement has made a number of significant efforts to address the state's inadequate response to domestic violence and rape.<sup>7</sup>

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<sup>7</sup> These nongovernmental organizations include, among others, the Advice Desk for Abused Women, Agisanang Domestic Abuse Prevention and Training (ADAPT), Black Sash, Centre for the Study of Violence and Reconciliation, Crisis Line, End Racism and Sexism Through Education (ERASE), 702 Helpline, Ilitha LaBantu, Ikinross Women's League, Kimberley Rape Crisis Committee, Lawyers for Human Rights, Lifeline, National

Their efforts, although at times hampered by limited resources as well as by race, class, and other divisions between women's groups, have resulted in many positive developments. These include the establishment of privately funded hot-lines and shelters for women in need, and the conducting of occasional training sessions on violence against women for police and judicial officers. These nongovernmental organizations have also been deeply involved in legal reform and in lobbying the police and judiciary to improve their response to domestic and sexual abuse. Where these organizations have had an impact on government policy and practice, women victims of violence are receiving somewhat better treatment. Yet, South African women's organizations contend that these improvements remain piecemeal and do not address the need for systemic change.

There are a handful of pioneering efforts to improve the state response to violence against women in South Africa. These include a specialized sexual offenses court in Cape Town, the Wynberg Court. At the Wynberg Court trained prosecutors achieve an almost 20 percent higher conviction rate in rape cases than that obtained in other courts. At Newcastle in KwaZulu-Natal, a "Crisis Centre" has been established at the hospital for women victims of violence, with the cooperation of the police and health personnel, and police handling of women who report abuse has been improved. At Sunnyside police station in Pretoria, a trauma center has been established, staffed by woman detectives, who are called when sexual abuse or domestic violence cases are reported. These initiatives, while not without difficulties, are commendable contributions. While moves have been made to extend their experience nationwide, progress has been slow, and these examples remain the exception. In other instances, positive efforts have not received sustained attention from the government and have closed down. For example, the work of a centralized rape reporting center in Hillbrow, a district of central Johannesburg, at which raped women receive police, medical and counseling services in the same centralized location has been significantly scaled back.

This report underscores the need for the South African government to improve its response to domestic violence and rape. These types of gender-based violence against women remain at extraordinarily high levels and, while there are encouraging initiatives, the state response has so far lacked the necessary

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Institute for Crime Prevention and Rehabilitation of Offenders (NICRO), NISAA Institute for Women's Development, People Opposing Women Abuse (POWA), Rape Crisis, Salvation Army, Women Against Women Abuse (WAWA), Woman and Child Project, Women's Health Project and Yohuselo Haven for Battered Women.

commitment and sustained attention. If the new South African government is indeed serious about its RDP pledge to “ensure a full and equal role for women in every aspect of [the] economy and society,”<sup>8</sup> it must take immediate steps to address violence against women — in particular rape and domestic violence — and fulfill its responsibility to prohibit and protect women against such abuses. Furthermore, these efforts to address violence against women must recognize the intersection of race and class with gender as it affects South African women who experience violence and seek state redress.

The South African government’s commitment to the elimination of violence against women will entail legal reform, police and prosecutorial training, enhanced inter-agency cooperation, improved data collection, and support for and collaboration with nongovernmental organizations. It may also require considerable resources at a time when there are many urgent calls on the government’s funds. However, no progress can be made towards establishing the type of society that the liberation movements have pledged to create without addressing the violence suffered by women — a majority of the population — on a daily basis.

## **Recommendations to the Government of South Africa**

### **Legal Reform:**

#### International Law:

- ◆ While Human Rights Watch is encouraged by the South African government’s efforts to sign Convention on the Elimination of All Forms of Discrimination against Women, it urges the government to formally ratify CEDAW without further delay.

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<sup>8</sup> Government of South Africa, *The Reconstruction and Development Programme of the Government of National Unity*, section 2.13.15.

## Domestic Violence:

- ◆ The 1993 Prevention of Family Violence Act should be expanded (1) to include protection for individuals who are abused by a partner with whom they have never lived and lesbian and gay couples and (2) to extend jurisdiction over abuse cases to ensure that women can be protected wherever they are in South Africa when the abuse occurs.
- ◆ The Department of Justice should issue guidelines for magistrates in order to clarify the types of abuse which would qualify for an interdict (a form of restraining order) under the Prevention of Family Violence Act. These guidelines should expressly include both verbal and emotional abuse, in addition to physical abuse.
- ◆ Delays in payments to agents — the sheriffs — responsible for delivering court orders prohibiting abuse should never be considered a justification for failing immediately to deliver interdicts that have been issued as emergency remedies to domestic violence.
- ◆ Legal provisions must be introduced to protect counseling service workers who advise abused women from violence or threats of violence directed against them by their clients' abusive partners.
- ◆ Without diminishing protection to domestically-abused women, policymakers must address the concern that interdicts granted under the Prevention of Family Violence Act may violate the *audi alteram partem* rule (which allows both sides to present their cases before courts) because such interdicts are issued without a hearing and are for unspecified durations. One possibility might be to create a temporary interdict order which can be made final after a hearing.
- ◆ Guidelines must be adopted by the police and prosecution service on arrest and prosecution policy so that domestic violence cases are accorded the full attention of the criminal justice system. Family violence cases must not be treated as "private problems" and therefore not suitable for intervention by the criminal justice system. Appropriate sentencing



policies must be developed, including compulsory attendance at programs designed for abusive partners.

- ◆ Prosecutors must be trained to deal with domestic violence cases in accord with clear guidelines. While prosecutorial discretion must be safeguarded, prosecutors should be instructed to refrain from dropping cases of domestic abuse and to argue for strict bail conditions to be imposed where there is a history of violent assault.

#### Rape:

- ◆ It should be recognized in law that this crime can be committed by men or women against men or women. The definition of rape should be broadened to include anal and oral penetration as well as penetration by foreign objects such as sticks, bottles, or knives. The definition should focus on coercion by the perpetrator rather than lack of consent by the victim.
- ◆ Legislation should be introduced to abolish the use of the cautionary rule, which permits courts to exercise an excessive level of discretion in deciding whether or not to credit the testimony of women who allege they have been raped, in cases of rape or sexual assault, on the grounds that it discriminates against women on the basis of sex.
- ◆ Guidelines on sentencing for rape should be adopted by the Department of Justice and circulated to all judges. At the moment, rape sentences are wide-ranging and appear to be related more to the judge's views on rape than to any consistent application of established standards.
- ◆ Judges, magistrates, and prosecutors should receive mandatory training on rape and domestic violence and in the use of medico-legal evidence.

#### **Improved Police Services**

The police appear to be a major impediment to effective action in addressing violence against women.

- ◆ A standard course of training on domestic violence, rape, and sexual assault should be completed by new recruits and by serving officers. The government should commission individuals and institutions with expertise in this area to develop such a program and should work together with the relevant government departments to effect its implementation on a national scale. Law enforcement personnel should be trained in procedures and enforcement of the Prevention of Family Violence Act and about the social and psychological context in which domestic violence occurs.
- ◆ Police are obligated to ensure protection and equal enforcement of the law in domestic abuse cases. Police must be trained to eliminate gender, class and race bias in their responses to such abuse and to realize that domestic violence is not to be excused, tolerated or condoned. Standardized arrest policies should be considered for domestic violence cases.
- ◆ Police who are involved in investigating rape cases should receive proper training in forensic skills and in the importance of medical information.
- ◆ Police must provide prompt protection to women by diligently enforcing court orders that prohibit abuse and reduce the abuser's access to the victim. Police stations must make it a priority to respond speedily to a woman's urgent call in cases of domestic violence.
- ◆ The government should create an independent mechanism to monitor and oversee police treatment of women victims of violence. This body should be empowered to hear complaints and to take steps to sanction police officers who do not act professionally, including cases in which the abused woman is a partner of a police officer.

#### **The Medico-Legal System**

- ◆ Provincial authorities should review government health services directly responsible for the examination and treatment of rape survivors to ensure the most responsive, effective, and accessible delivery of service.
- ◆ The Department of Health should establish standardized procedures and services to ensure that all district surgeons are appropriately trained in the treatment of rape and domestic violence survivors. The treatment should

be expanded from the collection of medical evidence to the provision of basic medical treatment. This after-care should include, at a minimum, medical treatment, emotional support and referral to the nearest counseling service. District surgeons should be required to provide rape survivors with information about additional existing services in the area.

- ◆ More district surgeons should be appointed in the rural areas.
- ◆ Rape reporting centers, modeled on the Hillbrow Medico-Legal Clinic, should be established as widely as possible, and in particular in townships. Such facilities must be staffed by trained police and medical personnel to allow victims to report cases of rape or battery, undergo medical examination, and receive appropriate treatment and counseling.
- ◆ Abortion laws which protect the right for rape victims to have access to abortion should be upheld without discrimination.

### **Inter-Departmental Coordination**

The effectiveness of the law depends on cooperation and coordination among implementing law enforcement, judicial and social service agencies.

- ◆ A national multi-disciplinary task-force on violence against women should be created to improve social, medical and legal procedures for women affected by violence. It should include, at a minimum, representatives from the Departments of Justice, Safety and Security, Health and Welfare. Liaison officers in each of the relevant departments at the state and provincial levels should be authorized to communicate and initiate changes within their department in coordination with the other departments and in consultation with nongovernmental organizations. One function would be to expedite the creation of local units, like the Hillbrow Medico-Legal Clinic, to attend to the needs of abused and raped women.
- ◆ Regional forums, similar to the Johannesburg rape forum, should be established in each province with government and nongovernmental

organizations on it. Government representatives should include district surgeons, police, and the Department of Justice.

- ◆ In each province, the government should form a working group in which governmental and nongovernmental organizations meet on a regular basis in order to improve the government's response to and services for domestic violence and rape victims.
- ◆ The government should help fund the creation of legal assistance programs, accessible and affordable shelters, as well as counseling services for abused women.

#### **Documentation of Violence against Women**

Efforts to improve the South African government's response to domestic abuse and rape would be greatly enhanced by the availability of reliable national data detailing the nature and degree of the violence. At the moment, police do not distinguish cases of domestic violence from other assaults, while national statistics regarding rape are not comprehensively compiled.

- ◆ We urge the South African government to improve the collection of data concerning crimes of violence against women. We recommend that the government first conduct a review of all existing statistical information. Such a review should include, at a minimum, the incidence of such violence, the identity of the parties, rates of prosecution and nature of punishment. The collection and reporting of statistics must also be improved, specifically to distinguish domestic violence cases from other assaults. Sufficient details should be recorded to create profiles of victims and perpetrators, including their racial and class status, so that intervention to stop or remedy abuse can be most effectively crafted. Efforts must be made to survey the extent of unreported violence against women.
- ◆ Studies of the nature and extent of violence against women should be carried out or funded by the government in close cooperation with nongovernmental organizations active in this field.

## BACKGROUND

### Women in the Struggle

From the outset, women were an important — although often marginalized — part of the resistance to the racial discrimination of the colonial and later apartheid regimes. In 1913, just one year after the founding of the ANC, a widespread campaign of passive resistance to the application of passes to African women in the Orange Free State was organized by women in the province. As a result of the campaign, a Bantu Women's League was established within the ANC; although the role of women within the ANC itself remained limited and largely restricted to support roles. Under the 1919 constitution of the ANC, for example, women had no voting rights: only in 1943 was the constitution amended to give women full membership and voting rights within the ANC. At the same time the ANC Women's League (ANCWL) was established, to which all women members of the ANC automatically belonged. In 1954, two years after the ANC's Defiance Campaign, which saw its membership surge to over 100,000, a national conference of women saw the creation of the Federation of South African Women (FEDSAW) and the adoption of a Women's Charter (parallel to the Freedom Charter adopted by a range of organizations at the Congress of the People at Kliptown in 1955) that committed the organization to the removal of "the laws and practices that discriminate against women." In 1956, the introduction of passes for African women throughout South Africa saw a highly visible nationwide anti-pass campaign by the ANCWL and FEDSAW, including a demonstration in Pretoria on August 9, thereafter "women's day" within the ANC alliance, and now recognized as a national holiday.

Anti-pass demonstrations were organized over the following years by the ANC, FEDSAW and the Pan-African Congress (PAC), after its formation in 1959, and culminated in the Sharpeville killings of March 21, 1960 and the banning of the ANC, the PAC and the South African Communist Party (SACP). With the onset of heightened state repression, FEDSAW also suffered although it was not itself banned. Women were recruited into the armed wing of the ANC, Umkhonto we Sizwe (Spear of the Nation), when the strategies of passive resistance were abandoned in favor of armed struggle. In 1983, FEDSAW became a member of the United Democratic Front (UDF), a coalition of anti-apartheid organizations formed to resist the imposition of a new constitution that continued to exclude blacks from meaningful political power. During the late 1980s, the ANC issued a number of

documents relating to the form of a future government in South Africa, and by the early 1990s had committed itself, among other principles, to the creation of a non-sexist state.

With the unbanning of ANC, PAC and SACP in February 1990, the ANCWL was also reconstituted. Among other activities, the ANCWL made demands for at least 30 percent of the ANC's National Executive Committee to be women (which was rejected at the first national conference of the ANC in July 1991). Nevertheless, the ANC adopted a quota for one third of their parliamentarians to be women. Eventually, one quarter of the members of parliament elected in April 1994 were women, most of them from the ANC. Two small political parties explicitly committed to women's issues contested the April 1994 elections, the Women's Rights Peace Party and the South African Women's Party. A Women's National Coalition (WNC) was launched in April 1992 by a large number of women's groups from across the political spectrum, and conducted a nationwide survey with the aim of finding women's demands for the new constitution of South Africa. In February 1994, a Women's Charter for Effective Equality was adopted at a national convention called by the WNC, which set out women's demands in fields ranging from the administration of justice to family life and partnerships, and called for "respect and recognition of [women's] human rights and dignity."

The new constitution contains a commitment to the elimination of discrimination on the basis of sex, gender and sexual orientation, and, in addition, to the creation of a Commission on Gender Equality, whose object is "to promote gender equality and to advise and to make recommendations to Parliament or any other legislature with regard to any laws or proposed legislation which affects gender equality and the status of women."<sup>9</sup> However, legislation to establish the Gender Commission has not yet been passed.

The South African women's movement has made significant efforts since the 1970s to draw attention to the problems of domestic violence and rape, while few of the "traditional" human rights groups in South Africa have devoted much time to these issues. Every government action to improve the situation can be traced to advocacy efforts by these nongovernmental women's groups, including the

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<sup>9</sup> Constitution of the Republic of South Africa Act (Act No.200 of 1993), section 119. See further below, in the section on the position of women under South African law.

creation of the Wynberg Sexual Offenses Courts, the acceptance of the Rape Trauma Syndrome by courts in the Western Cape and the creation of centralized rape reporting centers. The women's organizations have also been responsible for the establishment of privately funded hot-lines and shelters for women in need as well as training sessions for police and judicial officers on violence against women in a number of areas. Where these organizations have had an impact, raped and abused women are receiving somewhat better treatment.

An important development is the growing number of women's groups in black communities. Increasingly, women's organizations based in the Indian, coloured and African communities are emerging to deal with these issues. One woman told Human Rights Watch that in the past black women were told that domestic violence and rape were issues for white women. Such things didn't happen to black women, they were told, or there were more important political and anti-apartheid issues to focus on:

In the past, black men, and even black women, would say that domestic violence was a white issue. That it didn't happen here. Now, our sisters are coming around the townships, banging on the doors and they are saying it does happen here and we must do something about it. It gives us strength to speak out.<sup>10</sup>

The successes of the South African women's movement would be further enhanced by increased coordination among the women's groups themselves, with other human rights organizations and with government agencies at the national level. At the regional level, there has already been some effective coordination and cooperation.

### **Women and Poverty**

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<sup>10</sup> Interview, Alexandra Community Center, February 17, 1995.

South Africa is one of the most unequal societies in the world. Moreover, its inequalities are based to a unique extent on race: despite being a middle income country, the key indicators of poverty for the African population are equal to or worse than those for much poorer countries elsewhere in Africa.<sup>11</sup> The economic

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<sup>11</sup> The poorest 40 percent of households in South Africa (equivalent to 53 percent of the population), accounts for less than 10 percent of total consumption, while the richest 10 percent (equivalent to 5.8 percent of the population) accounts for over 40 percent of consumption. South Africa's Gini coefficient, which measures inequality, is much worse than that of most countries with a similar per capita Gross National Product, and about the same as the worst, Brazil. A Gini coefficient of 0 signifies absolute equality, and 1 signifies absolute concentration of wealth: South Africa's Gini coefficient is 0.61 (GNP per capita U.S.\$2,670); Brazil's 0.63 (GNP per capita 2,770); Poland's 0.27 (GNP per capita U.S.\$1,910); Chile's 0.58 (GNP per capita U.S.\$2,730); Kenya's 0.57 (GNP per capita U.S.\$310); Zambia's 0.44 (GNP per capita U.S.\$370). The World Bank, *Key Indicators of Poverty in South Africa: An Analysis Prepared for the Office of the Reconstruction and Development Programme by the World Bank, based on the South Africa Living Standards*



disparities between races introduced by the colonial regime were sharply accentuated by the policies of apartheid implemented by the National Party government elected in 1948: black<sup>12</sup> South Africans were forcibly removed from "white" areas and compelled to live in substandard housing in the townships or, if they were African, in the already overcrowded "tribal reserves" established in colonial times, which were now renamed "bantustans" or "homelands" and granted nominal "independent" or "self-governing" status. Blacks were excluded from opportunities for advancement by job reservation and legal restrictions on economic activity for "non-whites." Pass laws prevented Africans from working, traveling or living outside certain areas without official permission. While focusing on race, the legislated inequalities of the apartheid system applied also to gender, and women were brought under direct state control after 1948 to a far greater extent than had previously been the case.<sup>13</sup> Women of all races were legally inferior to men, and African women were especially disadvantaged.

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*Survey, coordinated by the Southern Africa Labour and Development Research Unit at the University of Cape Town (Pretoria: Office of the President, 1995), p.8.*

<sup>12</sup> In this report, "black" will be used to refer to South Africans previously classified by the apartheid system as "African" or "black" (of solely African ancestry), "Indian" or "Asian" (largely descended from indentured servants brought from the Indian subcontinent to work the sugar plantations in Natal), "coloured" (of mixed ancestry) and "white" (of European ancestry). The subcategories will also be used, since their previous racial classification remains relevant to the living circumstances of all women in South Africa.

<sup>13</sup> See generally, Cheryl Walker, *Women and Resistance in South Africa* (Cape Town: David Philip, 1991).

Among the effects of the apartheid system was the impoverishment of large sections of the population: the alleviation of poverty is perhaps the most urgent problem facing South Africa's new government.<sup>14</sup> Poverty is concentrated amongst the African population: 95 percent of those in the poorest 40 percent of the population are African, and 65 percent of Africans are poor, by the same measure.<sup>15</sup> Research published by the Centre for Social and Development Studies at the University of Natal found that seventeen million people were living below the minimum subsistence level in 1992.<sup>16</sup>

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<sup>14</sup> See generally, Francis Wilson and Mamphela Ramphele, *Uprooting Poverty*, (Cape Town and Johannesburg: David Philip, 1989).

<sup>15</sup> The World Bank, *Key Indicators of Poverty in South Africa*, p.13.

<sup>16</sup> In 1993 it was estimated by the Department of National Health and Population Development that 68 percent of Africans living in rural areas and 32 percent in urban areas had an income below the official government poverty line (R.1,200 per family per month (about U.S.\$340)). Forty-five percent of rural coloureds and Indians, 23 percent of urban coloureds, 8 percent of urban Indians, and less than 1 percent of urban whites were also poor by this definition. South African Institute of Race Relations, *Race Relations Survey 1993/94* (Johannesburg: SAIRR, 1994), pp.490-491.

Women are disproportionately represented both amongst the rural population and (in part as a consequence) amongst the poor. The population profile of the former homelands is heavily weighted towards women and children. The majority of working-age men leave the area to look for work in the urban areas, either permanently or as migrant laborers returning home only occasionally.<sup>17</sup> Until the abolition of the "influx control" laws in the mid-1980s which controlled population movement, women were unable to leave to seek work in the cities, and so if a woman's husband died or ceased to send money home, total destitution could result. While state control of the labor flow and regulation of residential areas by race is over, the legacy of such apartheid policies is very much present. Nearly 70 percent of the poor (defined as the poorest 40 percent of the population, with an income of R.301 (U.S.\$86 per month per "adult equivalent") are resident in the former homelands: in all the homelands except KaNgwane the poor form over half of the population, and in the former Transkei 92 percent of the population is poor.<sup>18</sup> Remittances home from migrant workers and old age pensions are the only source of income for many families in those areas.

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<sup>17</sup> An estimated 54.99 percent of the adult population of South Africa is female, and 45.43 percent of the total population is under eighteen years of age. In the former homelands, the gender and age imbalance is even more marked. Figures supplied by the World Bank.

<sup>18</sup> The World Bank, *Key Indicators of Poverty in South Africa*, p.12.

While women carry out the bulk of the subsistence farming that takes place in the homelands, their access to land under the communal tribal land tenure systems is only through their husbands or male relatives. Traditional leaders, or chiefs, who decide land allocations, are almost exclusively men, and men are regarded as the head of the household for land tenure purposes. A large number of rural households, both in the homelands and the commercial farming areas, in fact have no access to land other than a plot for a house. Of the nearly 2.5 million poor rural households (representing roughly twelve million poor people) more than two million have no access to piped water, modern sanitation or electricity, and nearly 1.6 million poor rural households (roughly ten million people) rely on wood as the main source of energy for cooking. Fetching water and collecting wood are overwhelmingly regarded as female tasks: in the vast majority of poor rural households women are thus forced to spend more than four hours a day collecting water and firewood.<sup>19</sup>

The migrant labor system also has a negative impact on women in the cities. Migrant workers still stay mostly in supposedly single-sex hostels run by the state or private companies. As apartheid controls have broken down, women have increasingly moved into the hostels where their partners are living — due to housing shortages elsewhere and in some cases as a consequence of political violence — as a result, they are dependent on the man with whom they are staying. Conditions in these hostels are appalling, but the consequences of being thrown out are nonetheless sufficiently serious to result in tolerance of abuse.

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<sup>19</sup> Ibid., p.20.

Women form 36 percent of the total work force in South Africa, as recorded in the 1991 population census.<sup>20</sup> When they do have paid employment, women are concentrated in lower paying service-sector jobs, including domestic service (where they form 89 percent of those employed); in other sectors they are concentrated in secretarial and other non-managerial positions.<sup>21</sup> In the African and coloured townships of the small towns of the commercial farming areas, often the

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<sup>20</sup> Ibid., pp.15,16. This figure may underestimate the unemployment rate for women, since many women who defined themselves as housewives in the survey would actually like to work out of the home. Average unemployment rates, defined as those who are not working but would like to work and are either actively seeking work or have given up looking, are 35 percent for women and 25 percent for men. Forty-eight percent of working-age women are in poor households, compared to 42 percent of working age men.

<sup>21</sup> South African Institute of Race Relations, *Race Relations Survey 1993/4*, p.457. The position of domestic workers was improved by the 1993 extension of the Basic Conditions of Employment Act to apply to domestic workers.

only work available for women is domestic work at rates even lower than those paid in the cities, and few women are able to secure such positions. Even where they are employed to do the same work as men, women may receive lower rates of pay: for example, women farm workers both depend on their husbands or male relatives for access to work and are paid at a lower hourly rate than their male counterparts.<sup>22</sup> Women form a majority of the work force earning less than R.3,000 (U.S.\$857) per year, and less than 10 percent of those earning more than R.70,000 (U.S.\$20,000).<sup>23</sup> Disadvantaged in the job market, women in South Africa are additionally almost exclusively responsible for child care. Even where both parents are present, men in all South African cultures are unlikely to take more than token responsibility for care of children.<sup>24</sup>

### **Women and Violence**

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<sup>22</sup> Sandra Hill Lanz, *Women on Farms* (Pretoria: Lawyers for Human Rights, 1994).

<sup>23</sup> RDP Office, *Beijing Conference Report: 1994 Country Report on the Status of South African Women* (Pretoria: Office of the President, 1995), p.36.

<sup>24</sup> Moreover, 39 percent of the population lives in households without a resident male head, and these households make up 50 percent of those who fall in the poorest 20 percent of the population. Nearly 70 percent of female-headed households are poor (that is, they fall in the poorest 40 percent of the population), while households with a resident male head have a poverty rate of 43 percent. The World Bank, *Key Indicators of Poverty in South Africa*, p.14.

The implementation of apartheid over forty-five years has resulted in an economic and social crisis in South Africa that in turn has led to extraordinarily high rates of violent crime. Over the past decade, statistics for homicide and serious assault have escalated dramatically, and crime is one of the principal preoccupations of South Africans under the new government. South Africa has the highest per capita figures for violent death recorded in any country not at war;<sup>25</sup> rape figures are similarly high, as discussed in the body of this report. The destruction of families and stable social conditions by the enforcement of the pass laws and the forced removal of whole communities under the infamous Group Areas Act, which demarcated residential areas for the different "races," created perfect conditions for a rise in crime. The impoverishment of the African population, in particular, has meant that many individuals are driven to crime in the absence of other economic opportunities. The vicious repression of political opposition by the apartheid police machinery, which at the same time largely ignored ordinary crime within black communities, has embedded a belief in the effectiveness of force in solving problems and encouraged the development of a culture of vigilante justice and noncooperation with state structures.

The rise in violent crime coincided with the development of endemic political violence in many black communities. Political violence first became a significant phenomenon in South Africa in the mid-1980s, at the time of the mass uprising against continued minority rule coordinated by the United Democratic Front (a coalition of anti-apartheid groups that led the opposition to the white government while the ANC was still banned) and the subsequent state of emergency that was declared by the government in 1985 and lasted, with a brief interlude in 1986, until 1990. In Natal and the homeland of KwaZulu (contained in several pieces within Natal's borders), violence broke out between supporters of the UDF and the KwaZulu-based Inkatha, at that time registered as a Zulu "cultural movement" and not a political party. Violence was particularly bad in the areas surrounding Durban and Pietermaritzburg, but later spread throughout most of the province.

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<sup>25</sup> The World Health Organisation reports South Africa's murder rate as fifty-four per hundred thousand; another study has put the figure even higher, at ninety-four per hundred thousand. "Shock murder figures for SA," *City Press*, March 5, 1995; "SA gets 'most violent' label," *The Star*, March 27, 1995. These figures are averages, and the rates are much higher in some localities: Human Rights Watch calculated a murder rate of 193 per hundred thousand during an investigation of violence on the Natal South Coast in late 1994: Human Rights Watch/Africa, "Threats to a New Democracy: Continuing Violence in KwaZulu-Natal," A Human Rights Watch Short Report, May 1995.

During the 1980s, this type of political violence was largely concentrated in KwaZulu and Natal, although there were outbreaks elsewhere, especially in the townships surrounding Cape Town. In 1990, after the unbanning of the ANC and the initiation of negotiations for a transition to a democratic government, the ANC suspended its armed struggle, and politically motivated violence by or against state structures and representatives decreased. However, violence between black political parties spread dramatically from KwaZulu and Natal to the townships of the greater Johannesburg area. Although from 1993 the violence in the Johannesburg area was mostly confined to the East Rand townships of Katlehong and Thokoza, it continued unabated throughout large areas of KwaZulu.

The main protagonists of the violence were members of Inkatha, which transformed itself into the Inkatha Freedom Party (IFP) in 1990 and of the ANC, although other parties involved included the Pan-African Congress (PAC), South African Communist Party (SACP), and right-wing groups, such as the Afrikaner Weerstandsbeweging (AWB, or the Afrikaner Resistance Movement). However, as the transition to democracy progressed, ever more evidence emerged of the deliberate promotion of violence by members of the security forces or the KwaZulu government. In KwaZulu and Natal, violence peaked before the elections at 429 recorded deaths in political conflict during the last two weeks of March and first two weeks of April 1994, reported by the Human Rights Committee of South Africa (HRC), a nongovernmental organization monitoring human rights and political violence.<sup>26</sup>

Although violence between supporters and members of different political parties has virtually ended in most parts of the country since the elections, it has continued in KwaZulu-Natal, now a single region incorporating both the former homeland and the white province under the new structures of provincial government. Fighting between supporters of the ANC and the IFP continues in the

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<sup>26</sup> For background on the history of political violence in South Africa and particularly KwaZulu-Natal, see Africa Watch, *The Killings in South Africa: The Role of the Security Forces and the Response of the State* (New York: Human Rights Watch, 1991); Africa Watch, "Half-Hearted Reform: The Official Response to the Rising Tide of Violence," *A Human Rights Watch Short Report*, vol. 10, no. 2, May 1993; Africa Watch, "'Traditional' Dictatorship: One Party State in KwaZulu Homeland Threatens Transition to Democracy," *A Human Rights Watch Short Report*, vol. 5, no. 12, September 1993; Human Rights Watch/Africa, "Impunity for Human Rights Abuses in Two Homelands: Reports on KwaZulu and Bophuthatswana," *A Human Rights Watch Short Report*, vol. 6, no. 2, March 1994; Human Rights Watch/Africa, "Threats to a New Democracy: Continuing Political Violence in KwaZulu-Natal," *A Human Rights Watch Short Report*, vol. 7, no. 3., May 1995.



province at levels which merited headlines during the 1980s, but are now apparently regarded by the media as "normal." As recorded by the Human Rights Committee, the average monthly death toll from political violence in KwaZulu-Natal was at least seventy-five for the first eight months of 1995. Some monitors place the figures even higher.

The participants in political violence, as in criminal violence more generally, are largely men. Men also form a majority of those killed in political violence. Nevertheless, a number of political massacres have included indiscriminate killings of the elderly, women and children: for example, of twenty-three people killed at the Uganda squatter camp at Umlazi, Durban, on March 13, 1992, twenty-two were women and children. In other cases, women activists have been targeted. Moreover, the victims of political violence include not only those killed and injured, but also the displaced. In rural KwaZulu-Natal, where a substantial majority of the residents are women,<sup>27</sup> the destruction of property and creation of "no-go" areas that has accompanied the violence has had the most severe impact on women and children. As in other conflicts, women and children form the majority of the displaced, most visibly amongst those found in the camps for displaced people that continue to exist in some parts of KwaZulu-Natal. Even where there are no camps — as is the case in most areas, where individuals and families have sought shelter in existing squatter camps or with relatives in the townships or still unaffected villages — it is women who have had to pick up the pieces and attempt to recreate a life with what they can salvage from a burnt or abandoned home.

While no major studies have been undertaken, there is evidence that women have also on occasion been targeted for rape as part of the political conflict. One reason may be that most of the recorded statistics are of deaths only. On the other hand, there are no reports of systematic rape targeted at women believed to support an opposing political party. Nevertheless, the Durban office of the Human Rights Committee of South Africa has recorded a number of rapes apparently committed with a political motive: for example, four rapes in the violence-torn Sundumbili area north of Durban during June and July 1995.<sup>28</sup>

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<sup>27</sup> According to World Bank calculations based on figures supplied by the government's Central Statistical Service, women form 60.48 percent of the adult population in the former KwaZulu, and children 53.36 percent of the total population of the homeland area. Table supplied by the World Bank.

<sup>28</sup> Human Rights Committee of South Africa, "Human Rights Update for Week 30," (Johannesburg, July 1995).

Among the effects — or possibly causes — of the political conflict has been a reinforcement of a violent and “macho” definition of manhood in the affected communities. One of the consequences of the implementation of the apartheid system was a speeding up of the erosion, begun under colonial rule, of the traditional systems of patriarchy that operated in the pre-colonial societies of South Africa. But while political power and responsibility was taken away, African men retained their dominant role in the family, as breadwinner and head of a household in which women and children deferred to the husband and father. In the 1970s and 1980s, however, rapidly increasing male unemployment prevented many youth from setting up households, both because few women would be prepared to marry a man who could not support them, and because it would be difficult to raise the money to pay *lobola*, or brideprice. At the same time, rapid urbanization, as apartheid controls broke down, and the increased politicization of young people brought rising expectations and an intensified challenge to the existing order of racial domination.<sup>29</sup>

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<sup>29</sup> See Catherine Campbell, “Learning to Kill? Masculinity, the Family and Violence in Natal,” *Journal of Southern African Studies*, Vol.18, No.3, September 1992. The observations of the Campbell article have been confirmed by conversations of Human Rights Watch representatives in conversations with activists especially in the KwaZulu-Natal region.

While the political uprising of the mid-1980s was based on a number of interlinked causes, the background to the mobilization of "youth" in those protests included the need to reassert masculinity in face of a system that disempowered black men. Violence in support of a political cause offered these young militants known as "comrades" an opportunity to define themselves in an overtly macho manner, when other routes — as breadwinner and head of a household — were denied. Violence as a reaffirmation of manhood has been emphasized particularly within Inkatha ideology — Chief Buthelezi, for example, described the ANC's demand for the banning of the public display of "traditional weapons" such as assegais (spears) as equivalent to "cultural castration."<sup>30</sup> But male ANC youth have also defined themselves as explicitly masculine warriors as evidenced by this quote:

Women are ashamed to hit someone or to kill them.... Girls don't feel ashamed to be attacked by Inkatha. And there are no girls doing the attacking, only men. And we go out as men to meet these men. We are men. How can we tolerate being attacked by men? Boys have got the desire not to be shamed in this way.<sup>31</sup>

While a link between a rise in political violence and a rise in violence against women more generally has not been demonstrated, there is at least circumstantial evidence that those areas worst affected by the uprising against the state and by intra-community political conflict are also those areas where reported rapes are highest.

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<sup>30</sup> "The Record of Understanding Signed by Mr. F.W. de Klerk and Dr. Nelson Mandela: An Inkatha Freedom Party Assessment," address by Chief Buthelezi in Mmabatho, Bophuthatswana, September 29, 1992.

<sup>31</sup> Quoted in Campbell, "Learning to Kill?"

In some rural areas of South Africa, violence against women also includes the phenomenon of witchcraft killings, which are most often directed against women, although men are also on occasion attacked after accusations that they have practiced black magic. At least ninety-seven women and forty-nine men were killed in Northern Province during the period April 1994 to February 1995, according to police statistics quoted in an interim report published by a commission of inquiry appointed by the new provincial government to investigate witchcraft and ritual killings in the province.<sup>32</sup> All kinds of misfortune, including matters as varied as financial problems, illness, drought or lightening strikes, are blamed on witchcraft, and traditional healers or "witch doctors" may then be paid to search out the individuals responsible. A number of villages have even been created under police protection to house people accused of witchcraft who have fled their homes. While convictions of the perpetrators of these killings have been secured in some cases, in many cases the reluctance of witnesses to come forward prejudices any investigation.

### **Violence Against Women by the Police**

This report does not focus on violence committed against women by state structures. Nevertheless, there is evidence that women are subject to abuse at the hands of the police in particular. During the emergency of the 1980s, many women were detained without trial for political activities, and some were tortured. Political detentions have ceased, and, as in most societies, women form a small minority of those who come into conflict with the criminal justice system: women form less than 3 percent of the prison population. Where they are criminal suspects, however, women may be subject to assault and torture as are men. In a report on police torture published by three South African nongovernmental organizations in April 1995, for example, several cases described torture of women who were criminal suspects: in one case, a woman accepted a R.50,000 (U.S.\$14,285) out of court settlement from police in connection with allegations that she had been stripped naked and tortured, including by the use of electrodes placed in her vagina, during the 1992 investigation into a payroll robbery.<sup>33</sup> In July 1995, two women served

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<sup>32</sup> *Interim Report of the Ralushai Commission of Inquiry into Witchcraft Violence and Ritual Murder in the Northern Province* submitted to Advocate Seth Nthai, Member of the Executive Council for Safety and Security, Northern Province, July 1995, p.128.

<sup>33</sup> Centre for Victims of Violence and Torture and Independent Board of Inquiry, *Breaking with the Past?* (Johannesburg: Network of Independent Monitors, Trauma , April

legal papers on the Department of Safety and Security for injuries sustained when they were arrested in the previous year during a strike. One of the women said she had been assaulted, forced to strip naked and do drill exercises, causing unhealed scars from a recent operation to open and bleed.<sup>34</sup>

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1995), p.84.

<sup>34</sup> Khangale Makhado, "Two women sue govt. for R.50 000," *The Sowetan*, July 24, 1995.

Even where they are not directly in conflict with the police, women may be the targets of police violence — often when the police are attempting to locate a relative or partner. The report on police torture cited in the previous paragraph published details of a case in which a number of plainclothes detectives arrived at the house of a woman who had just returned from visiting her husband in the hospital, conducted a search, and demanded to know where "George" was. When she denied knowledge of anyone by that name, she was taken with the detectives in the car, they assaulted her. She was taken to an open field, where her skirt and shoes were removed and something was attached to her feet which caused searing pain. Eventually, she gave her stepfather's address, to stop the torture. After returning to the car, she was threatened with "losing" her two year old child if George was not at the address she had given: at one point, the child, who was with her at the time, was held out of the window.<sup>35</sup>

Similarly, in a survey carried out by the Women's National Coalition, women in the former homeland of Bophuthatswana reported that women arrested by the police had been sexually abused or raped. Rapes in police cells are occasionally

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<sup>35</sup> Centre for Victims of Violence and Torture and Independent Board of Inquiry, *Breaking with the Past?* p.123 and 124. The police subsequently went to the clinic where her husband was being treated, removed him and took him to the police station, with two other "suspects," where the woman later heard screams. Seven members of the Vanderbijlpark Murder and Robbery Unit were charged with two counts of attempted murder, two counts of kidnaping and one count of assault with intent to cause grievous bodily harm. All of the accused remained on duty while the case was proceeding.

reported in the press. When a police officer has been charged with the offence, workers in advice offices confirm that it is likely that in most cases a victim would not report such an assault, for fear of retaliation or lack of confidence in a constructive response, and thus that the problem is far more widespread than appears from the number of reports.<sup>36</sup> No systematic studies have been carried out of the treatment of women in police custody, but the evidence suggests that an effort to halt police abuse of suspects — still common today, despite the political transition — should include a particular focus on abuse of women who are either suspects or potential informants.

#### **Lack of State Resources to Combat Crime and Violence**

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<sup>36</sup> For example, a police constable was charged with rape in August 1995, after allegedly raping a woman while she was held in the cells at the Carletonville police station and offering her R.100 (U.S.\$33) to keep quiet. "Alleged rape in cell: Const is charged," *The Citizen*, August 10, 1995. In May 1995, a police sergeant was sentenced to five years prison for raping a fifteen year old girl inside the Mabopane police station in August 1994, after she had come to the police to report another rape. "5 Years for Cop who Raped a Rape Victim," *The Sowetan*, June 1, 1995; interview, advice office worker, KaNgwane, September 8, 1995.

One of the legacies of apartheid is that, despite its high level of violence, South Africa is greatly underpoliced. Historically, the police force was required only to protect the interests of the white population and to suppress political activism among the black majority. Accordingly, little attention was paid to the detection and prevention of crime within the black communities. The new government has inherited a police force of approximately 146,000, including uniformed and nonuniformed members and administrative staff, which is responsible for a population of over forty-four million. The former attorney-general for the Witwatersrand, Klaus von Lieres, stated in March 1995 that the nationwide ratio of police is approximately 2.5 per thousand population, against an international norm of three to five per thousand.<sup>37</sup> Moreover, personnel and resources are still disproportionately devoted to "white" areas, leaving the most troubled regions even more severely neglected. According to information supplied to Human Rights Watch by the Port Shepstone police station — responsible for maintaining the peace and investigating crime in one of the areas worst affected by political violence — there is a local ratio of approximately 0.75 police to every 1,000 population.

Under the new government, South Africans are also for the first time demanding that the police respond to their concerns by cracking down hard on violent crime. However, the lack of personnel alone means that response times to emergency calls can be unacceptably slow. Individual detectives are required to handle a case load of fifty or a hundred dockets at any one time. Training has in the past not emphasized sound investigative techniques, contributing to a reliance on confessions — often obtained under dubious circumstances — to obtain convictions. Supervision of crime investigation by superiors is often virtually nonexistent, and inexperienced officers are therefore left to handle serious cases on their own. Poor pay and working conditions at junior levels means that well-qualified officers are hard to recruit.

The transition to a new era has been marked by the symbolic renaming of the South African Police Force as the South African Police Service. New police commissioners supposedly untainted by association with the security branch of the old force have been appointed nationally and in each of the nine new provinces. A new ANC minister for safety and security, Sydney Mufamadi, has been appointed to replace the old minister of law and order, and has expressed his commitment to the

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<sup>37</sup> "Shock murder figures for SA," *City Press*, March 5, 1995.



renewal of the force. Nevertheless, the fact remains that the police leadership is working with personnel recruited and trained during the era when the police were the front line of repression in the apartheid state. White officers in many areas remain deeply suspicious of the new ANC-led government, and some black officers have also absorbed the norms of the former regime.

Similar obstacles to change are found in all departments of state responsible for the criminal and civil justice systems and the welfare of victims of crime and violence. It cannot be expected that a transformation in the attitude and capabilities of the police, courts, correctional and welfare systems will occur overnight. This report aims to highlight the current deficiencies, while being conscious of the efforts that have been made already, and to suggest further steps to be taken in the future.

### THE POSITION OF WOMEN UNDER SOUTH AFRICAN LAW

Two legal systems are in force in South Africa: civil law, which is largely based on Roman-Dutch law as modified by statute, and customary law. Since the establishment of the colonial state, white, Indian and coloured women have been subject to civil law, while African women have been subject to both civil and customary law, depending on the circumstances. Historically, all women of whatever race have been disadvantaged under South African law; however, as in all other areas of life, Africans were especially disadvantaged.

Moreover, while the legal status of women has significantly improved over the last decade — most recently, the taxation of married women has been put on a equal footing and housing subsidies and other benefits for state employees have largely been equalized — state and traditional authorities continue to discriminate against black women on grounds of both race and sex. In particular, while married women of all races were once regarded as minors without legal capacity in their own right, most married white, coloured and Indian women, while still subject to some inequalities, now have full majority status; African women married under customary law, on the other hand, are still subject to serious legal disadvantages, and in the former homelands those married under civil or customary law may not have benefited from the reforms of the last decade. Since the assumption in South Africa, as in other countries, has been that women would in the great majority of cases enter into a marriage, special legal inequities do not apply to unmarried women: it is therefore the law relating to marriage and the family that affects women's status most seriously, and it is under this law that women have been subject to some of the most blatant discrimination.

## **Marriage and the Family in South African Law<sup>38</sup>**

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<sup>38</sup> This section relies heavily on Cathi Albertyn, "The Legal Status of Women: Marriage, Family and Inheritance," unpublished paper, 1992, and on June Sinclair "Family Rights," in D. van Wyk et al, *Rights and Constitutionalism: The New South African Legal Order* (Cape Town: Juta and Co., 1994).

A confusing set of overlapping regimes applies to marriage in South Africa, depending on the date a woman was married and the legal system (customary or civil) under which she was married. Furthermore, women's status in marriage is complicated by the fact that not all marriages are given equal recognition: a marriage must be solemnized in accordance with the provisions of the Marriage Act (Act No.25 of 1961) and not "potentially polygamous" in order to have full legal status.<sup>39</sup> This means that marriages according to Muslim or Hindu rites or African customary law may not be fully recognized.<sup>40</sup>

In Roman-Dutch law, which governs South Africa's civil marriage system, a married woman previously had inferior legal status to her husband, and was subject to his guardianship over her person and property. Since 1984, substantial legislative inroads have been made to this position. Prior to November 1, 1984, married women, with the exception of African women, were automatically married "in community of property" and were subject to the "marital power" of their husbands (unless they had an "ante-nuptial contract" that specified otherwise): that

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<sup>39</sup> Marriages must be solemnized by a duly appointed "marriage officer." In most cases, a Christian minister of religion is a marriage officer; however, many ministers of African independent churches have not been appointed marriage officers in accordance with the act, and African marriages in such churches are therefore considered to be under customary law.

<sup>40</sup> Although women in African customary unions have been given some protection by other statutes and Hindu marriages may be recognized if the priest is a marriage officer "under the Marriage Act."

is, the property of the man and women were merged into one, and the husband was the sole administrator of the joint estate. A woman in such a marriage was treated as a minor, unable to enter into contracts that bound the joint household without her husband's consent while her husband, on the other hand, could enter into contracts, including contracts alienating the marital home or other property, without her consent. The law was subsequently changed and marriages undertaken after November 1, 1984—under the Matrimonial Property Act (Act No.88 of 1984)—are no longer subject to male marital power. This act makes both spouses joint administrators of the joint estate and introduces the "accrual system," by which both parties share equally in the profits of the marriage in the event of dissolution. Further legislation in December 1993 finally abolished the marital power in all civil marriages of whatever date.<sup>41</sup>

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<sup>41</sup> General Law Fourth Amendment Act (Act No.132 of 1993). The legislation also repealed a number of other discriminatory laws relating, *inter alia*, to citizenship, attendance at trials, dismissal of female employees if they marry, the position of the husband as "head of the household," and generally to legal capacity. More controversially, the provision prohibiting women from performing dangerous work or night shifts at mines was also repealed.

African women may marry according to civil rites or customary law. Civil law marriages by African women before December 2, 1988 were governed by the Black Administration Act (Act No.38 of 1927), and were generally "out of community of property" while retaining the "marital power."<sup>42</sup> The Marriage and Matrimonial Property Law Amendment Act (Act No.3 of 1988) altered this position in respect of civil marriages between Africans contracted after December 2, 1988, to include community of property and exclude the marital power. The accrual system applied in these civil marriages only with the standard ante-nuptial contract.

However, the equalization of African women within civil law marriages does not necessarily apply within the former homelands, whether nominally independent or merely "self-governing." Each homeland inherited the statutory provisions in force at the date when they were nominally split from South Africa, which therefore varied in each case. Many then passed separate laws regulating marriage and the family, further confusing the position. The KwaZulu Code of Zulu Law, for example, states that a married woman shall be a major, but subject to the marital power of her husband.<sup>43</sup> According to section 229 of the interim constitution, all laws in force in the homelands at the date of coming into force of the interim constitution remain in force until repealed or amended, and many are therefore in conflict with national laws which were amended after the date of creation of the homeland.

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<sup>42</sup> This legal position was reflected in customary practices, according to which a man has the right to determine the people his wife associates with, her clothes, whether she may seek employment, even whether she may visit a doctor. The legal position could be altered by an ante-nuptial contract to exclude the marital power, or by a declaration to a magistrate that the marriage was in community of property, but these provisions were rarely used.

<sup>43</sup> KwaZulu Legislative Assembly Act on the Code of Zulu Law (Act No.16 of 1985), section 27(3).

Marriages according to African law and custom are not fully recognized by the state, since they are "potentially polygamous" and therefore are regarded as "against public policy." However, partial recognition is given for some purposes, giving African women in customary unions a limited degree of protection.<sup>44</sup> But in addition to the formalities required by tradition — notably the payment of lobola, or brideprice — the Black Administration Act set out requirements, including registration, as proof of existence of a customary marriage. Often, this registration procedure is not followed, making it very difficult for African women to claim even the limited benefits accorded to them by the state.<sup>45</sup> Prior to 1988, a customary marriage was automatically dissolved by a subsequent civil marriage to another person (however, a man was required to declare, subject to criminal penalties, that he was not previously married according to customary law, and if this declaration was false the material rights of his customary wife were protected). Amendments to the law in 1988 reversed this position, so that a civil marriage by a person already married under customary law is now void.

Marriage according to Muslim law is also "potentially polygamous" and therefore not recognized under the Marriage Act (although there are some limited statutory protections similar to those applicable to customary marriages). On the other hand, Muslim personal law does not subject a wife to any equivalent to the "marital power." Hindu marriages are recognized only if solemnized by a priest who is an officially appointed "marriage officer." As a consequence, women in Muslim and Hindu marriages generally have no claim to support or maintenance, their children are considered out-of-wedlock and therefore without rights to inheritance in the absence of a will.<sup>46</sup> In addition, cohabitation is not recognized by

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<sup>44</sup> For example, a woman in a customary union has rights in respect of her husband's pension, or to compensation if he is killed at work, and her customary inheritance and property rights are protected to some extent.

<sup>45</sup> *Lobola* (the Zulu name for brideprice, also known as *lobolo* or *bohadi*, in other South African languages) is an important part of most marriages in (uncodified) customary law and not uncommonly accompanies civil marriages. It involves the payment of cattle (or, nowadays, a cash substitute) by the prospective husband to the father of the bride, traditionally in consideration of the transfer of the woman and her reproductive capacity to the family of the husband. One of the major purposes of lobola was to provide security for the woman should the marriage fail through no fault of hers.

<sup>46</sup> Section 14(3) of the interim constitution provides that: "Nothing in this Chapter shall preclude legislation recognizing — (a) a system of personal and family law adhered to by persons professing a particular religion; and (b) the validity of marriages concluded under a

the law as giving any claims on the other partner, however long the cohabitation has lasted, except in very limited circumstances.<sup>47</sup>

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system of religious law subject to specified procedures." Although the implications are not clear, this section raises the possibility that a legislated system of Muslim and Hindu personal law that is discriminatory to women, might be immune to constitutional challenge. Customary law is not given this protection. However, the final constitution may of course change this provision.

<sup>47</sup> In the event of death at work, the Workman's Compensation Act (Act No.30 of 1941) provides that a dependent cohabiter has a claim, provided that no formal marriage remains in force.



Until December 1993, the husband within a civil marriage was recognized by law as "head of the household." Until March 1994, when the Guardianship Act (Act No. 192 of 1993) came into effect, he was also guardian of any children. Since that date, the parents of children in a civil marriage have joint guardianship and custody of children. If the parties are not married, the woman has sole guardianship over children. Under customary law, the husband (or a male relative, if he dies) has extensive rights over the family, including guardianship and control of the children, if lobola has been paid. Most notably of all, an African woman in a customary union who is living with her husband is deemed to be a minor and her husband deemed her guardian.<sup>48</sup>

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<sup>48</sup> Section 11(3)(b) of the Black Administration Act (No. 38 of 1927). This does not apply, however, to African women living in KwaZulu-Natal, all of whom were given majority status during the 1980s: the Black Administration Act was amended in 1985 to provide that the majority status of African women resident in Natal was not affected by marriage under customary law; while the Natal Code of Zulu Law was amended in 1987 and the KwaZulu Act on the Code of Zulu Law was amended in 1982 to provide that all African persons attained majority at twenty-one, irrespective of marital status. According to the Age of Majority Act (Act No. 57 of 1972), a person generally attains majority under South African law at the age of twenty-one years. This rule applies equally to persons of all races, except in the case of customary unions, as described above, or where a right or obligation of an African person depends upon a "Black law," when that law takes precedence.

Marriage in South Africa suffers a high rate of breakdown, irrespective of the divisions of race and class.<sup>49</sup> Divorce for all civil marriages is governed by the Divorce Act (No.70 of 1979).<sup>50</sup> In general, the parties must show the "irretrievable breakdown" of the marriage for divorce to be granted, but a "no fault" system applies, and there is no need to show adultery or similar facts for breakdown to be demonstrated. Most divorces are therefore consensual or undefended. Entitlement to property upon divorce depends on the type of marriage entered into: (1) marriage in community of property entitles each spouse to half the estate after payment of all debts; (2) marriage under the accrual system entitles each spouse to half the profits (or losses) of the marriage; and (3) marriage out of community of property means that each spouse retains his or her estate. In this last case, women may be entitled to no property of any kind on dissolution of the marriage. In particular, those adversely affected by the law are white, coloured and Indian women married before 1984 without an ante-nuptial contract or after 1984 with an ante-nuptial contract

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<sup>49</sup> According to research by the Human Sciences Research Council published in April 1994, South Africa's divorce rate is amongst the three highest in the world: South African Institute of Race Relations, *Race Relations Survey 1994/95*, p.300. Research conducted by the Socio-Legal Unit of the University of Cape Town suggests that in Cape Town probably over 50 percent of African marriages, contracted by civil or customary law, end in de facto divorce: Sandra Burman "Capitalising on African Strengths: Women, Welfare and the Law," *South African Journal on Human Rights* (1991), vol.7, p.215.

<sup>50</sup> In 1929, a "black divorce court" was established (by the Black Administration Amendment Act No.9 of 1929), which had concurrent jurisdiction with the Supreme Court for hearing divorces of African couples who chose that route. Parties may appear without legal representation.

which excludes accrual; and all African women married before 1988 (unless a declaration was made to the magistrate that the marriage should be in community of property) or married with an ante-nuptial contract excluding the accrual system.

The arrangements for civil divorce therefore center on the agreement of a "consent paper" in relation to property of the marriage, which will be made an order of court. The Divorce Act makes provision for the court to divide assets only in the case of marriages contracted with no provision for sharing property before 1984 (for whites) or 1988 (for Africans): in all other cases, the ante-nuptial contract or other regime applies regardless of the financial circumstances of the parties to the marriage and the court has no power to vary the settlement. Therefore, the order of court will usually relate only to maintenance of the ex-wife and the custody and maintenance of any children. Maintenance for the ex-wife can only be claimed if included in the original order and may not be claimed later, for example if financial circumstances change.

Although maintenance payments are enforceable through the maintenance courts, a special division of the magistrates' courts, some studies estimate that as many as 50 percent of spousal maintenance orders may not be paid, and treatment of women in these courts is often unsympathetic.<sup>51</sup> Only if there are children which are placed in the custody of the wife is she likely to gain any rights over the matrimonial home. The test for custody of the children is the interests of the child, and in practice custody is usually awarded to the mother. While contests in relation to custody are unusual in the case of children of white, coloured or Indian couples, traditional views of the rights over children granted by the payment of lobola make custody disputes much more common in civil marriages between Africans. Customary marriages may in general be dissolved without going to court, either by mutual consent or by rejection of either party and repayment of lobola if the dissolution is the fault of the wife.<sup>52</sup> Only younger children are likely to remain with the mother, since if lobola has been paid children are regarded as belonging to the man.

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<sup>51</sup> Ina Snyman, "The Victimization of Women in the Law Enforcement System," in W.J.Schurink et al., *Victimization: Nature and Trends* (Pretoria: Human Sciences Research Council, 1992). In 1991, the Maintenance Amendment Act (Act No.2 of 1991) introduced new measures against defaulters on maintenance payments.

<sup>52</sup> "Mild chastisement" and adultery are not grounds for a woman to divorce her husband under customary law. Fault on the part of the husband includes a public rejection of his wife for no just reason. A "just reason" includes a wife's neglect of her duties at home or neglect of her children, denying her husband sexual intercourse and continuing infidelity.

Although there are no systematic studies indicating the financial status of women after divorce, the indications are that the great majority of women are significantly poorer after the breakdown of a marriage. Property division on divorce is seldom equal: lawyers report the general rule as one third to the woman, two thirds to the man. Women in general are at a severe disadvantage in the labor market, leaving them still highly dependent on men. In cases of civil divorce, they are likely to have custody of any children, and in almost all cases they will have custody of young children who are most dependent on full-time care. Children born out-of-wedlock are in almost all cases in the custody of their mother, and the problem of obtaining some form of financial assistance in keeping the child is therefore a central concern.

The vast majority of all maintenance applications are therefore made for child support. Maintenance orders for child support by the father are made in the maintenance courts and are awarded for one or more minor children irrespective of whether they are born of a civil or customary law marriage or without any marriage. Studies indicate that as many as 70 percent of African children may be born outside of marriage, and the majority of maintenance applications therefore relate to children born out of wedlock. However, the maintenance payments awarded are usually low — even below the official subsistence level and certainly less than the actual cost of keeping a child — and default rates may be up to 85 percent of those cases that actually reach the court. High rates of unemployment mean that many men may be unable to pay sufficient maintenance even if they are willing. Lengthy delays in the application process, high transport costs for trips to court and knowledge of the likely result mean that many women never bother to claim maintenance from the father of their child. In most cases, the mother will therefore be left to fend on her own with such assistance as she can get from her extended family.<sup>53</sup>

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<sup>53</sup> In the case of African children born out of wedlock, maintenance may not be claimed through the maintenance courts if the man has paid the customary "seduction damages" and a

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payment to the girl's guardian for maintenance of the child (*isondlo* in Xhosa). Under the official, court-recognized, version of Xhosa customary law the customary amount for seduction damages is five cattle and for *isondlo* one cow, although money is usually substituted for cattle. However, differing interpretations of customary law among the courts and the two families involved may well arise. Sandra Burman and Shirley Berger, "When Family Support Fails: The Problems of Maintenance Payments in Apartheid South Africa," *South African Journal on Human Rights* (1988), vol.4, p.194 (Part I) and p.334 (Part II).

State maintenance grants are available for up to four children born of a civil or customary law marriage, and for one child born out-of-wedlock only. Extensive documentation is necessary for the application to be successful, delays are long, and the woman must have tried and failed to claim maintenance from the father, or have some reason why that is not possible (for example, that he is dead, incapacitated or in prison). The grants are small — again, substantially less than the cost of supporting a child — and in addition are awarded in a wholly racially discriminatory fashion: a 1987 study of national figures showed that 37 percent of eligible white children received such grants; 36 percent of Asian children; 24 percent of coloured children; and only 0.3 percent of African children. Although racial classification of children is a thing of the past, the figures remain similarly skewed today.<sup>54</sup>

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<sup>54</sup> Sandra Burman and Amanda Barratt, *Welfare Law and Bureaucracy in a Changing South Africa: A Case Study of Maintenance Grants for the Illegitimate* (Johannesburg: Centre for Applied Legal Studies, Working Paper 19, 1993).

In case of the death of her husband, a woman married under civil law has, at minimum, a claim for maintenance and support against the estate, even if a will has left all the property elsewhere.<sup>55</sup> Otherwise, inheritance depends on the marital regime: a woman married in community of property is entitled to half the estate, the other half devolving according to the will or the rules of intestate succession; similarly, a woman married under the accrual system will be entitled to half the profits of the marriage. If there is no will, the surviving spouse inherits the whole estate if there are no children; or the estate is split, if there are children. Women married under customary law, or African women married under civil law but out of community of property (most marriages before 1988), are subject to the customary law rules of inheritance and have in general no right of inheritance from their husbands.<sup>56</sup> The male heir becomes the guardian of both women and children, and in some areas may also inherit the woman as wife. The woman has a claim over the male heir for maintenance and support, but is largely dependent upon his good will for her livelihood. Since many customary law marriages are not formally registered, even those rights that do apply to women under customary law may not be enforceable through the courts.

#### **A Note on "Customary Law" in South Africa**

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<sup>55</sup> Since the Maintenance of Surviving Spouses Act (Act No.27 of 1990), which overturned a case which had decided the opposite.

<sup>56</sup> Black Administration Act, section 23; The Intestate Succession Act (Act No.81 of 1987), applicable to civil marriages, may apply to customary marriages in certain circumstances.

"Customary law" in most African countries is a peculiar hybrid, based partly on the practices of the pre-colonial African societies as recorded by the colonizers, and partly on the encoding, amendment and adaptation of those recorded practices as legislated by the colonizers — either in an attempt to eradicate "primitive" or "unchristian" practices, or in order to facilitate colonial needs such as the labor supply. It has been described as "neither customary nor law."<sup>57</sup> In South Africa, as in other African countries, the official recording of "customary law" took place largely in the context of the relationship between the (male) colonial authorities and (male) African ruling elites and perhaps had the most significant impact in the sphere of the family. Variable traditional practices later became rigid rules of "customary law" enforced by white administrators and judicial officers in the colonial and later apartheid legal system.<sup>58</sup> In some cases, customary law reflected closely precolonial (and even contemporary) African views on the nature of the family and marriage. In other cases, the white courts' view of African practices became accepted as the correct interpretation of the position of women in

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<sup>57</sup> Martin Chanock, *Law Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge: Cambridge University Press, 1985).

<sup>58</sup> A well-known study on the legal position of African women in South Africa under the colonial and apartheid systems, published in 1968, concluded that the Natal Code of Zulu Law, promulgated in 1891, supposedly as a codification of the existing tribal system of law, "stereotypes a concept of feminine inferiority unknown to the traditional society and burdens women in Natal with disabilities that they do not suffer in the other provinces." H.J. Simons, *African Women — Their Legal Status in South Africa* (London: Hurst and Co., 1968).



African society. For the most part, customary law was not subsequently adapted to address the rapid changes in African life brought about by the migrant labor system and increasing urbanization.

Furthermore, the system of customary law as applied in the courts has in many areas failed to challenge certain discriminatory aspects of attitudes towards women. The importance of women as childbearers leads to a complex of rules relating to infertility, including the duty of a younger sister to take the place of a wife who is unable to bear children (the sororate), and the duty of a wife to bear children by a relative of her husband, should he die while she is still fertile (the levirate). Similarly, the institution of lobola, or brideprice, can reinforce the view of women as the property of their husbands: in traditional practice, in which polygamy was the norm, the number of wives a man had — and had paid cattle for — was an indication of his wealth.<sup>59</sup>

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<sup>59</sup> See generally, Thandabantu Nhlapo, "Women's Rights and the Family in Traditional and Customary Law," in Susan Bazilli (ed.), *Putting Women on the Agenda* (Johannesburg: Ravan Press, 1991); and the essays in T.W. Bennett et al (eds.), *African Customary Law* (Cape Town: Juta and Co., 1991).

The continued existence of dual civil and customary marriage systems prejudices a substantial number of African women, especially rural women who are most likely to be married according to customary law. The overlap and occasional conflict of the two systems means that equal protection of the law is not provided to women, especially in relation to inheritance and property — and women may even be put in conflict with each other. For example, many African men, especially migrant laborers, have wives under both systems: one according to civil law, in the urban area where they work and live for most of the year, and the other according to customary law in the rural areas, usually the "homeland" of which they were previously designated residents or citizens.<sup>60</sup> While the legal position for women married under customary law in these circumstances has improved in some respects since 1988 because a subsequent civil marriage is void, they remain in practice at a significant disadvantage compared to women married under civil law; especially if, as is often the case, their customary marriages have not been formally registered.

### **The Effect of the New Constitution on Women's Rights**

On April 26, 1994, the first day of the election that installed the government of national unity, a new "interim" constitution came into effect which for the first time gives South Africans the protection of a justiciable bill of rights. Chapter 3 of the interim constitution sets out a list of fundamental rights. Section 8 provides that:

- (1) Every person shall have the right to equality before the law and to equal protection of the law;
- (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality

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<sup>60</sup> Under apartheid as originally conceived, all black South Africans would lose their South African citizenship and become instead citizens of theoretically independent states within South Africa's borders. However, although all substantial ethnic groups of African origin in South Africa were eventually assigned to a particular homeland, the system was never entirely realized. Many Africans continued to live — legally or illegally — in areas officially designated for whites only; moreover, only four of the homelands (Transkei, Bophuthatswana, Venda and Ciskei; "the TBVC states") ever became even nominally independent. The remaining six (KwaZulu, KaNgwane, Lebowa, Gazankulu, QwaQwa and KwaNdebele) were known as "self-governing territories" and did not have "sovereign" status within South African law, although they did have a large measure of legislative and executive autonomy.

of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

With reference to the potential conflict between customary law and the new constitution, section 181 of the constitution provides that: "Indigenous law shall be subject to regulation by law." Moreover, according to "constitutional principles" agreed between the parties to the pre-election negotiations, the final constitution adopted by the constitutional assembly must include provisions to the effect that, "[i]ndigenous law, like common law, shall be recognised and applied by the courts, *subject to the fundamental rights contained in the Constitution* and to legislation dealing specifically therewith."<sup>61</sup>

As a result of the new legal framework that has been established by the constitution, the discriminatory legal provisions of the current system of law applicable to women, especially African women, are likely to be subject to challenge in the courts.

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<sup>61</sup> Constitution of the Republic of South Africa Act (Act No.200 of 1993). Schedule 4, Principle XIII, as amended; emphasis added.

#### **THE GOVERNMENT'S OBLIGATIONS UNDER INTERNATIONAL LAW**

International law requires states to show due diligence in preventing and responding to human rights violations. With respect to violations of bodily integrity in particular, governments have a duty to prevent, investigate and prosecute such abuse, including cases in which the perpetrator is a private citizen. Where states do not prohibit such abuse or routinely fail to respond to evidence of murder, rape or assault of women by their intimate partners, they send the message that such attacks are justified or, at a minimum, will not be punished. In doing so, states fail to take the minimum steps necessary to protect their female citizens' rights to physical integrity and, in extreme cases, to life. To the extent that this failure reflects

discrimination on the basis of gender and/or race, it also constitutes a violation of the state's international obligation to guarantee equal protection of the law.<sup>62</sup>

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<sup>62</sup> For additional discussions of international obligations with respect to violence against women by private actors, see also Dorothy Q. Thomas and Michele Beasley, "Domestic Violence as a Human Rights Issue," *Human Rights Quarterly* 15, no. 1 (February 1993). pp. 36-62; Celina Romany, "State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law," and Rhonda Copelon, "Intimate Terror: Understanding Domestic Violence as Torture," in Rebecca Cook (ed.), *Human Rights of Women: National and International Perspectives*, (University of Pennsylvania Press, Philadelphia: 1994); Americas Watch (now Human Rights Watch/Americas) and Women's Rights Project, *Criminal Injustice: Violence Against Women in Brazil* (New York: Human Rights Watch, 1991); and Human Rights Watch Women's Rights Project, "Neither Jobs Nor Justice: State Discrimination Against Women in Russia," *A Human Rights Watch Short Report*, vol. 7, no.5 (March 1995).

The Declaration on the Elimination of Violence Against Women, adopted by the U.N. General Assembly in 1994,<sup>63</sup> calls on states to "pursue by all appropriate means and without delay a policy of eliminating violence against women" and, amongst other things, to "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons."<sup>64</sup>

Women victims of violence have an equal right to the enforcement of the law as any other victim of violence, and a pattern of non-enforcement amounts to unequal and discriminatory treatment. Article 26 of the International Covenant on Civil and Political Rights (ICCPR), which South Africa has signed but not yet ratified, guarantees that:

All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on

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<sup>63</sup> Declaration on the Elimination of Violence Against Women, GAOR, 48th Sess., U.N. Document A/Res/48/104/1994, February 23, 1994. A U.N. declaration is not a treaty, which states may ratify and be bound by, but is a non-binding resolution which sets out a common international standard that states should follow. See Appendix for the full text of the Declaration on the Elimination of Violence Against Women.

<sup>64</sup> The Declaration defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life." This definition was stated "to encompass, but not be limited to":

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The U.N. Human Rights Committee, which monitors the compliance of states parties with the ICCPR, has further held that the state not only has a duty to protect its citizens from such violations, but also to investigate violations when they occur and to bring the perpetrators to justice.<sup>65</sup>

The provisions of the ICCPR were strengthened in 1979 by the adoption of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). CEDAW prohibits discrimination against women, defined as

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<sup>65</sup> Report of the Human Rights Committee, 37 U.N. GAOR Supp. (no. 40), Annex V, general comment 7(16), para.1 (1982) U.N. Document A/37/40(1982).

any distinction, exclusion or restriction made on the basis of sex which has the effect of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>66</sup>

States which are parties to the convention undertake "to pursue by all appropriate means and without delay a policy of eliminating discrimination against women," which includes the duty "to refrain from engaging in any act of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;" and "to take all appropriate measures, including legislation, to modify or abolish existing laws, customs or practices which constitute discrimination against women."<sup>67</sup>

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<sup>66</sup> Convention on the Elimination of all forms of Discrimination Against Women, adopted and opened for signature, ratification and accession by U.N. General Assembly Resolution 34/180 of December 18, 1979; entry into force September 3, 1981; article 1.

<sup>67</sup> Ibid., article 2.



In 1992, the Committee on the Elimination of All Forms of Discrimination Against Women, established under CEDAW, adopted a general recommendation and comments which set out how CEDAW covers violence against women and what governments should do to stop such violence.<sup>68</sup> First, the committee stated that the general prohibition of gender discrimination "includes gender-based violence — that is, violence which is directed against a woman because she is a woman or which affects women disproportionately. It includes acts which inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion or other deprivations of liberty."<sup>69</sup> Secondly, the committee confirmed that violence against women constitutes a violation of human rights whether the perpetrators are state officials or private individuals, noting that: "States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and to provide compensation."<sup>70</sup>

In order to fulfil their recommendations under CEDAW, the committee found that states must take all measures necessary to provide effective protection to women, including:

- (a) Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including *inter alia* violence and

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<sup>68</sup> In January 1993, State President F.W. de Klerk signed CEDAW, together with other U.N. conventions relating to women's rights. In 1995, a parliamentary committee approved its ratification in principle. The other treaties signed were the Convention on the Political Rights of Women (opened for signature and ratification by General Assembly Resolution 640 (VII) of 20 December 1952); the Convention on the Nationality of Married Women (opened for signature and ratification by General Assembly Resolution 1040 (XI) of 29 January 1957); the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (opened for signature and ratification by General Assembly Resolution 1763A (XVII) of 7 November 1962); and the Convention on the Rights of the Child (opened for signature and ratification by General Assembly Resolution 44/25 of 20 November 1989). The Convention on the Rights of the Child was ratified by South Africa on June 16, 1995, a new national holiday designated Youth Day in commemoration of the 1976 Soweto uprising.

<sup>69</sup> Committee on the Elimination of All Forms of Violence Against Women, "Violence Against Women," General Recommendation No.19 (eleventh session, 1992), U.N. Document CEDAW/C/1992/L.1/Add.15.

<sup>70</sup> Ibid.

abuse in the family, sexual assault and sexual harassment in the workplace;

(b) Preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women;

(c) Protective measures, including refuges, counseling, rehabilitation and support services for women who are the victims of violence or who are at risk of violence.<sup>71</sup>

In 1994, the United Nations Commission on Human Rights appointed the first Special Rapporteur on Violence against Women. The special rapporteur is tasked to carry out work on violence against women, its causes and consequences, and to recommend ways of eliminating such violence. The special rapporteur's first report set forth the international legal framework condemning domestic violence and detailed actions that were currently being pursued by governments to reduce the occurrence of domestic assault. With regard to state responsibility, the rapporteur wrote:

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<sup>71</sup> Ibid.

In the context of norms recently established by the international community, a State that does not act against crimes of violence against women is as guilty as the perpetrators. States are under a positive duty to prevent, investigate and punish crimes associated with violence against women.<sup>72</sup>

The special rapporteur, moreover, asserted that countries should not use tradition or custom as an excuse for abdicating their responsibilities to prevent violence against women.<sup>73</sup>

The body of international human rights law and the evolving international consensus clearly acknowledge state responsibility for accountability of abuses by private actors. It now remains for the South African government to uphold its international obligations and to summon the political will to end impunity for perpetrators of domestic violence and rape.

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<sup>72</sup> Preliminary Report Submitted by the Special Rapporteur on Violence Against Women, its causes and consequences, U.N. Document E/CN.4/1995/42, November 22, 1994, p.18.

<sup>73</sup> Ibid, p.16.

## THE MAGNITUDE OF THE PROBLEM

There are no reliable statistics on the numbers of violent attacks on women in South Africa. The reported figures are already extraordinarily high, but they are certainly only a small percentage of the total. Incidents of domestic violence and abuse are likely to be most seriously under-reported, but even rape is reported in only a small minority of cases. Moreover, while the police do record the numbers of rape cases reported to them, no official statistics exist in the case of domestic violence. Even when women do complain to the police of assault at the hands of their partners, the authorities do not distinguish between these cases and complaints of assault generally.

Indifference and hostility on the part of the police and judicial authorities have made women reluctant to report violence against them, whether domestic violence or rape. The apartheid policies of the past have instilled a strong suspicion and distrust of the police and judicial system, particularly among black women. Although the new national police commissioner has pledged to transform the police force into a service that will fulfil the needs of the community, this commitment has yet to have any discernible effect on the manner in which women who report violence are treated by the police.

Social stigma and fear of reprisal further deters women affected by these crimes from coming forward. Raped and battered women are often ostracized by their families and communities if they report what has happened to them. Aware of the discriminatory manner in which the justice system will likely handle their claims, many women do not believe that reporting their cases is worth potential humiliation in their communities.

What is certain, however, is that South African women, living in one of the most violent countries in the world, are disproportionately likely to be victims of that violence.

### Domestic Violence

South African women of all races and income levels face abuse from their partners. However, because police statistics do not distinguish domestic violence cases from other assaults and no systematic nationwide surveys have been carried out to assess the extent of domestic violence, the problem is difficult to precisely quantify. South African organizations working with battered women have attempted to estimate the scope of such violence by extrapolating from their

caseload and surveys. They believe that a substantial number of women face domestic violence on a regular basis.

Rape Crisis estimated in 1992 that one in every three women was assaulted by her male partner.<sup>74</sup> The Women's Bureau estimates that approximately one in four women is abused by her partner.<sup>75</sup> The Advice Desk for Abused Women estimates that one in every six women is regularly assaulted by her partner, and that at least one in four women is forced to flee at some time because of a life threatening situation in her home.<sup>76</sup> The organizations People Opposing Women

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<sup>74</sup> Rape Crisis, 1992 as quoted in Desirée Hansson and Beatie Hofmeyr, *Women's Rights: Towards a Non-Sexist South Africa* (Johannesburg: Centre for Applied Legal Studies, Developing Justice Series No. 7, undated), p.20.

<sup>75</sup> "One in Four Women is Abused," *Citizen*, June 21, 1994.

<sup>76</sup> Advice Desk for Abused Women mission statement, (undated), p.4.

Abuse (POWA) and Coordinated Action for Battered Women also estimate that one in six women is abused by her partner.<sup>77</sup> Research carried out in Soweto in 1994 found that one in three women attending a clinic for any reason had been battered at some time by her husband or boyfriend.<sup>78</sup> A recent survey conducted by the government-funded Human Sciences Research Council found that 43 percent of 159 married women surveyed in the Cape Town metropolitan area had been subjected to marital rape or assault.<sup>79</sup> Thirty-eight percent of women responding to a questionnaire issued by the Women's National Coalition reported that they knew of a woman who had been battered.<sup>80</sup>

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<sup>77</sup> "Women Fight for Rights," *N.E. Tribune*, July 13, 1993.

<sup>78</sup> The research, carried out between January and April 1994 for the purposes of a masters thesis, compared fifty-nine women who had come to a clinic in the Mofolo section of Soweto for attention to injuries resulting from battery, with a control group of 149 women who had attended the clinic for any reason (including cases where the woman herself was not injured but was, for example, accompanying a child). Amongst the battered women, 40 percent had been battered for the first time; the remaining 60 percent were equally split between those who stated that they were regularly battered, and those who said it happened occasionally. Interview, Dr. Neil Martinson, Pretoria, September 12, 1995.

<sup>79</sup> "43% of Women Claim Marital Rape, Assault," *The Citizen*, August 18, 1994.

<sup>80</sup> Women's National Coalition *Interim Research Report: Campaign for Effective*

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*Equality*, (Johannesburg: WNC, 1994), p.101. The WNC was a coalition of women's groups that came together to formulate women's demands for the new South African constitution.

The results of two surveys in the Cape Town metropolitan area and adjacent rural areas carried out in 1990 and 1991/92 found that violence in the home — not necessarily between spouses or partners — represented one third of all interpersonal violence. In both surveys, while men were in general twice as likely as women to be injured in a violent assault outside the home, in the home men and women were affected almost equally. The most likely place for a woman to be assaulted is at home.<sup>81</sup> Another survey of all assault patients treated at the Cape Town Groote Schuur hospital during one week in 1991 found again that one third of those treated had been assaulted in the home, and that the distribution of assaults in the home was roughly equal between men and women. Eighty-four percent of those assaulted at home knew their assailants, and of those, 24 percent were assaulted by a spouse or partner. Significantly, the great majority of these were women: four times as many women as men treated for assault-related injuries in the home had been assaulted by a partner.<sup>82</sup>

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<sup>81</sup> The surveys recorded data on random samples of patients with fatal and non-fatal injuries treated at state hospitals only in the rural areas, and at state and private hospitals in the metropolitan area. The data recorded *all* unintentional trauma occurring in or around the home, not necessarily as a result of assault and not necessarily between sexual partners. Fights between men occurring in the home, for example, would therefore also be included. The National Trauma Research Programme of the South African Medical Research Council, *Trauma Review*, vol.2, no.3, December 1994.

<sup>82</sup> This survey recorded both the location of the violence and the relationship between the parties. The total number of assault patients was 312, of whom 106 had been assaulted in their own homes. *Ibid.*



Anecdotal evidence appears to confirm these figures. In a set of interviews conducted in Natal townships in the late 1980s, for example, young men and women referred to the "common practice of forced sex," and accepted violence as a normal part of a relationship between a man and a woman. As a consequence, some of the young women said that they would not marry: "In marriage there are too many rules. Husbands tend to beat their wives and scold them." Others accepted violence simply as a necessary evil of having a boyfriend: "Of course I don't like it when my boyfriend beats me. However there is no point in leaving him. I will probably just find someone worse."<sup>83</sup> Interviews conducted on a less systematic basis by Human Rights Watch with women and advice workers repeatedly supported these findings: a man is seen as necessary, especially in the rural areas, to have any hope of economic security, and a degree of violence in a male-female relationship is frequently accepted as normal and inevitable.

The difficulty in determining the exact extent of the problem of domestic violence is increased by the fact that most women abused by their partners do not seek help outside an informal network of family and friends. A 1993 survey of 111 women found that 50 percent sought assistance from their extended family; 22 percent went to friends or neighbors; 12 percent went to the church; 8 percent went to street committees or councils; and 2 percent went to social workers. Only 6 percent went to the police.<sup>84</sup> A survey conducted by the Advice Desk for Abused Women and the National Women's Coalition of 10,697 women (with a mean of 8.2 years abuse by their partners) found that their reluctance to report abuse to the police and government legal and social services stemmed directly from their negative experiences with police; the inadequacy of the legal system in dealing with domestic violence; and the fragmentation of social services.<sup>85</sup>

The reluctance of battered women to seek legal remedies stems from a complex number of reasons, including among others, distrust of the legal and law enforcement system, economic dependence, fear of retaliation, shame, self-blame, children or even love. The traditional values prevailing in all sections of South African society reinforce the attitude that "wife-beating" is a private affair, and to

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<sup>83</sup> Catherine Campbell, "Learning to Kill? Masculinity, the Family and Violence in Natal," *Journal of Southern African Studies*, vol.18, no.3, September 1992.

<sup>84</sup> Daniel Nina and Stavros Stavrou, "Violence in the Home," *Sash*, January 1994, p. 27.

<sup>85</sup> Anshu Padayachee, "The Prevention and Treatment of Abused Women in South Africa: A Game of Trivial Pursuit," Advice Desk for Abused Women (undated), p.2.

complain to the police is therefore to exhibit disloyalty and invite ostracism. One woman who spoke at a focus group organized by the Women's National Coalition had internalized societal views to such an extent that she saw herself as a child, who should therefore be subject to physical punishment: "a man should beat you up if you deserve it."<sup>86</sup> Battered women often want only the abuse to end, not the relationship, and are therefore reluctant to have recourse to official channels of redress, which often increase the likelihood of estrangement.<sup>87</sup>

All the organizations working to assist battered women note that domestic abuse takes place across race and class lines. As one report notes:

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<sup>86</sup> Women's National Coalition, *Interim Research Report: Campaign for Effective Equality* (Johannesburg: WNC, 1994), p.63.

<sup>87</sup> See Joanne Fedler, "Lawyering Domestic Violence Through the Prevention of Family Violence Act 1993 — An Evaluation After a Year in Operation," *South African Law Journal*, vol.112, Part II, May 1995, p.234.

While in the conventional wisdom abuse tends to bring to mind an uneducated, unemployed, working class man hitting his wife mercilessly and repeatedly, literature and intervention with abusive men has revealed that the perpetrators of violence against women include men who hold respectable jobs and positions in society. ... These include lawyers, doctors, psychologists, psychiatrists, priests and business executives. We call such men monsters, yet nearly every woman has had contact with an abusive man at some point in her life. He looks and behaves like any other.<sup>88</sup>

A study of sexual harassment on the Cape Town University campus, for example, reported the testimony of a white woman living in residence abused by her partner:

He was a respected and prominent member of [a religious organization] on campus and lived in a nearby residence. He beat me regularly [over a number of months]... I eventually told

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<sup>88</sup> Mmatshilo Motsei, *Detection of Woman Battering in Health Care Settings: The Case of Alexandra Health Clinic*, Women's Health Project, paper no. 30, January 1993, p.5.

my [religious instructor], who told me I shouldn't provoke him ... and should pray for his forgiveness.<sup>89</sup>

The lack of official statistics relating to partner abuse, however, mean that no statistical studies exist to indicate the likely profile of a batterer, and which groups of women may be most at risk.<sup>90</sup>

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<sup>89</sup> *Final Report: Committee of Enquiry into Sexual Harassment* (Cape Town: University of Cape Town, 1991).

<sup>90</sup> However, the Cape Town studies cited above indicated that alcohol played an important part in violence occurring in the home, with roughly two thirds of the urban trauma cases and 76 percent of the rural cases being alcohol related. In the urban areas, 45 percent of patients treated for injuries incurred in home violence were unskilled or semi-skilled workers, and 40 percent not working (including housewives and pensioners); in the rural areas, nearly 60 percent were unskilled or semi-skilled workers and 19 percent not working (excluding housewives and pensioners). Again, note that these figures include all violence in the home, not necessarily between spouses or partners. *Trauma Review* December 1994.

The types of abuse which South African women face in the home are the same as those faced by women the world over. They include verbal abuse, in which they are humiliated and degraded verbally by their partners; emotional abuse, in which they are threatened, for example with violence, economic deprivation or with the withholding of access to their children; and physical violence, which takes many forms, ranging from restrictions on freedom of movement, to hitting, choking, burning, stabbing, and even the use of electric shocks. In a 1993 study carried out in Alexandra township, it was found that physical injuries had been inflicted on women by a variety of means, from fists to weapons such as knives, bricks, the traditional knobkerrie (knob-ended stick), bottles, hammers, axes and screwdrivers.<sup>91</sup>

The same study found that the most common injuries requiring hospitalization were fractures of the head, limbs, sternum and ribs, followed by scalp and facial lacerations as well as penetrating chest wounds involving the lungs. In addition to the physical injuries sustained from such abuse, battered women often develop somatic symptoms such as headaches, backaches, fatigue, abdominal and pelvic pain, recurrent vaginal infections, sleep and eating disorders, sexual dysfunctions and other signs of moderate or severe depression.<sup>92</sup>

In the worst cases, violence against women by their partners results in death. A study of 115 inquests into the deaths of women in the Johannesburg magisterial district during 1994 found that twenty-nine, or 25 percent, related to homicide (37 percent related to accidental injury, including motor vehicle accidents). Of the homicides, ten women were killed by their partners and in another two cases the partner was the main suspect: a total of 41 percent. In twelve cases the suspect was unknown. The same study surveyed newspaper reports of homicides during 1993 and 1994 and identified forty-five cases in which women had been killed by their partners.<sup>93</sup>

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<sup>91</sup> Motsei, *Detection of Woman Battering*, p.14.

<sup>92</sup> Ibid., p.2.

<sup>93</sup> People Opposing Women Abuse, *"Woman Shot": A Pilot Study Exploring Intimate Femicide in the Johannesburg Magisterial District of Gauteng, South Africa* (Johannesburg: 1995). Interestingly, in thirteen of the twenty-four cases in which the occupation of the perpetrator was identified by the newspaper report, he was a policeman, and in another two cases a security guard. In sixteen of the forty-five homicides the perpetrator also killed himself and in ten of these sixteen cases attempted or succeeded in killing other members of the family. Other studies have examined the phenomenon of family killings, which were previously infrequent in South Africa but became more common during the 1980s. Between

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1986 and 1988, 223 family murders were reported, during which time there was approximately one family killing per month. A disproportionate number of these killings affected white families from the Afrikaner community: of 126 reported family killings between 1983 and June 1988, only two involved black families and 90 percent involved Afrikaans-speaking families. (These statistics do not distinguish between the murder of a spouse or child and the killing of the whole family.) In recent years, however, there has been an increase in reported family killings among the black population. V. Vall, "Family Murders in South Africa," Psychology Honors paper, University of Witwatersrand, unpublished (1988); *The Star*, November 18 and November 22, 1988 as quoted in Graeme Simpson, "Jack-Asses and Jackrollers: Rediscovering Gender in Understanding Violence," (Johannesburg: Centre for the Study of Violence and Reconciliation, 1992), p.7; Russell Molefe, "Why family killings are on the rise," *The Sowetan*, July 31, 1995.

## Rape

Over the past decade, the numbers of reported rapes have risen dramatically.<sup>94</sup> The rising figure is due both to increased reporting and an increase in sexual violence against women; those working in the field believe that violent crime is generally on the rise.<sup>95</sup> From a total of 9,365 reported cases in 1980, the police received 27,056 reports of rape and attempted rape in 1993.<sup>96</sup> During 1994, 32,107 cases were reported, an increase of 16 percent on the previous year: eight-eight rape cases, on average, are reported each day, a yearly rate of 149.5 rapes per hundred thousand population.<sup>97</sup> Twenty-two percent of women responding to the Women's National Coalition questionnaire indicated that they knew someone who had been raped; most said that no action had been taken in response.<sup>98</sup> The figure

<sup>94</sup> The figures are as follows:

1983:	15,342	1989:	20,458
1984:	15,785	1990:	20,321
1985:	16,085	1991:	22,765
1986:	14,975	1992:	24,812
1987:	18,145	1993:	27,056
1988:	19,638	1994:	32,107

South African Institute of Race Relations, *Race Relations Survey 1993/94*, p. 299.

<sup>95</sup> Reported murders — more likely to reflect the actual numbers of murders than the figures for rape — have also increased dramatically over the last decade, tending to confirm the escalating numbers for rape.

<sup>96</sup> "Huge Jump in Number of Reported Rapes," *Sunday Times*, May 8, 1994 and "27,000 Women Raped in SA Last Year," *The Citizen*, September 6, 1994. The racial breakdown was given as follows: "black on black" violence (25,042) 92.5 percent; "white on white" violence (1,024) 3.7 percent; "white on black" violence (271) 1 percent; "black on white" violence (179) 0.66 percent; coloured on Asian (126) 0.5 percent; and black on coloured/Asian violence (57) 0.2 percent.

<sup>97</sup> "Five year analysis of rape trends in the RSA," table supplied by the Human Sciences Research Council, 1995. The rate is expressed with reference to the areas policed by the former South African police; that is, excluding the ten homeland areas. In the United States, the reported rate of rape was forty-two per hundred thousand in 1990: Institute of Race Relations, *Race Relations Survey 1993/94*, p.297.

<sup>98</sup> Women's National Coalition, *Interim Research Report: Campaign for Effective Equality* (Johannesburg: WNC, 1994), p.102.

for reported rapes of children rose by almost 60 percent in 1994 — from 4,736 cases in 1993 to 7,559 cases in 1994; between January and April 1995, 2,809 cases of child rape were reported.<sup>99</sup>

Despite these figures, rape continues to be one of the most under-reported — and therefore unpunished — crimes, according to the South African Police. The police estimate that for every rape reported to them, another thirty-five go unreported; that is, reported cases make up only 2.8 percent of all rapes, giving a total figure of approximately one million rapes a year.<sup>100</sup> At the other end of the scale, one survey concluded that 45 percent of rape cases are reported; another found that 27 percent of sexual assaults are reported.<sup>101</sup> The conclusion is that there are no reliable figures, or even good estimates, of the number of rapes committed in South Africa. It is clear, however, that the figures are extremely high and that rape constitutes an urgent concern for most South African women.

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<sup>99</sup> "Police Report Huge Increase in Child Abuse," *Sunday Times*, January 29, 1995; Anso Thom "Jo'burg child abuse unit under mound of dockets," *The Star* August 2, 1995. Part of the startling increase in the figures is probably due to increased reporting following the establishment of specialized "child protection units" in the police.

<sup>100</sup> "Huge Jump in Number of Reported Rapes," *Sunday Times*, May 8, 1994.

<sup>101</sup> J.M. Lötter, "Criminal Victimization: Some results from survey research," in W.J. Schurink et al, *Victimization: Nature and Trends* (Pretoria: Human Sciences Research Council, 1992); and South African Institute of Race Relations, *Race Relations Survey 1993/94*, p.296. Academic surveys are also likely to underestimate the figures.



Unlike the victims of domestic abuse, recorded victims of rape are concentrated among particular groups of women: the poor and disadvantaged.<sup>102</sup> According to the South African police, an overwhelming 95 percent of rapes are reported by black women.<sup>103</sup> Sixty-five percent of rapes reported in Johannesburg, Alexandra and Soweto during 1992 occurred in Soweto.<sup>104</sup> In the police districts of

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<sup>102</sup> It is important to note that this distinction applies to *reported* rapes. Rape that is most likely to be reported is rape by a stranger, accompanied with obvious physical violence: rapes of this type are most likely to affect those who are more vulnerable; that is, women without private cars, with houses without proper security, and living in more violent areas. Rape within marriage or between parties who are known to each other is far less likely to be reported. It is therefore likely that figures for marital rape, incest rape, date rape, etc. are significantly under-reported.

<sup>103</sup> "New Refuge for Rape Victims," *The Star*, January 17, 1995.

<sup>104</sup> South African Institute of Race Relations, *Race Relations Survey 1993/94*, p.297.

the Cape Peninsula in 1992, the Athlone district (which includes the African townships of Guguletu, Khayelitsha, Langa and Nyanga) accounted for 49 percent of the rapes reported.<sup>105</sup> In the Cape Town metropolitan area during 1990, 93.6 percent of women treated at state and private hospitals for injuries resulting from violent attacks (irrespective of the location of the attack or the woman's relationship with the attacker) had an income of R.1,000 (U.S.\$285) or less per month; only 1.7 percent had an income of R.2,000 (U.S.\$570) or more.<sup>106</sup> This discrepancy can be explained in part by the fact that low-income women tend to take public transportation or walk longer distances, live in more crime-ridden areas, and have jobs which often require them to leave or return home when it is dark outside.

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Alexandra is a smaller township with an estimated population of roughly a quarter of a million situated in Johannesburg's northern suburbs; Soweto's population is estimated at anywhere from three to four million. In the month of December 1994, the Baragwanath medico-legal clinic in Soweto dealt with 200 cases of rape. "Silence Condone Rape," *New Nation*, January 20, 1995.

<sup>105</sup> Ibid., p.296.

<sup>106</sup> In 60 percent of cases, the injuries had occurred at home, and 27 percent were inflicted on the streets. Letter dated August 25, 1995 to Human Rights Watch from J.W. van der Spuy, head of the National Trauma Research Programme of the South African Medical Research Council. The figures were derived from the Cape Town metropolitan area study cited above and described in *Trauma Review*, December 1994.

The Hillbrow medico-legal clinic, which serves the inner-city and suburban police districts of Johannesburg and Johannesburg North, found, in a 1992 study of 584 rape cases reported to the South African police, that 71 percent of the victims, and 78 percent of the perpetrators, were black, although the 1991 census recorded three times as many white women as black women in the area. In the Johannesburg inner city area a large proportion of rapes occurred while women were traveling to and from work. In many cases, women were abducted with the threat of physical harm, and often at gun point. Reported rape in the predominantly white suburbs was far less common and occurred most often of older women in conjunction with housebreaking and theft. In 80 percent of the total number of cases, the rapist(s) were unknown to the woman. However, rapes of girls under the age of sixteen years were usually perpetrated by men known to them — family or friends — or by strangers who enticed or abducted them. Sixty-five percent of the women were raped by one male, and 34 percent were gang-raped. The Hillbrow survey also found that by far the majority of rape victims fell between the ages of seventeen to twenty-five years. A study conducted at the medico-legal clinic in Soweto, however, found that 75 percent of rape victims treated were sixteen years and younger.<sup>107</sup> By comparison, a spokesperson for the police in 1994 noted an increase in attacks on elderly women and stated that in half the reported cases of rape women knew their attackers.<sup>108</sup>

While detailed national statistics on the profile of rape victims are not collected by the police services, even less is known of the profile of rape perpetrators. Disturbingly, however, persons aged twenty years and younger accounted for 40 percent of convictions for rape during the period July 1993 to June

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<sup>107</sup> Lorna J. Martin, *Rape in Johannesburg* (Johannesburg: Centre for the Study of Violence and Reconciliation, 1993), p.5. This figure may reflect a higher probability of serious injury in the case of rape of young girls.

<sup>108</sup> "Huge Jump in Number of Reported Rapes," *Sunday Times*, May 8, 1994.

1994; by comparison, in cases of common assault young persons accounted for only 15 percent of convictions, and in cases of aggravated assault 21 percent.<sup>109</sup>

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<sup>109</sup> "Convictions for rape or attempted rape for the 12-month period July 1, 1993 to June 30, 1994," table supplied by the Human Sciences Research Council, 1995.

The incidence of rape is not evenly spread throughout the country: while the average yearly rate per hundred thousand population was 149.5 across South Africa in 1994, the rate in each police region varied from 188.7 in Natal to 101.3 in the Eastern Transvaal. As would be expected, the rate in metropolitan Johannesburg and Soweto was a high 193.1 per hundred thousand, but urban areas were not consistently the worst affected: within Natal, the rate in metropolitan Durban was 153.2 and in the remainder of the province 219.9 per hundred thousand.<sup>110</sup> In general, as noted above, reported rapes appeared to reflect overall levels of violence in an area: Natal, for example, is also the region most seriously affected by political violence.

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<sup>110</sup> "The distribution of rape cases in the RSA per police region" and "Difference in the rape rate in metropolitan and rural areas," tables supplied by the Human Sciences Research Council, 1995. The reported figures related to the old police regions, which have now been reorganized to match the nine provinces of the new government.

In the black townships, the dense population, the breakdown of the family unit under the stress of apartheid policies, high levels of unemployment and the consequent rise in crime have all contributed to increased levels of violence. Violence directed against young women by armed youth gangs has become a well-known phenomenon.<sup>111</sup> Gang rape, sometimes known as "jackrolling,"<sup>112</sup> is widespread:

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<sup>111</sup> "Black township youths have been historically marginalized by apartheid, leaving them as alienated outcasts within their own wider society. Black township youths have historically been excluded from the key resources of power and authority in the society. Particularly for young post-adolescent males, this leaves them frustrated, emasculated and generally disempowered ... it is a generation of young people who have been actively marginalized and brutalized by their society. It is no surprise that they present as the primary perpetrators as well as victims of violence, both criminal and political." S. Mokwena, "Marginalisation, Youth and Violence," as quoted in Simpson, "Jack-Asses and Jackrollers...", pp.9-10.

<sup>112</sup> The term was coined to refer to the forceful abduction of women in the township by a gang called the "Jackrollers" which operated between 1987 and 1988 in the Diepkloof area. The original Jackroller gang was made up of a network of fewer than ten youths. The gang was led by Jeffrey Brown who within months of his arrival in Soweto, earned the status of

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the most feared man in the township. The most notable practices of the Jackrollers were rape and abduction, car theft and bank robbery. But as the abduction and rape of women became more widespread in the townships, anyone who did it could be called a jackroller and jackroll has become a commonly used verb in township vocabulary. Steve Mokwena, "The Era of the Jackrollers: Contextualizing the Rise of Youth Gangs in Soweto" (Johannesburg: Centre for the Study of Violence and Reconciliation, 1991), p.18.

There are many in all the townships, though some rapists aren't called Jackrollers. But in all parts of the townships we have school kids who are rolling. They are there for raping, nothing else.<sup>113</sup>

The Cape Town-based Rape Crisis noted that "most of the women Rape Crisis sees are adolescents. The majority of them have been gang-raped."<sup>114</sup> There is, in fact, a township saying that "Jackroll is not a crime, it is just a game."<sup>115</sup> A Soweto community leader is quoted as saying:

When you leave your child alone in the home she is not safe. And in the street, she is not safe. And in the school she is not safe. There is nowhere that she can walk and be safe. Girls are afraid somebody in a car will stop them and say 'get in.' When they walk in the street they are raped by men with guns. Sexual

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<sup>113</sup> Diana Russell, "Rape and Child Sexual Abuse in Soweto: An Interview with Community Leader Mary Mabaso" (Cape Town: Centre for African Studies, University of Cape Town, March 26, 1991), p.7.

<sup>114</sup> Interview with Bronwen Pithy, Rape Crisis, Capetown, February 8, 1995.

<sup>115</sup> N. Mathiane, *Beyond the Headlines, Truths of Life in Soweto*, Southern publishers, 1990, pp.148-153 as quoted in Mokwena, "The Era of the Jackrollers," p.21.



abuse happens so much that some students stop going to school.<sup>116</sup>

In Soweto, a member of the Jackrollers declared that their aim was to impregnate every female under age twenty-six in the township. A seventeen-year-old student is quoted as saying: "I am afraid of the Jackrollers. They are affecting all of us as girls. We are not safe any more. We can't even walk in the streets without being harassed by hooligans."<sup>117</sup> The gangs not only target young women, but even kill them:

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<sup>116</sup> Diana Russell, "Rape and Child Sexual Abuse in Soweto: An Interview with Community Leader Mary Mabaso" (Cape Town: Centre for African Studies, University of Cape Town, March 26, 1991), p.6.

<sup>117</sup> "Rape in SA Every 83 Seconds: Report," *The Citizen*, June 9, 1993.

If they know you, they will kill you after raping you because if they don't, they know you will reveal their names. So, if they know you and they rape you, you are fortunate if they don't kill you.<sup>118</sup>

Schools have become centers for rapists in the townships to target young women. Lack of security in schools makes these young women vulnerable to attack. University dormitories appear to be as bad. One faculty member told Human Rights Watch that "the women's hostels at university are a haven for rapists."<sup>119</sup> The women's hostels in the townships, which house single, working women are also targets for rapists. One woman living in a hostel noted that:

Men try and get into the halls at the hostels and then they rape women. I live in a hostel next to a bar. The men drink and then they come looking for women in the hostel. The security is bad and the lighting in the halls bad. I came into the hostel one night and as I was walking down the hallway, I was grabbed from behind. The man put his hand over my mouth and tried to rape me. I struggled and finally got away. I didn't see anything and I didn't report anything because I thought it would be no use.<sup>120</sup>

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<sup>118</sup> Russell, "Rape and Child Sexual Abuse in Soweto," p.6.

<sup>119</sup> Interview with Lindsey Fredman, University of Western Cape, Cape Town, February 11, 1995; see also Diana Russell, "The Story of Lulu Diba," *Agenda*, No.16, 1993.

<sup>120</sup> Interview, Alexandra, February 17, 1995.

Women who are poor and homeless are also easy targets for gang rape. In Durban at the train station, several hundred women live on the pavement selling wares during the day, and sleeping there in the night. These women are constantly subjected to attacks by young thugs, known as *tsotsis*, who rob and rape the women.

Women reportedly take turns sleeping at the end of the bench outside the station because they know that the woman at the end is the most likely target for rape. Women are also raped when they use two portable toilets located near the settlement. On April 30, 1994, a seventeen year old girl was dragged off and raped by a *tsotsis* and threatened with death if she told what had happened to her. A few days later she saw him raping another young girl.<sup>121</sup> One woman at the Durban station told Human Rights Watch that:

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<sup>121</sup> Equality Now, "South Africa: Rape and Violence Against Women at the Durban Train Station," Women's Action 6.1, May 1994.

The police never come here to protect us. They are right there [a few streets away]. They know what is happening, but they don't care.<sup>122</sup>

In the former homelands, the lack of basic utilities such as electricity and piped water means that women spend many hours collecting fuel and water. Often, this will mean that they are in the bush away from safer populated areas, where they are vulnerable to attack. Advice workers in the former homeland of KaNgwane, for example, stated that most rapes they knew of were committed while women were away from their homes looking for wood and that the provision of basic utilities would greatly increase women's safety.<sup>123</sup>

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<sup>122</sup> Interview, Durban train station, Durban, February 2, 1995.

<sup>123</sup> Interviews, September 8, 1995.

The injuries that women sustain from rape include both genital and non-genital injuries. The 1992 study of rape survivors conducted by the Hillbrow medico-legal center found that almost 40 percent sustained genital injuries. Another 40 percent sustained other injuries included bruising, abrasions, lacerations and fractures.<sup>124</sup> Sixty percent of the women were referred to hospital for further care.<sup>125</sup> Sexually transmitted diseases are very common in South Africa, and the risk of transmission during rape is high. Although the epidemic has taken some years to reach South Africa, the prevalence of infection with Human Immunodeficiency Virus (HIV) is rapidly increasing and is currently believed to be close to 10 percent of the population.<sup>126</sup> It is estimated that the risk of HIV transmission from a single encounter during normal sexual intercourse, if neither party has another sexually transmitted disease and there are no lacerations or other trauma in the genital area, is between one in three hundred and one in five hundred, although women are significantly more at risk than men. In the case of rape, and especially gang rape, where other sexually transmitted diseases are more likely to be present and violence and other trauma are probable, the likelihood of infection is significantly higher, although no studies have been carried out.<sup>127</sup>

Pregnancy is also a risk from rape, and it is estimated that pregnancy will result in approximately 10 percent of rape cases. Abortion, while in general illegal in South Africa, is legal in rape cases, although only with the support of three doctors and a magistrate. The great majority of legal abortions are carried out on white women, who are more likely to have the knowledge and resources to complete the legal process: according to Department of Health figures, during the period 1982 to 1988, 3,261 legal abortions were performed on whites, 257 on Africans, 489 on coloureds and 131 on Indians. Of the 1,027 legal abortions carried out in 1992, only fifty were as a result of rape, although the reported figures suggest that at

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<sup>124</sup> Lorna J. Martin, *Rape in Johannesburg* (Johannesburg: Centre for the Study of Violence and Reconciliation, 1993), p.4.

<sup>125</sup> This figure is obtained from the records of 556 cases in the clinic and does not take into account reported cases which require immediate hospital attention. Ibid.

<sup>126</sup> Information supplied by the AIDS Research Unit of the South African Institute for Medical Research.

<sup>127</sup> Ibid.

least 5,807 women would have become pregnant as a result of rape and therefore have been eligible for a legal abortion.<sup>128</sup>

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<sup>128</sup> Abortion is regulated by the Abortion and Sterilization Act, (Act No.2 of 1975), which outlaws termination of pregnancy except in cases of "a serious threat" to the woman's physical health or "a danger of permanent damage" to her mental health; when there is a serious risk that the child will be born with "a physical or mental defect of such a nature that he [*sic*] will be irreparably seriously handicapped;" when the pregnancy "is shown to be the result of rape or incest;" or when the woman is, "due to a permanent mental handicap or defect ... unable to comprehend the consequential implications or bear the parental responsibility for" the child. To procure a legal abortion in a rape case, a woman must obtain a written application for an abortion from a registered medical practitioner, supported in writing by two other doctors. Application is then made to a magistrate to authorize the abortion, and the applicant must give a sworn statement that the pregnancy is the result of rape or incest. If the rape has not been reported to the police, the magistrate must establish if the woman had a "good and acceptable" reason for not having reported it. The application will be denied if the magistrate determines that the alleged offence did not occur or if it did

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not constitute rape in the legal sense, or if the magistrate does not accept her reason for not having reported it. Finally, the medical practitioner who is in charge of the facility where the abortion will be carried out must also be satisfied that the requirements of the Abortion Act have been fulfilled. Approximately 36,000 operations are performed for the removal of residues of pregnancy are performed each year, the majority believed to be as a result of illegal abortions; estimates of the number of illegal abortions carried out annually rise as high as 300,000. The content of new legislation to govern abortion is currently under debate in the National Assembly. Desirée Hansson and Diana Russell, "Made to Fail: the mythical option of legal abortion for survivors of rape and incest," *South African Journal on Human Rights*, vol.9, 1993, pp.500-524; Abortion Rights Action Group *Submission to the Parliamentary Select Committee on Abortion* (Cape Town: 1994).

Many women also suffer acute physical, emotional and behavioral problems after rape, not directly related to physical injuries sustained at the time of the assault. Together, these symptoms are known as Rape Trauma Syndrome (RTS), a type of post-traumatic stress disorder. They may include shock, nausea, insomnia, eating problems, listlessness, crying, nervousness, compulsive washing, poor concentration, mood swings, memory loss, sexual problems, substance abuse and general depression.<sup>129</sup> Not all women who have been raped suffer such symptoms; some may suffer them for only a short time, others for years; or symptoms may surface years after the actual rape, for example at the time of establishing a new relationship.

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<sup>129</sup> Sharon Lewis, *Dealing with Rape* (Johannesburg: SACHED Books, 1994).



## 6

### THE STATE RESPONSE TO DOMESTIC VIOLENCE

My husband has always abused me. He has a drug and alcohol problem. I stayed because I am Catholic and because we have six children, until he kicked me out. He used to tie me to the bed so I couldn't go out. I wasn't allowed to answer the phone. One time, he beat me so bad, he cracked my head and broke one of my fingers. Another time, he burned me with boiling water. Once he put an electric shock through my fingers. I got a peace order against my husband while I was married, but when they came to the house, the police said all they could do was warn my husband. Since my divorce four years ago, my husband harasses me all the time. He follows me. He steals mine and my children's clothes from the line. He comes around the house in the middle of the night. The police arrested him for trespassing three times, but he was immediately released. The police told me that they could not do anything more since we were divorced. In January [1995], I went to get an interdict and the court clerk told me that they couldn't give me one because 'everybody's free to walk the streets and live their lives.' Soon after, he threw a burning towel through the window of the house which burnt the curtains and started a fire. Now he is in prison for two months for damaging property.<sup>130</sup>

It is a sad testament to the South African judicial and law enforcement system that it is likely to respond more promptly to property damage than to women at risk from their violent partners. While women's organizations do note that the

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<sup>130</sup> Interview, Durban, February 3, 1995.

response of police and judicial authorities has recently improved, they stress that situations such as the one described in this testimony are not uncommon.<sup>131</sup>

In South Africa, as in many other countries, when it comes to male abuse of women the family has been viewed as a private entity. Assault or sexual assault of a woman has been treated as a criminal matter only when committed by a stranger against an obviously "virtuous" woman. In South Africa, however, the official respect for privacy in this context is ironic given the routine violations of any rudimentary concept of privacy by the apartheid state. As part of its program of "separate development" the National Party government regulated the intimate relationships of South Africans to an extreme degree; in particular, by forbidding "interracial" sex or marriage and by preventing, through the enforcement of a system of passes designed to prevent black settlement in "white" areas, most African men and women from sharing a normal family life. Nevertheless, reflecting the patriarchal character of the apartheid ideology, the state did not see fit to intervene within the family in order to protect the rights of women of any race.

Consequently, the police and judicial system treat complaints by battered women differently from other assault complaints. Those South African women who have been assaulted by their partners and turn to the state structures for protection and assistance often report unsympathetic or hostile treatment at the hands of police, court clerks and prosecutors. Frequently, police and court clerks are unaware of the law and misinform or turn away women. In other cases, the police are well-aware

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<sup>131</sup> Women from all over the world and from all walks of life are at risk from violence in the home, usually at the hands of their husband or partner. The United Nations, *The World's Women 1970-1990: Trends and Statistics* (New York: United Nations, 1991), p. 19. See also Human Rights Watch, *The Human Rights Watch Global Report on Women's Human Rights* (New York: August 1995), p.341.

of the law, but choose not to respond promptly and decisively. A common experience is that police either fail to respond to calls for help or merely warn abusers or refer them to other agencies. In other cases, police do not understand the complexity of domestic abuse and are reluctant to offer protection to a battered woman who repeatedly returns to an abusive spouse or withdraws charges that have been laid. These discriminatory attitudes of the law enforcement system limit access to remedies for battered women.

Nevertheless, important steps forward have been made in recent years. Most notable of these was the passing of the Prevention of Family Violence Act in 1993. Although imperfect and criticized by women's groups for its weaknesses, the act has opened a new channel of relief, even if it is not uniformly applied. Other initiatives have been undertaken to improve the response of the police to domestic violence calls where there is no interdict (restraining order), and other state agencies have begun to address the issue of assaults on women by their partners. The Reconstruction and Development Programme has made a firm commitment to addressing violence against women. Nevertheless, there is a long way to go before the policy developments at national level translate into real improvements for women on the ground, especially in the rural areas that are far from even such limited support services as exist in the metropolitan centers.

### **Criminal Law**

South African criminal law does not recognize a specific crime of wife or partner beating or of domestic violence more generally.<sup>132</sup> Women therefore have to lay common-law charges of assault for injuries suffered at the hands of their partners or husbands.<sup>133</sup> If forcefully pursued, however, assault charges should be

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<sup>132</sup> Some countries have enacted criminal legal provisions which apply specifically to violence within the family (for example, Spain, Portugal and Poland), or to particular forms of domestic violence (for example, violence relating to dowry collection, in India and Bangladesh). U.N. Centre for Social Development and Humanitarian Affairs, *Strategies for Confronting Domestic Violence: A Resource Manual* (New York: United Nations, 1993), p.12-13.

<sup>133</sup> Possible charges include arson, assault, assault with intent to do grievous bodily harm, threats to do bodily harm, obstructing justice, cruelty to children, incest, kidnapping, murder, culpable homicide, rape, forced prostitution, unlawful entry on to property, malicious damage to property, theft, robbery, unlawful possession of a firearm, sodomy, extortion, blackmail and sexual assault. Joanne Fedler, "Lawyering Domestic Violence," p.2, pre-publication copy.

sufficient to encompass most instances of physical violence between partners. Nevertheless, South African police and judicial authorities are frequently unwilling or unable to intervene to curb violence or to press charges. Under both Roman-Dutch law and English law, from which the principles of South African civil law are derived, a "right" to batter a wife was recognized.<sup>134</sup> Similarly, the payment of lobola, or brideprice, is often viewed as giving an African man married under customary law the right to beat his wife, who is regarded as his property. While these principles are no longer formally endorsed by the law, the attitudes which they reflected still remain.

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<sup>134</sup> A. Crump, "Wife Battering," *South African Journal of Criminal Law and Criminology*, 1987, p. 231.

In 1992, for example, a researcher witnessed a woman being assaulted by her husband outside a police station in Cape Town. When the witness called the police they only responded on the researcher's insistence, and placed the man and the woman *together* in the charge room, as though they were both suspects. When the woman who had witnessed the assault offered to assist the police by being a witness in a case against the man, they said that it would not be necessary, since the woman assaulted would not be laying a complaint. Upon pressing the matter further, the officers on duty stated that if they were to charge every man who assaulted his wife they would be able to attend to nothing else, while it would "increase the crime rate." The police said they would only intervene if the battery escalated to murder.<sup>135</sup>

In one police station in a former homeland, the station commander reported to Human Rights Watch that if a woman came to the police station asking for assistance because she had been beaten by her partner, he would regard the matter as a private one and attempt to mediate the problem. In no case had he ever arrested the man in such circumstances. If the parties could not agree, he would refer them to the magistrates' court, where a further inquiry could be held. Unsurprisingly, few women ever went to the police to report assault by their husbands or boyfriends.<sup>136</sup> In other cases, it appears that police have responded to the introduction of the Prevention of Family Violence Act (described below) by refusing to arrest a man accused of assaulting his wife unless she has already obtained an interdict under the act.<sup>137</sup>

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<sup>135</sup> Kathryn Ross, "Battered women: An invisible issue," in *Women Rape and Violence in South Africa: Two Preliminary Studies* (Cape Town: Community Law Centre, 1993).

<sup>136</sup> Interviews, Schoemansdal Police Station, KaNgwane, September 8, 1995.

<sup>137</sup> Minutes of a meeting held at Cape Town Magistrates' Court, February 10, 1995.

Even if the police do respond to an abused woman's call, this is often only a short-term solution to the woman's problem that may even aggravate the situation in the long term:

They pick him up for one evening, and then he's free (and furious) the next day.<sup>138</sup>

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<sup>138</sup> Quoted in Teresa Angless, "Violence Against Women: Battered Women Seeking Solutions," Paper presented to the Criminological Association of South Africa International Conference, September 2-3, 1993.

Even where the police are sensitized to the issue of domestic violence, they may prefer a conciliatory approach to an interventionist strategy. At Sunnyside police station in Pretoria, where the first special police "trauma centre" to deal with domestic violence and other cases of violence against women has been set up, the detectives prefer to mediate a dispute. Even if an assault is taking place as the police arrive, no arrest or charge is made unless the woman asks for the case to go forward. While this approach gives the woman control over the next steps taken by the police, in some cases she may not be in a fit physical or mental state to make decisions of this sort.<sup>139</sup>

Although statistics are not available in relation to criminal prosecution of domestic violence, because separate statistics are not kept for assault by a partner, women's groups believe that charges are withdrawn in domestic assault cases far more often than if an assault is between strangers. Police dealing with domestic violence cases also state that assault charges in such cases are far more likely to be withdrawn.<sup>140</sup> In an attempt to reduce the number of cases in which charges are withdrawn, as well as to avoid wasting police time, the detectives at Sunnyside

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<sup>139</sup> In a number of United States jurisdictions, by contrast, automatic arrest guidelines have been issued to police in domestic violence cases; and while the woman has the choice as to whether charges will be laid, she has no right to ask for them to be withdrawn.

<sup>140</sup> However, a large number of all assault charges are withdrawn: of 89,740 assault cases reported to the police between January and July 1994, only 23,534, or 26 percent, went to court. It is not known what percentage of these cases arose from domestic settings. Lt.-Col. Marietjie Louw, paper presented to the Conference on Domestic Violence, Pretoria: September 1994.

police station's special unit dealing with violence against women make any woman wishing to drop charges relating to abuse by a partner to withdraw them on her own.<sup>141</sup> In other cases, however, the police and prosecutors may even encourage a woman to drop charges.

One prosecutor interviewed by Human Rights Watch stated:

If the complainant wants to withdraw the case we oblige, because it is a domestic setting. Sometimes, too, when I think that the abuse is not severe and it's the first time, I urge them to get back together and to drop the charges.<sup>142</sup>

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<sup>141</sup> Interview, Lance-Sergeant Amanda Botha, Sunnyside Police Station, August 22, 1995.

<sup>142</sup> Interview with prosecutor (name withheld on request), Durban, February 3, 1995.



When asked what sort of abuse she considered not serious enough for charges to be brought, the prosecutor replied "if it's a slap or a kick and it's the first time and he is sorry, then I do not encourage her to file charges."<sup>143</sup> Another prosecutor in a former homeland indicated that woman reporting domestic violence would always be referred to a tribal *induna*, or headman, for him (tribal authorities are almost exclusively male) to resolve the issue. The courts would not handle such cases, regarding them as essentially private matters.<sup>144</sup> This sort of informal discouragement by a judicial official can prevent women from gaining access to state protection. In the absence of proper guidelines, prosecutors in each court will presumably hold different beliefs as to the level of abuse that warrants legal sanction.<sup>145</sup> Magistrates also may be insensitive to domestic abuse cases: in a criminal case heard at Hillbrow Magistrates' Court in February 1995, a batterer who had allegedly thrown his girlfriend through a plate glass window was acquitted by the magistrate on the ground that it was "reasonably possible that she had tripped over a potplant and fallen through the window." The history of abuse in the relationship was inadmissible evidence.<sup>146</sup>

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<sup>143</sup> Ibid.

<sup>144</sup> Interview, Tonga Magistrates' Court, KaNgwane, September 8, 1995.

<sup>145</sup> According to section 195(1) of the Criminal Procedure Act (Act No. 51 of 1977), a wife or husband is both competent and compellable as a witness against her or his spouse in criminal proceedings, where the spouse is charged with an offence against the witness or a child of the marriage (in general, a spouse is only competent but not compellable to give evidence against her or his partner).

<sup>146</sup> Joanne Fedler, "Lawyering Domestic Violence," p.236.

Criminalization should not be the sole response to the phenomenon of domestic violence: in particular, the focus of the criminal justice system on punishment of the perpetrator, rather than preventing future abusive behavior or assisting the victim, leaves a large part of the problem unaddressed. Nevertheless, when combined with other appropriate interventions — especially protection of and support for the victim and compulsory treatment programs for the perpetrator — the message sent by treatment of domestic violence as a serious crime is very important.

The criminal process indicates that the victim is entitled to the state's protection as much as any other victim of violence, and that the perpetrator is personally responsible for his actions. Treating domestic violence as a crime has an important symbolic role, demonstrating that society does not tolerate abuse of women (or men) by their partners. Studies in other countries have shown that the intimidating procedures of arrest can help to reduce the risk of reoffending by the perpetrator, who in most cases does not otherwise regard himself as a criminal.

A criminalization strategy cannot be developed in a vacuum. For example, a policy that the police must arrest the husband in a case of domestic violence must include complementary changes in related policies, such as the granting of police bail and the introduction of police training to deal with and be sensitive to family violence cases. In the wider system, the response should address prosecution and sentencing policies (including whether the victim has the right to withdraw a charge), the provision of emergency shelters, psychological and legal support for survivors of violence, and treatment groups for men who batter their partners. All parts of the criminal justice system must receive information and training relating to the treatment of domestic violence cases.<sup>147</sup>

### **Civil Remedies: "Peace Orders" and the Prevention of Family Violence Act**

Until 1993, the principal mechanism through which abused women could seek to stop abuse by a partner was a "peace order." If a complaint on oath is made to a magistrate "that any person is conducting himself violently towards, or is threatening injury to the person or property of another or that he has used language or behaved in a manner towards another likely to provoke a breach of the peace or

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<sup>147</sup> The courts in South Africa have, however, recognized the psychological as well as physical suffering of women in abusive relationships, by accepting self-defense as a defense to a murder charge when a woman has killed her partner after a history of persistent battery, even though her life is in no immediate danger. The leading case is *S. v. Lavalle* (1990) 1 SCR 852.

assault," the magistrate may order the person complained of to appear before him or her, or if necessary to be arrested and brought to court, and conduct an enquiry into the complaint. The magistrate then may "bind over" the party complained of to keep the peace towards the complainant for up to six months, requiring him to give "recognizances" to that effect (that is, a commitment to pay a certain amount as a form of fine in the event of breach). The peace order merely constitutes a warning, and has no provision for automatic arrest or prosecution if breached, although the court may order the recognizances forfeited if the order is not obeyed, which then has the effect of a civil judgment. If the person complained of refuses to give any recognizance to keep the peace at the initial hearing, the magistrate may order him to be committed to prison for up to six months.<sup>148</sup> A survey conducted by the Advice Desk for Abused Women in 1993 found that peace orders were ineffective as a remedy for battered women.<sup>149</sup>

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<sup>148</sup> Section 384, Criminal Procedure Act (Act No. 56 of 1955).

<sup>149</sup> The Advice Desk for Abused Women found that of ninety-three peace orders it surveyed that were obtained between January and June 1993, less than one quarter of the women found that the order acted as a deterrent to further abuse. Seventy-one women reported that the violence increased after they obtained the order and that threats of divorce and deprivation of financial support were made to them. These threats, they claimed, prevented them from making reports to the police regarding breaches of the peace order. They were further deterred because the courts could not provide them with any protection other than a warning to the abuser. Anshu Padayachee, "The Prevention and Treatment of Abused Women in South Africa: A Game of Trivial Pursuit," The Advice Desk for Abused Women (undated), p.11.

Battered women can also apply to the Supreme Court for an interdict, but this is a lengthy and expensive prospect, requiring the retention of an attorney and an advocate and the consequent high legal fees. Other legal remedies theoretically open to women include divorce, a claim for money damages, an order to commit the abuser to a mental institution or an order for compulsory substance abuse treatment.

Apart from divorce, which may not be desired by a woman for other reasons, these remedies are almost impossible to obtain by a woman with few resources and are rarely used by abused women.<sup>150</sup>

In 1993, the passage of the Prevention of Family Violence Act (Act No.133 of 1993) introduced an improved, expedited procedure through which a woman may seek an interdict against an abusive partner.<sup>151</sup> The new act has made it easier and cheaper to obtain interdicts (restraining orders) to stop domestic abuse. An abused woman, or any other person who has a "material interest" in the matter on behalf of the woman, can apply for an interdict at the nearest magistrates court or at the Supreme Court. If the magistrate or judge believes that the woman is in danger of abuse, he or (rarely) she must grant an interdict, which is accompanied by a suspended warrant of arrest, to prevent the abuser from further assaulting or threatening the woman. Once the abuser is served notice by the sheriff's office, the

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<sup>150</sup> Ibid.

<sup>151</sup> The Prevention of Family Violence Act was promulgated at a time when it was politically expedient for the National Party government to be seen to be doing something for women in order to attract the female vote in the April 1994 election. Its enactment was not accompanied by government funding for support structures nor by programmes to address gender bias in the police and court system. Joanne Fedler, "Lawyer Domestic Violence," p.234.

interdict comes into effect.<sup>152</sup> When the sheriff has informed the court that the interdict has been served, the court will inform the applicant and send her a certified copy of the interdict and the original warrant of arrest.

In the event that the woman possessing an interdict is threatened with abuse, she can call the police and give them the warrant of arrest. The police should then take an affidavit from the woman as to the facts, and arrest the abuser using the warrant. The arrested partner should be brought before a magistrate within twenty-four hours and charged with contravening the interdict. No bail can be granted by the police. The penalty is a fine or imprisonment not exceeding twelve months, or both.

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<sup>152</sup> Sheriffs' offices are privately run businesses regulated by the state and given jurisdiction to serve court papers over a particular area.

The cheaper, simplified application procedure, and the immediate arrest provisions are significant improvements from the past. It has created an expedited procedure for obtaining interdicts. While they are still granted only at the magistrate's discretion, they are cheaper, quicker and simpler. The form can be filed without the assistance of a lawyer and many women in practice go straight to the court to make their application. Most South African women's groups agree that magistrates have generally used their discretion to grant interdicts in appropriate cases. For example, in one year and two months, the seven magistrates courts designated to deal with interdicts in the Cape Town area granted 90 percent of the applications before them.<sup>153</sup> In a four month period between April to July 1994, the total number of interdicts granted for the whole of South Africa was 2,118 and 169 were denied.<sup>154</sup>

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<sup>153</sup> The breakdown for 4,869 interdict applications, between December 1, 1993 and January 1995, is as follows: (1) Bellville: 699 granted, fifteen denied; (2) Cape Town: 452 granted, twenty denied; (3) Goodwood: 630 granted, eight denied; (4) Kuilsriver: 322 granted, two denied; (5) Mitchell's Plain: 1,568 granted, thirty denied; (6) Simonstown: eighty-seven granted, none denied (only until July 1994); (7) Wynberg: 1,035 granted, one denied (only until mid-December 1994). *Magistrate's Liaison Report on the Implementation of the Prevention of Family Violence Act*, unpublished report, June 1994 for figures between December 1, 1993 to July 1994 and interview with paralegal, National Institute for Crime Prevention and Rehabilitation of Offenders (NICRO), Cape Town, February 8, 1995 for figures between August 1, 1994 to January 15, 1995.

<sup>154</sup> "Statistics on Family Violence," Law Race and Gender Project, CIV-1.

While the interdict cannot provide total protection or shield a victim from a partner intent on battering, the order does set limits which are immediately enforceable. For some battered women, this new law has made a positive difference in ending domestic abuse. One woman told Human Rights Watch, "since I got the interdict the fighting and screaming has stopped because my husband is afraid of going to jail."<sup>155</sup> Another woman said that the interdict had made "quite a difference. After fifteen years of abuse it stopped. He now knows that I can go to the police."<sup>156</sup> In one case, the interdict forms alone had been sufficient to scare an abusive husband to stop his abusive behavior.<sup>157</sup> A number of battered women surveyed by the nongovernmental organization, the National Institute for Crime Prevention and Rehabilitation of Offenders (NICRO), noted similar experiences and stated in telephone interviews that the interdict had changed their lives for the better.<sup>158</sup> The Pretoria Central Magistrates' Court reported to Human Rights Watch in August 1995 that it was receiving approximately twenty applications for interdicts a week — and only one case of interdict violation.<sup>159</sup>

However, the Prevention of Family Violence Act is not a complete panacea for abused women. First, the Act is restricted to individuals who are or were married (by civil or customary law), or who "ordinarily live or lived together as husband and wife, although not married to each other." Women (and children)

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<sup>155</sup> Interview, Johannesburg, February 17, 1995.

<sup>156</sup> Interview, Cape Town, February 8, 1995.

<sup>157</sup> Interview, Johannesburg, February 15, 1995.

<sup>158</sup> Telephone survey forms of clients, NICRO, Cape Town, February 8, 1995.

<sup>159</sup> Interview, Clerk of the Court, Pretoria Central Magistrates' Court, August 16, 1995.

being abused by a male relation or by a live-in non-male sexual partner must still resort to the more expensive and complicated Supreme Court interdicts.

In the South African context, the exclusion of women who have never lived with their abusers in a "marital" relationship is particularly problematic. There are approximately one million domestic workers in South Africa, or approximately one in every ten employed adults. Of those, the great majority are female and black.<sup>160</sup> Many domestic workers are prohibited from living with men on their employer's property and may never have lived with their partner, but still experience partner abuse. Male migrant workers housed in the single sex hostels maintained by the mining companies also live away from their sexual partners in most cases, and often maintain two relationships: a wife by customary law in the rural areas from which they come, and another partner in a township near the hostel. In neither case may he "ordinarily live" with the woman nor have an officially recognized marriage. Other relationships in which women's safety may be at risk include partners in a lesbian relationship, prostitutes being harassed by a "client," and teenage girls living with their parents.<sup>161</sup> However, it is reported that in some cases — for example, in Pretoria Central Magistrates' Court — magistrates may be prepared to grant interdicts to gay couples, on the basis that the constitution forbids discrimination on the grounds of sexual orientation.

Second, the act does not specify the range of abuse for which a woman may be granted an interdict, leaving it to the individual magistrate to determine whether the abuse qualifies. The act refers to the words "assault or threaten" as well as "any other act." These sweeping provisions allow magistrates overly broad discretion to determine what constitutes abuse. This has resulted in a lack of consistency between various jurisdictions as to what cases will be granted. It is also unclear whether most magistrates would view emotional or psychological harassment, not coupled with physical violence or threats of violence, as abuse. For example, one counselor told Human Rights Watch of a case in which the husband would wake the woman up in the middle of the night holding a kitchen knife above her threateningly, but never actually touch her, causing her great fear.<sup>162</sup> Other

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<sup>160</sup> According to the 1991 population census, a total of 957,092 persons were employed in private households, or just over 10 percent of a total workforce of 9,360,314. Eighty-nine percent of domestic workers are women (compared to 36 percent of the general workforce). South African Institute of Race Relations, *Race Relations Survey 1993/94*, p.457.

<sup>161</sup> Joanne Fedler, "Lawyering Domestic Violence," p.239.

<sup>162</sup> Interview with Sharon Pratt, Family and Marriage Services of South Africa (FAMSA), Cape Town, February 9, 1995.



cases include the killing of the applicant's pet or sending a woman newspaper cuttings on family violence killings.<sup>163</sup> The silence of the act in this regard leaves open the possibility that women who face abuse of this type, that does not involve actual physical harm, would not qualify for protection. The Pretoria Central Magistrates' Court, for example, will not usually grant an interdict if there is only damage to property.<sup>164</sup>

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<sup>163</sup> Brenda Ramsden, "The Prevention of the Family Violence Act and Beyond: Legal Strategies to Deal Comprehensively with Relationship Violence against Women in South Africa," unpublished, May 1994, p.15.

<sup>164</sup> Interview, Clerk of the Court, Pretoria, August 16, 1995.

Third, under the normal rules of civil jurisdiction, the woman must apply to the court having jurisdiction over the respondent. If, for example, a woman has moved away from the joint home, she may well be in another court jurisdiction, perhaps hundreds of kilometers away, placing unnecessary obstacles to an application for an interdict. Service of interdicts by the sheriff's office may also be restricted to certain areas, since not all courts have sheriffs, while the jurisdictional area of other courts is split between several sheriffs' offices. One woman told Human Rights Watch "I specifically asked the sheriff's office to serve the interdict on my husband at work, because I knew if he received it while I was around at home, he would give me a thorough beating. But they told me it was out of their jurisdiction."<sup>165</sup>

Fourth, although the courts may order that the fee for the interdict to be served on the abuser be paid by the state, impoverished women in some areas report long delays in the serving of the interdict as a consequence. In cases where the applicant has been exempted from paying the fee, it appears that some sheriffs do not act until they receive the fee from the Department of Justice.<sup>166</sup> Human Rights Watch heard of cases where women who had been granted an interdict by a magistrate had waited up to six weeks for the sheriff to deliver service, instead of the usual one to two days. Yasmeen, an Indian housewife who had been assaulted regularly since her marriage nine years before, applied for an interdict on January 4, 1995. However, the sheriff's office did not serve the interdict for two weeks because the office was waiting for payment from the state.<sup>167</sup> Until the husband has

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<sup>165</sup> Interview, Johannesburg, February 15, 1995.

<sup>166</sup> The cost depends on the distance from the court to the location where the man is served with the papers. Sheriff's offices charge by the kilometer. There is a different rate for magistrates' court or Supreme Court cases. However, costs vary enormously and can be up to several hundred rands.

<sup>167</sup> Interview, Durban, January 31, 1995.

been served, the interdict cannot take effect. For a woman at risk of violence, the delay may be life-threatening. In some areas, for example Pretoria Central, some magistrates are prepared to circumvent the problems raised by the cost of using a sheriff to serve interdicts by ordering the police to serve the interdict on the respondent instead. This has the advantages both of saving costs and of ensuring that the police are aware of the interdict at the exact moment that it comes into force.

Fifth, the act does not extend protection to workers in shelters or counseling services from whom abused women seek assistance. There have been occasions where the safety of such workers have been threatened although their professional assistance to abused women. Men have been known to issue threats or to trail counselors in order to intimidate them and through them, the partner they are abusing. In cases such as these, there is no expedited protection order that counselors can get in order to protect themselves from the aggression that abusive men deflect to them. For the months of July and August 1994, counselors at the NISAA Institute for Women's Development in Lenasia near Johannesburg were stalked by the husband of one of their clients. They reported that initially they received no assistance from the police.<sup>168</sup> In Johannesburg, a lawyer with People Opposing Women Abuse (POWA) was stalked for two days in 1994. She was also threatened by another husband for "destroying his marriage."<sup>169</sup>

Lastly, some South African lawyers have pointed out that the act is also problematic from the perspective of the abusive husband or partner. They argue that since a final interdict is granted on the basis of an *ex parte* application granted

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<sup>168</sup> Interview, Zubeda Dangor, NISAA, Institute for Women's Development, Johannesburg, February 15, 1995.

<sup>169</sup> Interview, Joanne Fedler, People Opposing Women Abuse (POWA), Johannesburg, February 14, 1995.

without the presence of the accused husband, the act is unconstitutional because it violates the *audi alteram partem* rule, according to which both sides must be heard in any application, denying the abuser due process. Other issues of concern raised include the unspecified duration of the interdict, and the possible eviction of an abusive husband from his property.<sup>170</sup>

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<sup>170</sup> See "The Prevention of Family Violence Act: Innovation or Violation?," *De Rebus*, March 1994, p.212 and "Family Violence Act causes 'Nightmarish' Problems," Fiona Stewart, Letter to the Editor, *De Rebus*, October 1994, p.721.

As far as Human Rights Watch was able to determine, the fears of an abusive husband being evicted from his property appear to be unfounded. Most magistrates appear not to grant applications asking for men to be prohibited from entering the marital home. The National Institute for Crime Prevention and Rehabilitation of Offenders (NICRO) has found that only 2 percent of the interdict applications asking for the eviction of a man from the marital home are granted.<sup>171</sup> In all the cases that Human Rights Watch investigated, it was rather the abused wife or partner that had been forced through intimidation to move out. As regards the need to hear the man's side of the story, the act does provide for the case to be brought back to court if he contests the order: the respondent may, after twenty-four hours' notice to the applicant and the court, apply for the amendment or setting aside of the interdict. The procedure is, in this respect, similar to other urgent court applications (which occur, for example, in a commercial law context) which may initially be made without notice to the respondent. However, in some other countries, restraining orders to prevent domestic violence are issued initially as temporary, and are made final following a hearing.

While some of the limitations of the act can be remedied through legislative action, legal remedies preventing domestic abuse can never on their own eradicate the problem. The interdict will only act as a deterrent to a certain type of abuser. Joanne Fedler of People Opposing Women Abuse (POWA) noted from her experience that there are some abusive husbands who will not hesitate to harm their partners if sufficiently angered, despite the legal penalties: "If a man is intent on harming his wife, the interdict will not stop him. In fact, it may even infuriate him sufficiently to kill her."<sup>172</sup> Rashida Manjoo of the Advice Desk for Abused Woman

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<sup>171</sup> Interview with Jane Keen, National Institute for Crime Prevention and Rehabilitation of Offenders (NICRO), Cape Town, February 8, 1995.

<sup>172</sup> Interview with Joanne Fedler, People Opposing Women Abuse (POWA), Johannesburg, February 14, 1995.

reported a case in which an abusive husband had forced his wife to eat the very interdict granted to protect her.<sup>173</sup>

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<sup>173</sup> Interview with Rashida Manjoo, Legal Adviser, Advice Desk for Abused Women, February 1, 1995.

Whatever the assessment of its provisions, perhaps the most important defect of the Prevention of Family Violence Act is that its protection is largely unavailable in the former homelands, whose own laws remain in effect until repealed or amended by new legislation.<sup>174</sup> Although some police stations and magistrates courts in the former KwaZulu are using the interdict procedure, in KaNgwane, for example, neither police nor magistrates' court officials interviewed by Human Rights Watch had even heard of the act. Millions of South African women are therefore denied the benefits of the new interdict procedure and are effectively barred from other remedies by lack of resources and of access to legal and economic support services. The Department of Justice, however, has drafted legislation, which should be passed by Parliament during 1996, to extend the Prevention of Family Violence Act and other legislation to the whole territory of the Republic of South Africa.<sup>175</sup>

### **Police Ignorance of the Law**

In practice, the greatest problem with implementation of the act appears to lie with the police. Ignorance about the law within the police continues to be prevalent, despite a memorandum issued by the Department of Justice to the police and courts in 1993. One counselor told Human Rights Watch of a case in Soweto in which an abusive husband, who regularly beat his wife, doused the house with gasoline with the intention of locking her in and setting the house on fire. Her screams alerted the attention of the neighbors and eventually the police arrived. She was in possession of an interdict, with the warrant of arrest which would have allowed the police to arrest and charge her husband. However, the police appeared not to know what the interdict was and were unwilling to help. When the

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<sup>174</sup> The former TBVC states, nominally independent from Pretoria, had full legislative competence, and therefore neither the Prevention of Family Violence Act nor any other South African legislation passed after "independence" was of any effect within their borders. The former "self-governing territories" however, had legislative competence only in some areas (listed in a Schedule to the National States Constitution Act No.21 of 1971), and where they did not have legislative competence, South African law applied. It is arguable whether legislation similar to the Prevention of Family Violence Act would or would not have been within the legislative competence of the self-governing territories, and therefore the status of the Prevention of Family Violence Act within the former self-governing territories is ambiguous.

<sup>175</sup> Telephone interview, Department of Justice, September 20, 1995.

organization People Opposing Women Abuse (POWA) complained to the station commander, he reportedly said "Of course they [the police officers sent to the scene] don't know about interdicts, next time send her directly to me."<sup>176</sup>

Initially, there were many reports of police simply warning a man to appear in court, rather than arresting him, if the interdict was violated. While this practice appears to have largely ceased, at least in the main urban areas, serious problems persist regarding lack of knowledge of the correct procedures.

One station commander told Human Rights Watch that although he was personally aware of the act, that "frankly, the way in which this act was publicized through the stations was poor."<sup>177</sup> Another police officer interviewed by Human Rights Watch, while aware of the act, was completely ignorant of the police role. He mistakenly described the interdict procedure as follows:

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<sup>176</sup> Interview with Debbie Brent, shelter administrator, People Opposing Woman Abuse (POWA), February 17, 1995.

<sup>177</sup> Interview with Maj. J. Koobair, station commander, Sydenham police station, Durban, February 2, 1995.



Women who have been beaten by their husbands must get an interdict with the court. When this interdict is violated by the husband, she must go back to the courts again and return to us with a letter from the magistrate before we can do anything. The problem is many women come in here before that without real interdicts.<sup>178</sup>

When his ignorance of the interdict procedure was pointed out to him, he stated:

We have a different type of interdict here [in Alexandra]. Maybe what you are describing happens elsewhere in the country. Over here, we don't even get notified of some laws because we are in a township. So maybe the station commander has not been told of this new law.<sup>179</sup>

In a July 1994 study conducted in Natal by the South African nongovernmental organizations Lawyers for Human Rights and the Advice Desk for Abused Women, paralegals were sent to their area police station to speak with police officers and find out if women were using the Prevention of Family Violence Act, and if the forms were available at the police station.<sup>180</sup> The results of this survey indicated that barely 60 percent of the station commanders were even aware of the year-old act and few stations had the forms available for women to fill out. In only one case had the station commander, who was aware of the act, held lectures for the staff of the station informing them about the provisions of the act.<sup>181</sup>

Clearly, the current procedure for notifying police of new laws is inadequate. Although efforts have been made by police headquarters to ensure that all police staff at all stations are aware of the 1993 act and its provisions, these

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<sup>178</sup> Interview, police officer Nguchane, Alexandra police station, Alexandra, February 17, 1995.

<sup>179</sup> Ibid.

<sup>180</sup> Police stations at the following locations were visited: Chatsworth, Hammarsdale, KwaDabeka (Clermont), Kwamashu, Lamontville, Msinsini, Nagina, Pinetown, Pungashe, Umlazi, Umsinsini, Umzumbe, Vela and one unnamed.

<sup>181</sup> Paralegal report of interview with Captain Martin Marais, station commander, KwaDabeka Police Station, August 5, 1994.

efforts have not resulted in all police knowing the correct procedures. Police response to domestic abuse calls must be standardized. Without this cooperation from the police, the provisions of the new act are meaningless.

#### **Unsympathetic or Hostile Police Attitudes**

Problems with the police extend beyond lack of knowledge of the 1993 act. Women of all races report that they are unwilling to report incidents of domestic violence to the police station due to the widespread impression that the police are often unhelpful and even hostile. Human Rights Watch heard numerous accounts of police indifference to the plight of abused women.

Janet, a white woman who does part-time work, has been abused intermittently by her husband. She stated:

The last time in December [1994], he fractured my nose by hitting me with a pipe and tried to rape me in front of our child. But I didn't bother to go to the police because they won't do anything. I'm filing for a divorce.<sup>182</sup>

Molly, a coloured housewife, married for eighteen years, was granted an interdict because her husband regularly became violent when he was drunk. She told Human Rights Watch,

My husband beats me when he is drunk. I always call the police — they come and warn my husband. But then they say that they can't do anything more because it is a domestic affair and leave. I did get an interdict, but I think my husband destroyed it.<sup>183</sup>

Sally, a coloured woman and a housewife married for sixteen years has been regularly abused by her husband, who has been convicted for armed robbery in the past. "At first," she said,

I thought that it was part of the marriage. My husband comes home drunk all the time and abuses me. Many times, he has forced me to have sex with him. He threatens me with his gun if

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<sup>182</sup> Interview, Durban, February 3, 1995.

<sup>183</sup> Interview, Durban, February 3, 1995.

I do not give him oral sex. I am now hiding at my mother's house. I am too scared to get an interdict. What will the police do? Nothing.<sup>184</sup>

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<sup>184</sup> Interview, Durban, January 31, 1995.

Pumla Ngewu, a counselor at the Cape Town-based organization Ilitha Labantu noted that in Guguletu township the police were completely unhelpful except for one officer: "When Sergeant Adonis is there, the women who go in are helped. Otherwise, they face problems."<sup>185</sup>

Women who are the partners of police officers or their friends find it impossible to get help from the police. According to information collected by the Advice Desk for Abused Women, abused partners of police officers cannot seek assistance from the police. "Police husbands, from captain to major, are armed and feel they are a law unto themselves," noted Anshu Padayachee of the Advice Desk for Abused Women:

There have been a number of cases in which women have been driven to suicide. There was one case in which a woman married to a policeman complained to her husband's senior. He would not believe her because the man is a good policeman. Around November 1994, she shot herself.<sup>186</sup>

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<sup>185</sup> Interview with Pumla Ngewu, counselor, Ilitha LaBantu, Guguletu, February 8, 1995.

<sup>186</sup> Interview Anchu Padayachee, Advice Desk for Abused Women, February 1, 1995.

In another case, a battered woman who had been married for three months to a police officer shot herself in December 1994. She had reported the violence to the station commander who had reportedly told her that "she mustn't worry about it."<sup>187</sup> Jane, an African woman married to a police officer, tried to charge her husband for assault and file for a divorce. However, her papers have been lost. She believes that the delay is due to the fact that the files have been destroyed by friends of her husband at the court.<sup>188</sup> Laila, an Indian woman, married for thirty-five years, told Human Rights Watch that she has been unable to get help from the police. "He beats me sometimes until I am bruised all over. I have an interdict, but the police are not helpful. My husband is friends with the station commander. I don't think that I could ever get assistance from the police."<sup>189</sup> Another battered woman reported that the police refused to help her and instead admonished her by saying "how could you do this to your husband," a traffic policeman.<sup>190</sup>

"Police culture works against women," noted a counselor at Rape Crisis, "the attitudes and assumptions that the police have about women undermine the proper functioning of the law."<sup>191</sup> These attitudes were expressed quite blatantly in a number of interviews conducted by paralegals for Lawyers for Human Rights and the Advice Desk for Abused Women in 1994. Police station commanders expressed outright hostility when informed of the provisions of the Prevention of Family Violence Act.<sup>192</sup> Sergeant Gwamanda, a female police officer from the station at Hammarsdale, acknowledged that she had not heard about the act. After being shown a copy of the government gazette, she reportedly added that the act would "make wives be rude to their husbands and cases of divorce will be more if

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<sup>187</sup> Ibid.

<sup>188</sup> Interview, Durban, January 31, 1995.

<sup>189</sup> Interview, Durban, February 3, 1995.

<sup>190</sup> Interview with Debbie Brent, shelter administrator, People Opposing Woman Abuse (POWA), February 17, 1995.

<sup>191</sup> Interview with Denise Washkansky, counselor, Rape Crisis, Cape Town, February 10, 1995.

<sup>192</sup> Paralegal reports submitted to Lawyers for Human Rights and the Advice Desk for Abused Women, 1994.

women know about that gazette."<sup>193</sup> At Umlazi police station the station commander, who admitted ignorance of the act, refused to read the law on the grounds that "he had not time to look at such forms."<sup>194</sup>

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<sup>193</sup> Paralegal report of interview with Sergeant Gwamanda, Hammarisdale station commander, KwaDabeka Police Station, July 26, 1994.

<sup>194</sup> Paralegal report of interview with station commander, Umlazi police station, July 27, 1994.

One counselor at the Advice Desk for Abused Women reported the experience of one of her clients seeking an interdict against her boyfriend. The abused woman was discouraged from filing the application by a police officer at the Sydenham Police Station who told her not to "waste her time with those people [the Advice Desk for Abused Women] and to return to her husband."<sup>195</sup> In one 1994 interdict case in Mamelodi, a Pretoria township, the station commander called a lawyer who had assisted a woman to file for divorce and obtain an interdict, and informed her that the woman wished to withdraw the interdict and divorce proceedings. When the lawyer contacted the woman, she found that the station commander had visited the woman and her husband at home and urged her to reconcile with her husband, and that she had been too frightened to state to the police officer that she wanted to continue with the legal action.<sup>196</sup> At the Lenasia police station, in an Indian township near Johannesburg, an information flyer for abused women distributed by the NISAA Institute for Women's Development was anonymously removed from the bulletin board. In December 1994, when a NISAA representative went to the same police station after receiving a telephone call from an abused woman, the police officer behind the charge desk, S. B. Naidoo, reportedly said, "Here come those anti-male women again." When confronted, officer Naidoo said threateningly, "This is a police station. If you don't talk quietly, we will lock you up."<sup>197</sup>

In other cases, widespread police corruption may obstruct the obstacles of the act. Paralegals from rural areas attending a workshop on the procedures for obtaining an interdict expressed as their major cause for skepticism their belief that any man on whom an interdict was served would simply bribe the police not to arrest him if he violated it. Alternatively, the police may refuse to act in family violence cases without approval from the local chief.<sup>198</sup>

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<sup>195</sup> Interview with Counselor, Advice Desk for Abused Women, Durban, February 1, 1995. Commendably, the station commander Col. P. Naidoo expressed concern upon receiving a complaint from the Advice Desk and asked for the woman concerned to meet with him directly in the future.

<sup>196</sup> Interview, Louise Du Plessis, Attorney, Pretoria, August 16, 1995.

<sup>197</sup> Interview, Zubeda Dangor, NISAA, Institute for Women's Development, Johannesburg, February 15, 1995.

<sup>198</sup> Interviews, paralegal workshop organized by the National Institute for Public Interest Law and Research, Pretoria, August 11, 1995.

Women living in townships report that the Prevention of Family Violence Act has had only a limited impact on their lives. Police delays in responding to domestic violence calls are standard. In Alexandra, one woman told Human Rights Watch that delays of up to twenty-four hours were not uncommon.<sup>199</sup> Another woman spoke of her experience with the police:

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<sup>199</sup> Interview, Alexandra Community Center, Alexandra, February 17, 1995.



I called them to stop my husband from beating me. I had an interdict so they could arrest them. It took the police one hour to come to my house. By that time, my husband had left. I told the police where my husband had gone. But they were unwilling to go there and arrest him.<sup>200</sup>

Frequently, women are told that they must wait for a police vehicle to become available before the police will come to stop the abuse.

Women fleeing abuse can find that the police may not only be unhelpful, but even place them in greater danger by believing the man's word over the woman's. In March 1994, an abusive husband followed his daughter and found the place where his wife and children were living, in a shelter for battered women. Upon seeing the husband, the wife — who had an interdict — called the police in fear. The police arrived, but refused to take any action against the husband, stating that it was a domestic affair. When they left, the police took the interdict with them, leaving the woman not only at risk of harm from her abusive spouse, but without the proof of the legal protection to which she was entitled. Any deterrent effect that the interdict may have had was destroyed by the failure of the law enforcement authorities to act. The interdict was not returned until the organization People Opposing Women Abuse (POWA) contacted a magistrate. By that time, any confidence that the woman might have had that the interdict would provide her with protection was gone.<sup>201</sup> In another case, a husband repeatedly harassed his estranged wife. Although the wife had an interdict, when she called the police the husband would tell the police that he had come to see his children. The police

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<sup>200</sup> Interview, Capetown, February 8, 1995.

<sup>201</sup> Interview with Debbie Brent, shelter administrator, People Opposing Woman Abuse (POWA), February 17, 1995.

would then leave, telling the wife that "he has rights to the children."<sup>202</sup> On October 5, 1995, a woman was assaulted by her drunk husband late at night. When the police arrived at the home, one hour after being called, they told the woman that they could not do anything and told them to go to sleep. After the police left, the husband assaulted the woman again, very badly, and also assaulted her mother, who is in a wheelchair.<sup>203</sup>

In a particularly egregious case in June 1994, the South African police brought an abusive husband to a battered women's shelter in Durban and threatened to break in on behalf of the husband who claimed that his wife had been abducted by the Advice Desk for Abused Women. The incident occurred at approximately 5:30 p.m. when a police officer from Sydenham police station, accompanied by the abusive husband, demanded entry into the shelter on the grounds that a "missing person" report had been filed by the woman's husband. The abused wife had previously sought and been granted an interdict following two years of abuse from her husband. It had taken a great deal of courage on the part of the woman to file the interdict and to leave her husband, who in the past had threatened her children and family members if she left.

The shelter staff-person informed the police of the situation and the fact that an interdict had been issued. The police officer refused to listen or to give the name of his superior, but insisted that the door be opened in order for the husband to retrieve his wife. When the door was not opened, the police officer left threatening to return. At 11:00 p.m. three detectives from Sydenham police station returned and insisted that the shelter be opened to allow the husband to speak with his wife to reassure him that she was not being held against her will. The police became abusive and threatened to break the door and to arrest the shelter staff-person.

The women, in the meantime, had locked herself in her bedroom upstairs fearing that her husband and the police would forcibly remove her from the shelter and return her to her abusive husband. The woman agreed that she would go to the police station in the morning, but was terrified of going outside to speak with

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<sup>202</sup> Ibid.

<sup>203</sup> Interview, Louise Du Plessis, Attorney, Pretoria, October 6, 1995.

anyone in the dark while her husband was standing nearby. The shelter staff-person later noted that the police were

totally insensitive to the abuse the woman had suffered and her fear. In fact, in choosing to believe the husband (who had been served with an interdict that morning), they sent a strong message to her that the police, like so many other members of society, are going to take the man's word and treat the women's rights as ancillary.<sup>204</sup>

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<sup>204</sup> Letter from Susan Garvey, shelter staff-person to Station Commander, Sydenham Police Station, Domerton, June 20, 1994.

In their defense, the police blame factors beyond their control for the problems in implementing the act. One (white) police commander expressed the opinion that the success of the act was limited both because of the reluctance of the black community to pursue legal remedies and because in his area the housing shortage deterred women from pursuing any legal action against an abusive spouse.<sup>205</sup> The station commander of Umsinsini station in the Umzumbe area noted that in rural areas such as his, that the lack of telephones for battered women to call for help was a problem.<sup>206</sup> The station commander at Sydenham police station explained that, although his police station received approximately one report of rape a week and daily cases of domestic abuse, "We are unwilling to go further, because we are untrained in this area and not sure of what to do."<sup>207</sup>

There are initiatives to improve police response to domestic violence cases. At Sunnyside police station in Pretoria, for example, the first specialized unit in the country was established in January 1995 to deal with cases of violence against women. The Trauma Centre was the initiative of one police detective, Sergeant Bets Fourie, and is staffed by three women detectives, who are called to handle all cases of rape, sexual abuses or domestic violence that come to the police station. While they attempt in the first instance to mediate a dispute, the detectives are aware of and sympathetic to the legislation and refer women to the court to obtain an interdict in appropriate cases, as well as to support services available from the state or nongovernmental organizations. A training session on "victim care" for

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<sup>205</sup> Paralegal report of interview with Captain Martin Marais, station commander, KwaDabeka Police Station, August 5, 1994.

<sup>206</sup> Paralegal report of interview with Warrant Officer C.J. van Vuuren, Umsinsini police station, July 11, 1994.

<sup>207</sup> Interview with Maj. J. Koobair, station commander, Sydenham police station, Durban, February 2, 1995.

uniformed officers at the station was also organized in conjunction with the local branch of the National Institute for Crime Prevention and Rehabilitation of Offenders (NICRO).

Despite initiatives of this type, police stations elsewhere will continue to dismiss the issue of domestic violence until there is standardized training nationally for both uniformed and investigative branches of the police both at entry level and on an ongoing basis. Resources must be devoted to ensuring that police understand that domestic violence in a home is a community issue of priority that must not be condoned by the police in any way.

### **Impediments within the Judicial System**

While the interdict application procedure is simplified and expedited, by comparison to other available court procedures, for some women the distance to the nearest court that issues interdicts is a deterrent. Due to jurisdictional rules only courts with civil jurisdiction can issue interdicts. As a result, some women are forced to travel long distances to a civil court in order to obtain an interdict. For example, in the KwaZulu-Natal province, women living in the Amanzimtoti area, a predominantly white and Indian area, have to travel approximately fifty kilometers to Durban. Women living in Wentworth, a coloured area, have to travel approximately 30 kilometers to Durban to obtain protection. In other cases, courts which do have civil jurisdiction have refused to issue interdicts, such as the Umlazi court forcing women to travel approximately forty kilometers to Durban.<sup>208</sup> In August 1995, the Mamelodi magistrates court still would not issue interdicts, and women from the township had to travel to Pretoria North, frequently trying both Mamelodi and Pretoria Central courts before finally receiving attention. In 1995, women's organizations in Phoenix and Newlands, Kwa-Zulu Natal province, lobbied successfully for the criminal court in their areas to have jurisdiction to grant interdicts.<sup>209</sup> Similar steps must be taken in other areas of the country to increase women's access to the interdict procedure if it is to be effective.

The role of the court clerk who handles interdict cases is crucial to the whole procedure. Since many women are not represented by lawyers, it will be the clerk who draws up their affidavit and explains the procedure to them. While in

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<sup>208</sup> Interview, Rashida Manjoo, Legal Advisor, Advice Desk for Abused Women, Durban, January 31, 1995.

<sup>209</sup> Ibid., August 27, 1995.

some cases court clerks are well-informed and sympathetic — in Pretoria Central, for example, the clerk interviewed by Human Rights Watch had taken it upon himself to send copies of the legislation to all the local police stations. If he learned of problems with police action in response to an interdict, he would intervene directly to ensure they acted correctly in future.<sup>210</sup> In other instances, women have complained about the manner in which they are treated by the clerks. Court clerks have not received any special training in handling applications for interdicts under the act, and therefore it is entirely up to the individual to inform him or herself about the way in which the legislation works and the issues at stake.

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<sup>210</sup> Interview, clerk of the court, Pretoria, August 16, 1995.

The duty of court clerks is to distribute the correct forms to abused women and assist them in completing them — and nothing more. It is not their job to determine the merit of the application or to vet women before handing them a form.

However, there have been a number of cases in which court clerks have refused to give women the forms to file an interdict because "I can't see any bruises," "you aren't married" or "he's not beating you at the moment."<sup>211</sup> The prevalence of this occurrence at the Durban magistrates court prompted the Advice Desk for Abused Women to complain to the deputy attorney-general in the province in January 1995.<sup>212</sup> In some courts, the clerks are not even aware of the existence of the law. One paralegal discovered that the court clerk at the Umzumbe magistrates court had not heard of the act one year after its passage.<sup>213</sup>

Once an interdict is violated, prosecutors have wide discretion as to whether or not to prosecute. As in the case of criminal charges of assault arising when there is no interdict, women may be pressured into dropping charges or prosecutors may encourage them to do so. One prosecutor interviewed by Human Rights Watch noted that her court received approximately five to six applications for interdicts a day. Many of those applications were later withdrawn because of threats by abusive partners to withhold financial support. Similarly, many charges against men who had violated the interdict were withdrawn on the request of the abused woman.

Prior to April 1994, when the interim constitution came into effect, the burden of proof was on a criminal suspect to demonstrate why bail should be granted. Under the bill of rights incorporated in the interim constitution, this burden of proof is reversed, so that the state must show why a suspect should not be granted bail. Especially given South Africa's past history of extensive use of detention without trial, this is an important right. However, prosecutors have not yet adapted to the new order, nor have they been trained to do so, by preparing arguments why bail should be refused in cases where individuals may be put at risk if a suspect is released. Excessive case loads and inexperienced police and

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<sup>211</sup> Interviews with counselors, the Advice Desk for Abused Women, Durban, January 31, 1995.

<sup>212</sup> Letter from Yasmin Bacus, Coordinator, Advice Desk for Abused Women to the deputy attorney-general, Durban Magistrates Court, January 11, 1995.

<sup>213</sup> Paralegal Report of Interview with court clerk Mr. Gwala, Umzumbe magistrates court, July 27, 1994.

prosecutors mean that inadequate background research is done before a bail case is heard. In some domestic assault cases, men with a history of violent assault are therefore being granted bail, sometimes without opposition, thus placing their partners in danger. In September 1995, new legislation governing bail was passed by parliament which returned the burden of proof to the accused to show why bail should be granted in cases of serious assault.

Although the act provides that the police may not unconditionally release a man who violates an interdict and that he must make a court application to be released on bail, there have been a number of cases in which the police act unilaterally. In one case reported to Human Rights Watch, a man was released by police after violating an interdict on Friday. He was scheduled to appear in court on Monday and be charged. Upon being released, he sought out his partner and beat her up, resulting in a second violation of an interdict. By the time he appeared in court on Monday, he was facing two counts of assault.<sup>214</sup> In another July 1994 case, the husband of a teacher was arrested for violating the interdict after he stabbed his wife. He was released immediately by the police, and later stabbed his wife six times as she got off a bus.<sup>215</sup> Magistrates report that the police release men in these circumstances quite frequently, despite the provisions of the act that explicitly preclude them from doing so.<sup>216</sup> While the right to bail must be protected, the police must be aware that they do not have the power to unilaterally release an individual arrested for violating an interdict, prosecutors must be given guidelines to oppose bail in cases in which there is a risk of further violent assault, and magistrates must be trained to realize the implications for the safety of the woman. Where bail is granted by a magistrate, appropriate conditions must be imposed, including the barring of the individual from the common home.

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<sup>214</sup> Interview with prosecutor (name withheld on request), Durban, February 3, 1995.

<sup>215</sup> Group interview with officials from the Advice Desk for Abused Women, Durban, February 1, 1995.

<sup>216</sup> Minutes of a meeting held at Cape Town Magistrates' Court, February 10, 1995.



The act does not make any specific provision for judges and magistrates to make any order as to costs, which means that women generally have to pay their own expenses in applying for an interdict.

### **Inadequate and Uncoordinated Government Services**

One of the major obstacles to a woman seeking to leave an abusive relationship is economic dependence on the man, and the lack of any available accommodation other than the shared home. All the women interviewed for a 1992 study of twenty-five women who had used a Cape Town shelter for battered women stated that their major reason for not leaving earlier was having no alternative.<sup>217</sup> Tamina, an Indian housewife, echoed the dilemma of other abused women when she said to Human Rights Watch, "I am treated very shabbily. He comes home very late at night and uses foul language against me. He has thrown his shoes at me and has hit me with a belt and broomstick. But I am still with my husband because I have nowhere to go."<sup>218</sup> There are only a few privately-run shelters catering for abused women nationally, and all are based in urban areas. According to the RDP office, no shelters receive state funding.<sup>219</sup>

In addition, there is a lack of cooperation between various government services, such as police, courts, social welfare and health. According to Anshu Padayachee of the Advice Desk for Abused Women:

Abused women need many diverse services: emergency shelter, medical care, protection, financial assistance and counseling services. One agency alone cannot offer all these services, therefore it is imperative that services are well coordinated and that the various professionals understand how other agencies view the problem and deal with it. ... Today, women in South Africa are experiencing great difficulty in securing adequate treatment ... the lack of collaboration between agencies results in

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<sup>217</sup> Teresa Angless, "Violence Against Women: Battered Women Seeking Solutions," Paper presented to the Criminological Association of South Africa International Conference, September 2-3, 1993.

<sup>218</sup> Interview, Durban, February 1, 1995.

<sup>219</sup> RDP Office, *Beijing Conference Report*, p.46.

services for abused women being prone to fragmentation, discontinuity and inaccessibility.<sup>220</sup>

Joanne Fedler, a lawyer with People Opposing Women Abuse (POWA) has noted:

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<sup>220</sup> Anshu Padayachee, "Inter-Agency Liaison: A Problem in the Treatment and Prevention of Wife Abuse," *Acta Criminologica*, vol. 5, no. 1, 1992, pp.66-67.

Battered women do not need the law's sympathy. Nor do they need to become the symbol of the extent to which a particular government cares for the disempowered. They need safety. They need maintenance. They need a roof over their heads. They need work. They need legal advice that is responsive to the unique circumstances in which they find themselves. A commitment to ending violence in the home must deliver to women the means of survival. Only then will legislative improvements to the Prevention of Family Violence Act be a measure of the extent to which women's lives are valued.<sup>221</sup>

Any attempt to address domestic violence requires an approach which takes into consideration the structural and social factors that place women at risk. The haphazard and often inadequate treatment that abused women experience contributes to their reluctance to seek government assistance and results in women returning to face more abuse because of a lack of viable options.

Yet government services for abused women are currently virtually non-existent. Where there are initiatives, they are often not effectively utilized. The Legal Aid Board, for example, an independently structured body administering public funds provided for the provision of legal assistance in criminal and civil cases, has for the first time allocated R.10 million (U.S.\$2.85 million) in its 1995/96 budget to the provision of legal services for women. However, although women apply for and are granted legal assistance from general funds, none of this specially earmarked money has yet been spent nor have there been effective efforts to make its availability known to nongovernmental organizations or lawyers who might make use of it. Government assistance to battered women can only succeed through a concerted and coordinated effort on the part of a number of different departments, particularly the Departments of Justice, Health, Welfare, and Safety and Security. There is a need for agreed strategies for response and referral at national level, coupled with directed funding to provide shelters, welfare payments, health services, legal assistance, counseling services and education for survivors of abuse. Public education campaigns on the evils of domestic violence should be aimed at victims, perpetrators, practitioners and witnesses.

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<sup>221</sup> Joanne Fedler, "Lawyering Domestic Violence," p.33, pre-publication draft.

Efforts have been recently made to establish practical coordination between government departments and nongovernmental organizations. A "joint interim committee on women abuse," bringing together nongovernmental organizations and several government departments, including health and welfare, was set up following a September 1994 conference on domestic violence. The committee will run a further national conference on women abuse in November 1995, with the aim of ensuring that national and provincial networks of organizations working with abused women are established for the future. In addition, there are initiatives to develop a comic strip and radio and television programs in several languages on the subject of domestic violence. November 25, 1995, the International Day of No Violence Against Women has also been adopted for the first time in South Africa.

**THE STATE RESPONSE TO RAPE AND SEXUAL ASSAULT**

I was raped in October 1994. I was in my boyfriend's apartment cooking. His roommate and I were there alone. His roommate came from behind into the kitchen and attacked me. He dragged me to the bedroom. He raped me. I screamed and struggled. I scratched him until he had marks all over his face. There was blood everywhere. All the time, he was threatening to kill me. Then he picked up a knife and told me he would kill me if I told anyone. I was so scared he was going to kill me, I threw myself out of the window. I fell three floors to the ground. My pelvis and spine were broken. See these scars on my legs, they are from the broken glass of the window. I was hospitalized and then in a wheelchair for three months. Even now, I have to wear this medical corset to support my spine and I can't stand for long. I don't have a job any more because I cannot travel anywhere. I still get dreams about the rape. I have two children I have to support. I reported the case to the police. I told them I know the man and that he had scratches on his face. But the police have done nothing. I even see him around here every once in a while. What's the use of going back?<sup>222</sup>

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<sup>222</sup> Interview, Alexandra, February 17, 1995.

Rape is defined in South Africa as intentional, unlawful sexual intercourse with a woman without her consent. The essential elements are *mens rea* (intent); unlawfulness; sexual intercourse with a woman; absence of consent. The law only applies between a man and woman and there must be penetration of the penis into the vagina. Acts of forced oral sex or sodomy, or penetration by foreign objects such as bottles or sticks, are not considered rape, but are criminalized under indecent assault.<sup>223</sup> This narrow definition of rape has been criticized by South African women's organizations because the law does not recognize as rape any forced sexual act which does not include penetration by a penis; because only a woman or girl may be raped; and because consent, and not coercion, is the standard used.<sup>224</sup>

While the number of rapes reported is only a fraction of the total, the number of prosecutions is even smaller. Less than one third of reported rapes reach the courts. Of those cases prosecuted, only half — that is, less than 15 percent of the reported cases — result in convictions. By contrast, more than two thirds of prosecutions for aggravated assault are successful. Of the 27,056 reported rape and attempted rape incidents in 1993, only 8,998 (33.3 percent) were prosecuted. Of those 8,990 cases brought to court, 4,753 (52.8 percent, or 17.6 percent of the total) resulted in convictions.<sup>225</sup> During the period July 1993 to June 1994, a total of 8,553 rape cases were prosecuted, and 4,311 convictions were secured.<sup>226</sup>

The South African legal system is rife with assumptions and biases against women who have been raped. Riana Taylor, a criminologist who works with the Advice Desk for Abused Women, noted that the role of the courts in rape cases is "absolutely frightful at the moment." She added:

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<sup>223</sup> Kathryn Ross, "An examination of South African rape law," in *Women, Rape and Violence in South Africa* (Cape Town: Community Law Centre, 1993), p.8.

<sup>224</sup> *Ibid.*, pp.11-12. Rape is the only crime in which the behavior of the victim is considered relevant to the guilt of the perpetrator.

<sup>225</sup> Sharon Stanton and Margot Lochrenberg, *Justice for Sexual Assault Survivors?* (Cape Town: University of Cape Town Institute of Criminology, Rape Crisis and Lawyers for Human Rights, October 1994), p.1.

<sup>226</sup> "Convictions for rape or attempted rape for the 12-month period 1 July 1993 to 30 June 1994," table supplied by the Human Sciences Research Council, 1995.

In order to prosecute for rape, a woman must deal with the district surgeon [i.e. a government doctor], the prosecutor and the judge. With all three, there are potential problems.<sup>227</sup>

### **The Police**

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<sup>227</sup> Interview with Riana Taylor, Criminologist, Advice Desk for Abused Women, Durban, January 31, 1995.

The detectives made it into a small thing, but for me it was my life. I tried to commit suicide a few months after it happened. I just felt nothing was being done.<sup>228</sup>

Widespread reports of police mistreatment of rape survivors contributes to the low percentage of reported rapes. Raped women frequently have to relate their experience over the counter to busy, indifferent and often judgmental police officers in a crowded charge office. Even where guidelines exist relating to interviewing in private by a female officer, these guidelines may not be followed. Police officers often subscribe to stereotypes of raped women, and women who do not fit those assumptions have to convince the police that they have been raped. These commonly held beliefs about rape victims include the assumption that rape is a "natural" masculine response in a situation where a woman does not say "no" clearly enough and that the woman must have done something to provoke such an attack.<sup>229</sup> For example, women face greater difficulty in filing rape charges if they did not resist physically, did not sustain serious injuries, do not act sufficiently distressed, dated the perpetrator, dressed "provocatively" or are prostitutes.

Cynthia, who was raped by someone she knew, described her experience with police as

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<sup>228</sup> Anonymous rape survivor, *Weekend Argus* (Cape Town), October 3, 1992, as quoted in Desirée Hansson "The first rape court and the legal recognition of Rape Trauma Syndrome," *Agenda*, No.16, 1993.

<sup>229</sup> Lloyd Vogelmann and Gillian Eagle, "Overcoming Endemic Violence," *Social Justice*, vol. 18, nos 1-2 at 212.



humiliating, and worse than the rape itself. I felt dehumanised at the way I was treated. The police officers lacked sensitivity in dealing with my trauma. Instead, they joked openly about what happened to me, and I felt as though I was the perpetrator rather than the victim.<sup>230</sup>

Mary, a rape survivor in Johannesburg, told Human Rights Watch, "I went in to report my rape at the police station in Lenasia. The police were laughing at me."<sup>231</sup> Another woman recounted her experience:

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<sup>230</sup> "Silence Condone Rape," *New Nation*, January 20, 1995, p.5.

<sup>231</sup> Interview, Lenasia, Johannesburg, February 15, 1995.

I was beaten by my boyfriend, who is unemployed. One day in February [1995] he beat me so badly and raped me that I couldn't walk. My face was swollen from all the beating and I had to have eight stitches on the back of my head. I went to the police, and told them where to find him. The police told me that they will have nothing to do with the case because he is my boyfriend.<sup>232</sup>

Riana Taylor, a criminologist with the Durban-based Advice Desk for Abused Women, related some of the experiences she had witnessed in assisting raped women to prosecute the offenders:

A woman was raped at Sea Cow Lake. She reported it to Greenwood Park Police Station. All the procedures were followed correctly and the case went to trial. The day of the trial the investigating officer arrived approximately two hours late to court. It then turned out that he had lost the "docket" for the case which he had to hand over to the court. Valuable evidence was lost as a result. Statements from the rape survivor and other witnesses also had to be taken again — approximately nine months after the rape. As a result of the time delay, some witnesses could not be traced and some witnesses could not remember certain details. The accused was acquitted.<sup>233</sup>

In another case, she noted that:

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<sup>232</sup> Interview, Cape Town, February 8, 1995.

<sup>233</sup> Interview with Riana Taylor, Criminologist, Advice Desk for Abused Women, Durban, January 31, 1995.

A woman was raped in Newlands East in her home by a family friend. She followed the correct procedure and called the police immediately. Statements were taken and she was taken to a district surgeon. The case went to trial. The investigating officer was called in to testify as to the scene of the crime. He gave the wrong information in terms of essential technical detail. It also became clear in court that he overlooked important aspects of the crime during his investigation. As a result, the evidence presented to the court was pretty flimsy. The accused was acquitted.<sup>234</sup>

A counselor with the organization People Opposing Women Abuse (POWA) in Johannesburg, cited similar experiences. In June 1994, a woman was gang raped by eleven men who broke into her room, abducted and raped her. The trauma which the woman suffered caused her to lose her ability to function normally and eventually she lost her job. Her case was called three times, but all three times, she found herself unable to give evidence. Her case was transferred by the Kliptown police to Protea police station (both in Soweto) but was subsequently lost. Because the docket was lost, all the arrested suspects were released on bail and the case has not been pursued. Since that time, the police have notified the woman that she must come down to the station and make a second statement.<sup>235</sup>

Corruption is also a significant problem across the South African Police Service. In one case reported in Mamelodi, outside Pretoria, a girl child of twelve or thirteen was raped by one of her male relatives. When the police Child Protection Unit was called by the mother, they were bribed to drop the case. The girl was left to stay in the same household.<sup>236</sup>

As in other areas of South African life, deeply ingrained racial and sexist stereotypes work particularly against black women. Sharon Pratt of Family and Marriage Services of South Africa (FAMSA), noted that "If a woman calls from Constantia [a predominantly white area], the treatment is fine. But if she calls from

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<sup>234</sup> Ibid.

<sup>235</sup> Interview with Lulu Ngcephe, social worker, People Opposing Women Abuse (POWA), Johannesburg, February 17, 1995.

<sup>236</sup> Interview, Louise Du Plessis, Attorney, Pretoria, August 16, 1995.

one of the black or coloured townships, there is a breakdown of services."<sup>237</sup> One station commander told Human Rights Watch that he believed that many of the African women coming in to the police station were fabricating reports of rape in order to get access to an abortion after becoming pregnant by their boyfriends.<sup>238</sup>

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<sup>237</sup> Interview with Sharon Pratt, Family and Marriage Services of South Africa (FAMSA), Cape Town, February 9, 1995.

<sup>238</sup> Interview with Maj. J. Koobair, Sydenham police station, Durban, February 2, 1995.

There are numerous reports by women's organizations of police behind the desk who are unaware of the procedures to follow when a rape is reported. A spot survey conducted by the Human Rights Committee of South Africa, a nongovernmental organization monitoring violence and state repression, asking police officers what they would do with a complaint of rape found that 90 percent of the police officers said they did not know.<sup>239</sup> In June 1994 a sixteen-year-old who was abducted and gang-raped went to the KwaMashu police station at 4:00 P.M. to report the incident. The police officer behind the desk sent her home telling her it was too late to find a doctor to examine her. She went home and had a bath. By the next day, much of the evidence of the rape was gone.<sup>240</sup>

Some women's organizations point for the need for more women police. At the moment, approximately 15 percent of the police force is female, few of them in positions of command. Others point out that it is not just a matter of gender and that "a trained male officer can be better than an untrained female officer."<sup>241</sup> Lisa Vetten of People Opposing Women Abuse (POWA) noted:

It is a matter of the police commissioners making this an issue a priority. If they would do that, then you would not have police being rude to rape survivors or sloppy police investigations. Rape survivors are frequently being told that there are no police

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<sup>239</sup> Interview with Linda McClean, Human Rights Committee, Durban, February 3, 1995; Human Rights Committee *Natal Overview*, October 1994.

<sup>240</sup> Interview with Riana Taylor, Criminologist, Advice Desk for Abused Women, Durban, January 31, 1995.

<sup>241</sup> *Ibid.*

vehicles available to transport them from the station to the district surgeon for a medical examination. They sometimes wait hours. However, when a drunk driver needs to be transported to the district surgeon, that is done immediately. It is an issue of priority.<sup>242</sup>

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<sup>242</sup> Interview, Lisa Vetten, People Opposing Women Abuse, Johannesburg, February 15, 1995.

At national level efforts have been made to address these deficiencies.<sup>243</sup> As early as 1986, a "field unit" to deal with rape investigations was set up within the Northern Transvaal Murder and Robbery Unit, covering thirty-three police stations. However, the unit dealt mostly with white victims. After the publication of a report on the rape unit by the government-funded think-tank the Human Sciences Research Council in 1990, all provincial police commissioners were recommended to establish similar rape units, benefiting from the experience of the Northern Transvaal, although not all in fact did so. Finally, in 1993, a process was initiated to establish a specialist course for all police officers involved in investigating rape cases, and a curriculum was developed over the next two years in cooperation with nongovernmental organizations working in the field of rape counseling. In February 1995, a national training session was held for police training officers, and it is intended that training sessions will be run by the training officers on a provincial basis for approximately 2,000 detectives who will specialize in sexual assault cases. Promotion exams, that must be passed before a police officer can move to a higher rank, also now include materials on dealing with rape and sexual assault. Basic training for all police recruits has also been redesigned to include a new emphasis on human rights and victim support. In addition, uniformed police may benefit from training sessions put together on an ad hoc basis by local women's organizations or on the initiative of provincial ministries for safety and security.

As part of their basic training, uniformed police officers on patrol are now instructed, if they are the first to arrive at a rape scene, only to make the victim safe, secure the scene of the crime, get a basic description of the perpetrator and call the specialist investigation unit. Detective officers who have been trained in sexual assault cases will then conduct any questioning of the victim and take the case further. In another initiative, several police stations where large numbers of rapes are reported have also been issued, on a trial basis, with "victim care packages." These packages are for women who report rape to use after they have been medically examined: they include personal hygiene products, a sanitary towel, and clean underwear (since underwear will usually be taken by the police for forensic

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<sup>243</sup> Many of these efforts have been initiated by Captain Sharon Schutte, of Murder and Robbery Headquarters, by whom this information was supplied. Interview, Pretoria, August 8, 1995.

testing). One way glass screens have been installed in about a dozen police stations in the larger urban centers, so that rape survivors may identify a perpetrator without coming face to face with him, and it is intended that they will be installed in other stations as resources allow.

Trauma centers for rape survivors have been established in a handful of locations, on the initiative of the police or community groups. They exist or are proposed in Newcastle (KwaZulu-Natal), Port Elizabeth and Kimberley. In Sunnyside police station in Pretoria, trained female detectives are called to deal with all cases of reported sexual assault. Another effort in Hillbrow (Central Johannesburg) has unfortunately been significantly scaled back. These initiatives have yet to lead to a unified national system to provide proper service by the police to women survivors of sexual violence.

### **District Surgeons**

If a woman who has been raped wishes to lay charges, she must be examined by a doctor to obtain medical evidence for legal proceedings. Women can either be attended by a private practitioner or by a government district surgeon.

The Department of Health is responsible for employing full and part-time district surgeons, amongst whose duties is the examination of women who have lodged rape complaints with the police.<sup>244</sup> The police will issue the rape survivor with a form (the "J88 Form"), which she takes to the district surgeon to fill in after conducting an examination. A district surgeon is only responsible for gathering medical evidence to confirm the rape, and is not tasked with providing any medical treatment. Examinations may be conducted either at the consulting rooms of the district surgeon or at a provincial hospital.<sup>245</sup> If a pregnancy follows from the rape, the district surgeon or other medical practitioner is required to issue a certificate

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<sup>244</sup> District surgeons are also responsible for autopsies, drunk driving tests, carrying out (legal) abortions for rape victims and medical treatment of prisoners, state disability pensioners, orphans, and residents of old age homes and juvenile institutions. Every part of the country falls under the jurisdiction of a district surgeon, although they may be at some distance in rural areas. In KaNgwane, for example, the district surgeon is based at Komatipoort, on the Mozambique border, and women are therefore usually referred by police and examined by doctors at a local mission hospital.

<sup>245</sup> "Some Recommendations on Legal Reform Relevant to the Redress of Violence Against South African Women," submitted by a group of Cape Town organizations to the South African government's sub-council on the status of women, 1994, p.14.



confirming that the pregnancy is most likely the result of the rape, so that the woman may procure a legal abortion if she so wishes.<sup>246</sup>

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<sup>246</sup> As noted above, abortion is currently illegal in South Africa, except in certain limited circumstances, which include where pregnancy is the result of rape or incest.

Although honorable exceptions exist, the reputation of district surgeons among women's organizations is, in the words of one counselor, "horrendous."<sup>247</sup> The medical examination conducted by the district surgeon is of crucial importance to the chances of obtaining a conviction in rape cases. Often, it is the only corroborating factor to a rape survivor's testimony. This medical evidence, however, is only of value if the examination is properly conducted and all specimens for forensic analysis are collected. Frequently, such evidence is badly taken or incomplete. If rape survivors are examined by trained doctors, who have experience in the field and a level of awareness of what would assist the judiciary in reaching a decision, the chances of a conviction are substantially improved.<sup>248</sup>

The district surgeon system has been criticized by health professionals for providing a sub-standard service for the state. District surgeons are badly paid by comparison with private practice, and there is no incentive to come out in the middle of the night to examine a rape victim or to provide any medical care beyond the collection of medical evidence. The Department of Health does not provide district surgeons with appropriate training in assisting rape victims. The department also has not expanded the responsibility of district surgeons to include the provision of basic medical treatment to rape victims; although in many cases the district surgeon will be the only doctor that a raped woman will see—ever.

The current procedure through which a rape complaint must be filed with the police is unnecessarily cumbersome. Often, women who have been raped must travel a distance to get to the nearest police station to report the rape. Then, after filing a police report, they must travel yet again to the nearest district surgeon. The more rural the area, the greater these distances are. In many areas, the district surgeons are far away. In one case, a fourteen-year-old who was raped in January

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<sup>247</sup> Interview with Denise Washkansky, counselor, Rape Crisis, Cape Town, February 10, 1995..

<sup>248</sup> Lorna J. Martin, *Rape in Johannesburg*, (Johannesburg: Centre for the Study of Violence and Reconciliation, 1993), p.7.

1995 told Human Rights Watch that she was unable to reach the district surgeon for a medical examination. The police did not have any vehicles to transport her and so she finally went home.<sup>249</sup>

This delay caused by travel is further exacerbated at both the police station and the district surgeon's office. There are many reports of women sitting for hours before they are examined by a district surgeon. One of the reasons contributing to delayed examinations is that district surgeons are also responsible for collecting evidence in drunken driving cases, which require blood tests to be taken quickly, and which are given priority over rape cases. Other reasons include a lack of concern and training.

Once a woman has been examined by a district surgeon, she must take the findings of the report back to the police station where she reported the rape. This unnecessarily protracted procedure places an undue burden on raped women to report the crime. The lack of centralized police and medical services for rape victims greatly diminishes the effective reporting and investigation of rape charges. The successful creation of centralized rape reporting centers in Hillbrow, Johannesburg (despite its subsequent closure), and in Newcastle, KwaZulu-Natal, indicates that with political will these problems can be easily solved at little extra cost.

### **The Courts**

The ability of a raped woman to get justice in a South African court depends heavily on whether she fits the court's image of a raped woman. Judges, magistrates and prosecutors all bring their own stereotypes to determinations of whether a woman has been raped:

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<sup>249</sup> Interview, Johannesburg, February 17, 1995.

There must be blood and tears to prove rape. Judges and prosecutors often do not believe that a woman can be raped without such injuries. I've sat in cases where a woman, who has been raped over a year ago and gone through counseling, has got up on the stand and been strong or become angry while testifying. Immediately, something clicks in the minds of those in the courtroom. Their image of a raped victim is some helpless, weeping woman violently attacked by a stranger. If you do not fit that stereotype, then you couldn't have been raped.<sup>250</sup>

### **Prosecutors**

Charges are most likely to be pressed when a woman has been raped by a stranger with obvious physical violence. Except in cases of incest or child abuse, rape by an acquaintance is often viewed more leniently by the South African court system. Even in violent rapes, incompetence and bias within the court system may lead to completely unnecessarily acquittals, for lack of elementary investigative steps. Training on sexual assault cases is included in courses at Justice College, where prosecutors are trained. In addition, rape cases are referred to a regional magistrates' court by local courts, so that more experienced prosecutors should be in charge. Nevertheless, many cases are not properly handled.

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<sup>250</sup> Interview with Riana Taylor, Criminologist, Advice Desk for Abused Women, Durban, January 31, 1995.

In early 1995, for example, a teenaged girl living in Mamelodi with her grandparents was gang raped by four men as she was walking home one night. Her grandparents immediately took her to the police, who sent her to the district surgeon. Three of the four were arrested, but the girl heard nothing more of the case and was not contacted by the police or the prosecutor to give a statement. When an attorney followed up on the case, she found that the accused had appeared in court eight times, before eight different prosecutors, and the charges had eventually been dropped because there was not enough evidence to pursue the case.<sup>251</sup> In a 1994 case of campus rape at the University of Pretoria, the case was dropped by the prosecution despite the fact that the man had in effect admitted the rape in his statement, which described how the woman had stated she was a virgin and refused to agree to intercourse.<sup>252</sup>

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<sup>251</sup> Interview, Louise Du Plessis, Attorney, Pretoria, August 16, 1995.

<sup>252</sup> Ibid.

Attempts have been made to address the problem of inexperienced prosecutors. The office of the attorney-general for the Transvaal, for example, has recently issued guidelines to prosecutors in sexual assault cases. The guidelines state that in offices where there is more than one prosecutor, one person should be identified to specialize in handling sexual assault cases and in any event one prosecutor should always handle a case from start to finish. The prosecutor must consult thoroughly with the complainant before the trial commences, and with the district surgeon where medical evidence is available. A list of medical terms and their meanings is attached to ensure that prosecutors are familiar with the terminology of medical examinations and the J88 Form. Special treatment should be afforded to complainants who will be witnesses, and applications should be made for proceedings to be held in camera where appropriate, which should always be the case with a child victim. Expert evidence should be sought where possible with regard to sentencing of sexual offenders and the possibility of treatment, and the prosecutor should always address the court on the question of sentencing to avoid a situation in which the offender might once again have access to a victim. If the prosecutor regards the sentence as inadequate, he or she is instructed to contact the attorney-general's office immediately with a view to appeal.<sup>253</sup>

As in domestic violence cases, inexperienced and untrained prosecutors may fail to prepare properly for a bail hearing, resulting in men accused of rape being allowed to walk free pending trial. With the introduction of the protections of the interim constitution, the burden of proof is reversed in bail applications, so that a magistrate is obliged to release an offender if a prosecutor does not make a case why bail should be refused. In many rape cases, when released on bail, men may intimidate the rape survivor. Alternatively, the accused disappears and cannot be brought to trial. Accordingly, the Transvaal Attorney-General's office guidelines instruct prosecutors that bail applications should in general be opposed, and if granted the prosecutor should ensure that it is a condition of bail that the accused is barred from the home of the complainant. In addition, new legislation governing

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<sup>253</sup> *Attorney-General Guidelines: Victims of Rape and Sexual Offences Against Children*, General Minute No.3 of 1995 to all prosecutors within the jurisdiction of the Attorney-General, Transvaal. Each of the old administrative provinces of South Africa, and the Witwatersrand (as well as the former TVBC states), has an attorney-general who is responsible for the conduct of prosecutions within that province. There is no national attorney-general. Section 310A of the Criminal Procedure Act (Act No.51 of 1977) provides for appeal against a sentence by an attorney-general, provided that a judge in chambers has granted an application for leave to appeal. The court system is currently being examined with the aim of reorganization.

bail passed in September 1995, which clarifies the obligations of the courts in bail applications, sets out guidelines in cases of violent assault, and in the case of serious crime — more controversially — returns the burden of proof to the accused to show why bail should be granted. While this legislation attempts to prevent the inappropriate release of individuals charged with serious crimes, it does it by transferring to the accused — who is usually unrepresented — the consequences of a system staffed by inexperienced and ineffective prosecutors.

### **The Cautionary Rule**

Women's organizations have been critical of the application of the "cautionary rule" in rape cases,<sup>254</sup> as reinforcing judicial stereotypes about raped women. The cautionary rule requires the court to exercise additional care when assessing the credibility of a rape survivor, particularly when her testimony is not corroborated. The application of the cautionary rule to sexual assault cases clearly has its basis in large part in a perception that women are devious and hysterical, by contrast to rational, credible male witnesses.

The South African law of evidence invokes the cautionary rule in sexual offenses cases on the grounds that "distinct" and "peculiar dangers" abound in the form of "hysteria that can cause a neurotic victim to imagine things that did not happen," "spite, sexual frustration or other unpredictable emotional causes," "financial considerations when the complainant is pregnant," or "the wish to protect a friend or to implicate someone who is richer than him."<sup>255</sup> A 1985 report by the South African Law Commission supported the use of the rule in rape cases on the grounds that:

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<sup>254</sup> Cautionary rules are used by magistrates and judges in a range of cases where witness credibility could be a problem. The rule is currently applied to the following types of witnesses: single witnesses; accomplices; children; spies, police traps and informers; women in sexual offenses trials; claimants in estates of deceased persons; prostitutes; and inquiry agents. The list is a result of accumulated precedent, rather than the application of consistent or independent criteria about credibility.

<sup>255</sup> Hoffman and Zeffert, *The South African Law of Evidence* (1994 reprint), as quoted in People Opposing Women Abuse, "Calling for Change: A Discussion on Some Aspects of the Laws and Procedures Surrounding Sexual Violence in South Africa." Johannesburg Rape Hearings, December 1994.

Experience has shown that it is dangerous to rely on the uncorroborated evidence of the complainant in such circumstances... [A] complainant could be motivated by an emotional reaction or spite, an innocent man might be falsely accused because of his wealth, the complainant might be forced by circumstances to admit that she had intercourse and then represent willing intercourse as rape.<sup>256</sup>

The words "neurotic," "spiteful," "sexually frustrated," and "unpredictably emotional" all conjure up stereotypical images of unstable women who are *prima facie* deceitful, flocking to bring contrived rape charges against innocent men.

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<sup>256</sup> "Women and Sexual Offenses," South African Law Commission Report (April 1985), para. 3.55 as quoted in Kathryn Ross, "An examination of South African rape law," in *Women, Rape and Violence in South Africa* (Cape Town: Community Law Centre, 1993), p.13.



The rationale of the rule is to ensure that women do not bring false rape charges. In practice, however, the cautionary rule permits the court to exercise an excessive level of discretion in deciding whether to believe women who allege that they have been raped. In many cases, the rule has been used to discount the testimony of those women who do not fit the stereotype of the rape victim as a helpless, chaste woman violently attacked by a stranger. As a result, judges have handed down lenient sentences or acquitted rapists, where other types of assault would have resulted in severe sanctions or certain conviction. Women's organizations in South Africa point out that studies of the issue have found no evidence that the percentage of false rape charges is greater than the percentage of false charges brought for any other crimes.<sup>257</sup>

South African women's organizations argue that the test used to determine the accused's guilt should be the same as for other assault crimes — proof beyond reasonable doubt. The burden of proof in criminal cases already protects a defendant, especially in rape cases where there will often be no independent witness. The cautionary rule causes judges to discount rape survivors' testimony, greatly reducing the chance of conviction: in 1992, for example, the percentage of rape prosecutions that resulted in conviction was 53 percent, as opposed to common assault cases in which 86 percent of the prosecutions resulted in conviction.<sup>258</sup> Since in the overwhelming majority of sexual assault cases the complainants are women, the use of the cautionary rule in sexual assault cases affects predominantly woman and is therefore discriminatory.

In 1991, the Namibian High Court abolished the use of the cautionary rule in sexual offenses cases. The court ruled its use unconstitutional on the grounds that it constituted discrimination against women. The court also noted that the abolition of the cautionary rule did not mean

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<sup>257</sup> The reports are cited in People Opposing Women Abuse, "Calling for Change....,"

<sup>258</sup> People Opposing Women Abuse, "Calling for Change: A Discussion on Some Aspects of the Laws and Procedures Surrounding Sexual Violence in South Africa." Johannesburg Rape Hearings, December 1994, p.8.

that the nature and circumstances of the alleged offence need not be considered carefully. Where the complainant is a single witness the cautionary rule relating to single witnesses will obviously apply. Where any motive for a false charge is suggested by the accused or appears from the evidence, this must carefully be considered. In the end, however, only one test applies, namely was the accused's guilt proved beyond reasonable doubt and this test must be the same whether the crime is theft or rape."<sup>259</sup>

The international law standards to which South Africa has recently committed itself, as well as the interim constitution, clearly state that there shall be no discrimination against women, and in particular that there shall be equal treatment of men and women under the law. Human Rights Watch believes that South Africa should follow the Namibian example and outlaw the use of the cautionary rule as discriminatory against women.

### **Judicial prejudice**

Recent South African case law regarding rape is replete with discriminatory and sexist assumptions about women, which are used as a justification for a reduced sentence or even an acquittal.<sup>260</sup> In 1987, a five year

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<sup>259</sup> In Namibia, the use of the cautionary rule in sexual offenses cases was found to be unconstitutional on the grounds of discrimination on the basis of sex since the rule "discriminates against women complainants and has no rational basis for existence." *S v. D and Another*, October 1991, Namibia High Court, Justices Strydom and Frank.

<sup>260</sup> Not surprisingly, the recent case law follows decades of precedent. In a 1949 case, the defendant was acquitted on the grounds that "these cases of sexual assault require special treatment, that charges of this kind are generally difficult to disprove, and that various considerations may lead to their being falsely laid ... Had the charge against the appellant been, for instance, one of theft, requiring no more than the ordinary high, but not exceptional standard of careful scrutiny ..., the verdict of guilty must have stood." *R v. W* 1949 (3) SA 722 (A) at 780 and 783. Another judgment noted, "in the case of all females alleging sexual assaults the need for similar caution, in the absence of corroboration, flows from the fact that such charges are easily laid and difficult to disprove, and a multiplicity of motives may exist for their being falsely laid. This has been recognized since time immemorial, and a classic example of such a false charge can be found in the Biblical story of Potiphar's wife and Joseph. Apart from the danger of maliciously false charges, it is also recognized that, even with adults, one may encounter cases of unfounded allegations of sexual assault which owe

sentence of imprisonment for a convicted rapist was set aside on appeal to two and a half years. The judge, Mr. Justice Michael Corbett (currently Chief Justice), stated:

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their origin to flights of fancy." *R v. J* 1966 (1) SA 88 (SR) at 92A-C.

To my mind, it is a mitigating factor in that the shock and affront to dignity suffered by the rape victim would be ordinarily less in the case where the rapist is a person well-known to the victim and someone moving in the same social milieu as the victim. ... In my opinion the lack of any serious injury to the complainant and the fact that she was evidently a woman of experience from the sexual point of view, justice would be served by a suspension of half the sentence imposed.<sup>261</sup>

In another 1987 case, a rape conviction was overturned on appeal by Mr. Justice Botha on the grounds that the rape victim could have made up the charges for the following possible reasons:

She may have been overcome by shame, disgust or remorse (perhaps even alcoholic remorse) at the fact that she had consented to intercourse with the appellant; she may have been sexually frustrated because of the appellant's drunken state ... she may have been filled with revulsion at the unusual sexual acts to which the appellant had wanted her to submit, whether or not she was a willing party to such acts ... or she may simply have become afraid, with the coming of the morning. It is true that these possibilities are speculative and that a court is not usually required to speculate on possibilities having no foundation in the evidence placed before it. ... It is precisely because of the difficulty of discerning hidden motives that cases of this nature require special treatment. ... In my view there can be no doubt, however, that the risk of a false motive is present in the circumstances of this case, even though the motive for it may not be readily apparent.<sup>262</sup>

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<sup>261</sup> *S v. N* 1987 (3) SA 450 Justice Corbett (Viljoen and Nestadt concurring) as quoted in People Opposing Women Abuse, "Calling for Change...", p.9.

<sup>262</sup> *S v. Balhuber*, 1987 (1) PH H22(A), Justice Botha, *Ibid.*, p.10.

The accused was thus acquitted.

Attitudes have not changed noticeably in recent years. In 1993, a Port Elizabeth policeman, Anton Weitz, was convicted of four charges of sexual assault — one involving a teenage girl. The magistrate, Peter Campbell, ruled that the policeman should not be fired from his position because his crimes were not serious enough and because his victims had "over-reacted." Campbell went on to joke "we men must learn to keep our hands to ourselves. ... It may be difficult for us men to understand why women react the way they do."<sup>263</sup>

In March 1994, Mr. Justice Pierre Olivier set aside a trial court sentence of seven years imprisonment for two rapists — George Biggs and Gavin Adriaanse — who had raped a nineteen-year-old virgin in 1989. The jail sentence was later upheld by the Cape Supreme Court. The rape survivor, who knew Biggs well, had accompanied the two men to drop off a friend, taking along her sister's child whom she was babysitting. Both men subsequently raped her, threatening to shoot her if she did not comply. Now twenty-five years old, she still is in counseling and suffers from nightmares, depression, and fear of crowds and of driving with men in cars.<sup>264</sup>

The judge recommended that the case be sent back for resentencing, asking that correctional supervision be recommended for the two offenders. The grounds upon which Mr. Justice Olivier decided to set aside the jail sentences were that: (1) the rape was not based on violence, but the need for sexual gratification; (2) the woman raped had suffered no serious injury or psychological harm; (3) the woman had known one of the men well and had not been raped by "total strangers"; and (4)

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<sup>263</sup> *S v. Weitz*, 1993 Magistrate Campbell, Ibid.

<sup>264</sup> "Victim Describes Time of Torment," *Weekly Mail and Guardian*, December 9-14, 1994.

the woman must have known that the two men were lying when they had threatened her by saying they had a gun. One of the two men whose sentences were set aside later faced a subsequent charge of rape and was convicted of raping a minor.<sup>265</sup>

In December 1994, Mr. Justice Pierre Olivier, at that time an acting appeal court judge, was promoted to a permanent position in the Appellate Division of the Supreme Court. South African women's organizations protested the choice, noting that the judge's decision on rape had recognized neither "the seriousness of the crime nor the reality of women's experience of rape."<sup>266</sup>

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<sup>265</sup> "Appeal Court Candidate in Rape Furore," *Weekly Mail and Guardian*, December 9-14, 1994.

<sup>266</sup> "Olivier Gets Promoted," *Sunday Times*, December 11, 1994.

In another rape case in 1994, Magistrate Marais convicted a businessman, Abdulatief Camroodien for raping a prostitute at gunpoint. In sentencing, the magistrate stated "If the complainant was an innocent young woman, I would not have hesitated to send you to jail for a very long time." Camroodien was fined R.8,000 [US \$2,285] and convicted to four years imprisonment, with two years suspended.<sup>267</sup>

In yet another 1994 rape case, radio news editor Brett Hilton-Barber was acquitted of raping a former lover. Although introduction of a victim's previous sexual history is usually barred in court during a rape trial, this rule is waived if the rape is allegedly perpetrated by someone with whom the rape complainant has previously had a sexual relationship. Having learnt of the prior sexual relationship in this case, the magistrate discounted the rape allegation, stating "it was improbable that Mr. Hilton-Barber would have raped the complainant when he could have had sex with her at any time." He also stated that it was "unthinkable" that he could have raped her within earshot of people at a party at the radio station and that there were no bruises on her body when she consulted a doctor four days later.<sup>268</sup>

Since the beginning of 1995, the Law, Race and Gender Unit at the University of Cape Town, in conjunction with Lawyers for Human Rights, has been conducting courses on race and gender at Justice College, where magistrates and judges are trained. Approximately 450 magistrates have been through the one day course, which aims to make judicial officers aware of their own prejudices and educate them on some of the most pressing issues surrounding racial and sexual stereotyping. Evaluations of the course by the participants have been overwhelmingly positive, despite the hostility and resistance usually shown to the organizers at the beginning of the day. While this course is clearly an encouraging

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<sup>267</sup> *S v. Camroodien*, 1994, Magistrate Marais as quoted in People Opposing Women Abuse, "Calling for Change...", p.10.

<sup>268</sup> "The Right to Say No to Sex," *Sunday Times*, July 3, 1994 and "Radio 702 Journalist Acquitted of Rape," *The Star*, June 29, 1994.

step, it needs to be expanded and repeated in later training for its effect to be guaranteed.<sup>269</sup>

### **Marital Rape**

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<sup>269</sup> Telephone interview, Ilze Olckers, Lawyers for Human Rights, September 18, 1995.



Marital rape was recognized as a crime in South Africa by the 1993 Prevention of Family Violence Act.<sup>270</sup> A husband may therefore now be convicted of raping his wife. While the marital rape provision is an important reform, the difference that it will make in practice to women in abusive marriages is probably limited. Because marital rape is most likely to occur in the home, proof of rape by a husband is difficult to obtain. The use of the cautionary rule and the ingrained attitudes of largely male judges further reduces the likelihood of achieving a conviction. Human Rights Watch was told of one conviction for marital rape, but there have been very few prosecutions.<sup>271</sup> In a November 1994 case, a thirty year old man was acquitted in Durban regional court of raping his wife. According to testimony given by the wife, the husband had come home drunk, threatened her with a hammer, hit her and forced her to have sex. The magistrate stated that since the woman did not respond with violence by pushing or fighting off her husband, she must have consented to sex. He also noted that since her testimony was not corroborated, it had to be viewed with caution. The case prompted a women's organization to write to the local newspapers asking "[m]ust women now fight back against drunken, hammer-wielding attackers with equal violence and further risk their lives to prove they are not consenting to rape?"<sup>272</sup>

### Sentencing

Sentences in rape cases show a conspicuous lack of consistency. The penalties handed down by the courts are erratic and frequently lenient in sexual

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<sup>270</sup> Section 5 of the act reads: "Notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted for rape of his wife."

<sup>271</sup> The senior prosecutor at the Pretoria Regional Magistrates Court reported a case in which a man was convicted of raping his estranged wife, after she had obtained an interdict against him under the Prevention of Family Violence Act. Interview, September 19, 1995. The office of the attorney-general for the Transvaal conducted a survey within its jurisdiction at the beginning of 1995 and found that there had been only two cases of marital rape reported, and one prosecution since the introduction of the legislation. In that case, the accused had been acquitted. Interview, attorney-general's office, Pretoria, September 6, 1995.

<sup>272</sup> "Educate Magistrates About Rape in Marriage, Please," Letter to the Editor from Marie-Therese Naidoo, Women's Charter Alliance, Durban, *The Daily News*, December 7, 1994, p.13.

abuse cases. The lack of clear sentencing guidelines or even a minimum sentence allows the judge wide discretion. For example, in 1994:

- the rape of a prostitute at gunpoint received a R.8,000 [U.S.\$2,285] fine;
- a four-year long molestation of an eleven-year-old girl received a sentence of 2,000 hours of community service over weekends only;
- the sexual assault of four school girls between the ages of fourteen to seventeen years old received a fine of R.3,500 [U.S. \$1,000];
- the rape of a three-month-old baby received a twenty-five year sentence.<sup>273</sup>

Although no sentencing guidelines are established by the Department of Justice for any crime, case law from the Appellate Division does provide some guidance to lower courts. Legally relevant factors in sentencing include previous convictions, especially for rape; the age of the victim; the age of the rapist; and the degree of violence involved. Other unrecognized factors also play a part, however, including the race of the accused, the race of the victim, and the experience of a particular magistrate in handling sexual assault cases. An analysis of sentencing in 159 rape convictions in the Durban regional courts during 1983, for example, found

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<sup>273</sup> "Silence Condone Rape," *New Nation*, January 20, 1995, p.5. Sentencing for other crimes is equally arbitrary: no sentencing guidelines are issued to magistrates and judges by the Department of Justice, and although each part of the court system is bound by decisions of higher courts, these decisions do not form a consistent standard.

that average sentences for coloured rapists tended to be more severe than those for Africans and Asians, with whites receiving the least severe sentences. Correspondingly, rapes of white women were more severely punished than rapes of coloured, Asian or African women.<sup>274</sup> While these are old statistics and are from one region only, there is no evidence to suggest that the pattern has become more consistent in recent years, and much anecdotal evidence to confirm that sentencing continues to be substantially affected by race and class.

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<sup>274</sup> The study recorded sentences ranging from corporal punishment (now abolished in South Africa) to ten years' imprisonment. The mean sentence was 4.5 years; in ten cases the sentence was suspended. Although 75 percent of those convicted received a sentence of imprisonment, only 28 percent of these received an effective term of more than four years. Steven Collings, "Rape Sentences — An Empirical Analysis," *South African Journal of Criminal Law and Criminology*, vol.9, 1985.

Similarly, the discretion exercised by the Department of Correctional Services in granting parole can result in arbitrary differences of treatment — often apparently on racial or class grounds — between individuals sentenced for similar crimes. The department's prison parole board has enormous discretion to shorten the time a prisoner actually spends in prison through early parole. In January 1995, for example, the parole board voted to release on parole Giuseppe diBlasi, a man who had been convicted of gunning down his wife in Hout Bay in September 1992. After serving only sixteen months of a four-year sentence, diBlasi was released under "maximum supervision" by the parole board who called him a model prisoner. The Cape Attorney-General condemned the decision as "an arrogant disregard for the judicial process."<sup>275</sup> DiBlasi was subsequently reimprisoned and his sentence was increased to fifteen years. The case is currently on appeal.

### **Recognition of Rape Trauma Syndrome**

In 1993, a task group on rape was set up in Cape Town in response to an invitation of the acting attorney general in the Cape to investigate the state response to rape cases. The task group decided to select a case in which to bring expert psychological evidence of the lasting impact of rape on a woman's mental health. In a groundbreaking decision in 1992 (*S. v. Daniels and Three Others*), Supreme Court Judge D.M. Williamson accepted expert evidence on Rape Trauma Syndrome (RTS), a form of post traumatic stress disorder experienced by many rape survivors, during sentencing. The group later went on to run training workshops for prosecutors on the effects of RTS. The recognition of RTS by the court has led to its use to support a victim's claim of rape; to explain why a victim may not remember the incident or may not be forthcoming about describing the rape; and to determine sentencing for the rapist. The decision is, however, only formally binding within the Cape Provincial Division of the Supreme Court, while its further recognition will depend on expert evidence being given in rape cases.<sup>276</sup>

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<sup>275</sup> "A-G Slams Prisons' Decision, *Sowetan*, January 27, 1995.

<sup>276</sup> See Desirée Hansson, "What is Rape Trauma Syndrome?," Institute of Criminology,

### **Township Justice**

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University of Cape Town, occasional papers series 4-92, 1992 and Desirée Hansson, "A Shock to the System: The First Rape Court and the Legal Recognition of Rape Trauma Syndrome," *Agenda*, No.16, 1993.

A peculiarly South African phenomenon, which developed in the context of a well-founded suspicion of "apartheid justice" and the failure of the police and judicial system to act effectively against crime in the black townships, is the widespread existence of "alternative" popular systems of justice. In some cases, well-developed "people's courts" have been established, under the control of street or section committees and with a large degree of public confidence and accountability. In other areas, the people's courts have become little more than self-appointed lynch mobs meting out vigilante justice, in previous years often to those regarded as "collaborators" with the government. During the state of emergency of the 1980s, the detention of many community leaders contributed to the loss of legitimacy of the people's courts. At the same time as the rise of the people's courts, and in particular in response to political violence and the perceived complicity of the police in that violence, "self-defense units" (SDUs) formed of young activists or "comrades" were established in many townships, with the encouragement of the ANC. Again, some SDUs were disciplined and accountable groups, performing a community service; others were made up of uncontrolled youths, little better than criminals. With the election of the government of national unity, some SDU members have been incorporated into the police force as reservists; others continue to operate on their own account, in some cases as criminal gangs.<sup>277</sup>

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<sup>277</sup> Colin Bundy, "At War with the Future? Black South African Youth in the 1990s," in Stephen John Stedman, *South Africa, The Political Economy of Transformation*, SAIS African Studies Library (Baltimore: Reinner Publishers, 1994); Wilfried Schärf, "The Role of People's Courts in Transition," in Hugh Corder (ed.) *Democracy and the Judiciary* (Cape Town: Institute for a Democratic Alternative in South Africa, 1989); Daniel Nina and Stavros Stavrou, *Popular Justice in a 'New South Africa': From People's Courts to Community Courts in Alexandra* (Johannesburg: Centre for Applied Legal Studies, 1992).

The high level of violent crime has become a central preoccupation of all South Africans, especially since the transition to democratic government has ended heavy handed police repression of political activity. The apparent powerlessness of the police to act against criminals has encouraged support for vigilante justice against gangsters and others who seem to operate with impunity.<sup>278</sup> Rapists have been among the targets of such popular efforts at punishment of crime: in Soweto, for example, "comrades" organized against the Jackrollers to the extent that a "hit squad" was formed in Diepkloof with the purpose of killing Jackrollers.<sup>279</sup> While such "self-help" actions are a predictable response to the failure of state systems to act effectively to protect the community, they are often extremely problematic in their own right.

Human Rights Watch interviewed two "comrades" from Alexandra township, in the northern suburbs of Johannesburg, organized in an informal crime prevention and punishment group. As in other townships, rape is a serious problem in Alexandra. In a three month period between August to December 1994, the Alexandra Health Clinic treated sixty-three cases of serious injuries related to rape.<sup>280</sup> The comrades estimated that over 50 percent of the cases that they acted on involved rape, overwhelmingly committed against young girls. The other cases they punish include house-breaking and car-jacking. They stated that in all the rape cases that they deal with, the police have taken no action. The comrades find the perpetrator and then "discipline" him. Disciplining can take a variety of forms including payment of money to the rape victim, parading the accused naked through the township or a beating. According to the two comrades interviewed, the type of punishment selected on any given day is determined by the group and how they feel: "If we feel moody, and we are sympathetic to the girl's family, then we can do more." In January 1995, the police had reportedly arrested the perpetrator of a rape against a fourteen-year-old girl, made him scrub the police floors, and then released

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<sup>278</sup> In June 1995, for example, it was reported that a man from the township of Vosloorus on the East Rand near Johannesburg had taken the law into his own hands and killed five well-known criminals: in three incidents in one week he had shot eight people, and in numerous other cases had shot people before handing them over to the police. Community members expressed strong support for his actions. Elias Maluleke, "Killer Vigilante's Bloody Crusade," *City Press*, June 11, 1995.

<sup>279</sup> Steve Mokwena, "The Era of the Jackrollers...", p.27.

<sup>280</sup> Interview with Mmatshilo Motsei, Agisanang Domestic Abuse Prevention and Training (ADAPT), Alexandra, February 14, 1995.

him. The family of the girl had approached the comrades to take action on their behalf. The comrades beat the man up.<sup>281</sup>

A group of township women told Human Rights Watch that, while self-help measures were often the only way to get justice, such measures could raise their own problems. Moreover, although the comrades told Human Rights Watch that if another comrade was responsible for a rape, that person would be punished and expelled from the group, the women noted that if a comrade had committed the rape then likelihood of getting any justice was remote. Not only do comrades rarely discipline one of their own, but they also intimidate the survivor and her family from reporting the case to the police.<sup>282</sup> A rape survivor spoke of her frustration with the inaction of police, and then her humiliation when the comrades too did nothing:

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<sup>281</sup> Interview with two comrades, Alexandra, February 17, 1995.

<sup>282</sup> Interviews, Alexandra Community Center, February 17, 1995.



I finally went to the comrades because the police had not done anything and the man who raped me was still walking around the township, while I had to be hospitalized for two months. The comrades caught the man and brought him to a public meeting. They made me talk about the rape before whole room full of men. I described everything, because I thought that finally I would get some justice. Before this, I had been telling people that I was in hospital because of a car accident. I didn't want to talk about my rape because of the way people treat you — like you have a disease. The man admitted that he had raped me. He signed a note agreeing to pay me R.15,000 [U.S.\$4,300]. But since that time, nothing has been done. I don't even want him to be arrested any more. What will that do? I want him to pay me the money which I had to spend on medical bills.<sup>283</sup>

Another danger is that this form of "justice" may be used mistakenly on the wrong person or too severely. When asked if they had ever identified the wrong person by mistake, one comrade answered:

People make the mistake of thinking that illiteracy means ignorance. Just because we are not educated does not mean that we cannot identify the right person. We are not stupid.<sup>284</sup>

The two comrades denied that they had ever killed a person as part of "disciplining," but others in the township acknowledged that comrades on occasion had killed alleged perpetrators. As Mmatshilo Motsei of the Agisanang Domestic Abuse Prevention and Training (ADAPT) stated: "It's difficult to grow up in these

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<sup>283</sup> Interview, Alexandra, February 17, 1995.

<sup>284</sup> Interview with two comrades, Alexandra, February 17, 1995.

townships as a black man. It's dehumanizing and has resulted in a lack of respect for life. So, not surprisingly, while some of these comrades are youth leaders, many of them are just thugs."<sup>285</sup>

When asked about police inaction in the township and the specific cases that the comrades had dealt with, a police officer in the Alexandra police station stated:

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<sup>285</sup> Interview with Mmatshilo Motsei, Agisanang Domestic Abuse Prevention and Training (ADAPT), Alexandra, February 14, 1995.

The problem is not the police. We're trying to do our best. It is the courts that are the problem. If they don't have enough time to investigate cases, then the cases get dropped. The police are overloaded. It's also difficult to find the complainant often times.

In some parts of the township it is not safe for a policeman to go.<sup>286</sup>

As long as the police and judicial system is seen to be failing to bring criminals to justice, people in the townships will continue to take the law into their own hands. Where these efforts are well-structured and responsibly coordinated, crime-ridden communities may well continue to see them perform a valuable service, especially in cases of petty theft or even minor assault. Vigilante justice, however, is necessarily arbitrary and reinforces a cycle of violence. While there is potential for incorporating well-organized and disciplined people's courts into the criminal justice system in some way,<sup>287</sup> there is a need for urgent action to preempt the summary justice meted out by "comrades" and others by ensuring that the criminal justice system functions effectively, in rape as much as in other cases.

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<sup>286</sup> Interview, police officer Nguchane, Alexandra, February 17, 1995.

<sup>287</sup> In some cases, this is already happening. For example, in the township of Guguletu outside Cape Town, magistrates refer some minor cases to be dealt with in the community.

## THE RESPONSE OF THE SOUTH AFRICAN GOVERNMENT

The inadequate response of the state to domestic violence and rape is one more problem that the South African government has inherited in the minefield of problems from the apartheid era. As quoted in the introduction to this report, the new government's Reconstruction and Development Program states its commitment to addressing this heritage by responding to the issue of violence against women and sex and gender discrimination. Nevertheless, problems remain throughout the system of state response to domestic violence and rape.

There has been widespread publicity on the transformation of the police force from the enforcers of apartheid laws to servers of the community. However, most of the efforts to reform the police force have concentrated on the racial and political repression associated with the police, and not on their treatment of women, which often also replicate persistent racial and political problems. There have been some positive changes in the approach of the police since the election, but these changes have generally been on an *ad hoc* basis as described by Riana Taylor, a criminologist with the Advice Desk for Abused Women:

The police are becoming more user-friendly in the new South Africa and are trying to change their image. Previously, they were difficult to approach, but now are more open to training. However, this change of attitude is completely dependent on the station commander. Only if the station commander is sympathetic will the station assist women. In other stations, such as the KwaMashu police station (in the former KwaZulu Homeland), nothing has changed. Women continue to have great difficulty reporting rape because of the attitudes of the police posted there and corruption.<sup>288</sup>

A representative of the Gauteng Province Member of Safety and Security stated that the department was looking at the legal and constitutional issues and

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<sup>288</sup> Interview with Riana Taylor, Criminologist, Advice Desk for Abused Women, January 31, 1995.

were committed to providing training for police, including counseling skills and for holding cells for juveniles. She noted that the department was aware of problems:

I know that the police are lacking in a number of respects. We are aware that raped women have to make complaints in open charge rooms in front of everyone; that detectives do not investigate rape dockets thoroughly, that district surgeons often refuse to come out at night to examine a rape victim.<sup>289</sup>

In the courts, little has changed. A practicing lawyer confirmed that magistrates and prosecutors continue to treat rape victims terribly. "We are getting new faces," she noted, "but the old people are still there."<sup>290</sup>

The problem, according to Ilze Olckers of Lawyers for Human Rights, is the fact that the issues of domestic violence and rape require inter-agency cooperation to solve. As a result,

women's issues get shunted between the Department of Justice and the Reconstruction and Development Programme (RDP). Women are falling through the cracks. The government needs to create a framework. You can't just pass the Prevention of Family Violence Act, or have an individual reporting center. It must be reinforced at all levels in the government. You can't discuss these issues without looking at the past policies of migrant labour and apartheid and how black women are worst affected.<sup>291</sup>

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<sup>289</sup> Interview with representative (name withheld on request), Gauteng Ministry of Safety and Security, Johannesburg, February 17, 1995.

<sup>290</sup> Interview with lawyer (name withheld on request), Durban, February 2, 1995.

<sup>291</sup> Interview with Ilze Olckers, Lawyers for Human Rights, Cape Town, February 10, 1995.

The lack of services evident in the urban areas is multiplied in the rural areas, especially the former homelands. State services are virtually nonexistent, police more ignorant and more prejudiced, and women themselves less educated and with access to fewer personal resources. Those few nongovernmental organizations that operate in these areas are even more overstretched and underresourced in both financial and personnel terms than those in the cities.

Recent initiatives have been made to address the problem of uncoordinated and inadequate services and to make government departments aware of their obligations. In September 1995, the government of national unity sent a high level delegation, headed by Minister of health, Dr. Nkosazana Zuma, to the U.N. Women's Conference in Beijing. A report prepared by office of the Reconstruction and Development Programme, the *Beijing Conference Report: 1994 Country Report on the Status of South African Women*, was presented to the conference on the position of South African women and the government's commitments to women's empowerment. In preparation for the conference, each government department was asked to consider its internal and external policies with reference to the official Draft Platform of Action prepared for the conference, and in particular to consider the question of violence against women. At the Beijing conference, the Women's Rights Project met with the South African delegation to raise concerns about violence against women in South Africa and to call on the South African delegation to make concrete commitments to address the situation. An "interim committee on women abuse," a joint initiative of nongovernmental organizations and the Departments of Welfare and Health, is organizing a national conference that will take place in November 1995 and aims to set up national and provincial networks that will bring together the different government departments and nongovernmental organizations involved in offering support to women survivors of violence.

### **PIONEERING STATE EFFORTS: THE WYNBERG SEXUAL OFFENCES COURT AND POLICE RAPE REPORTING CENTERS**

While the overall treatment of rape survivors by the South African law enforcement and judicial systems remains abysmal, a number of positive efforts indicate that improvements are possible where thoughtful programs are put into place. The first example described here is the Wynberg Sexual Offences Court in Cape Town and the second is the Hillbrow rape reporting center in Johannesburg (which has virtually been closed down). Both initiatives benefited from committed government employees who have worked to improve the state response to rape. Unfortunately, the lack of commitment and sustained attention on the part of the government undermined the efforts of those at the Hillbrow center committed to the creation of a better response system to rape victims. While a handful of other state initiatives also exist, among them the Newcastle Crisis Centre described here, they are yet to be replicated on a national level.

#### **The Wynberg Sexual Offences Court**

The Wynberg Sexual Offences Court was created in 1992 following protest by women's organizations about the manner in which the courts had dealt with two rape cases. The first case involved the acquittal of the rapist of an eight-year-old because the district surgeon had chosen to ignore his subpoenas to give evidence in court. The second case involved the comment of a magistrate during sentencing that the complainant was unlikely to have suffered psychological damage as she was not a virgin. Then acting attorney general of the Cape, Frank Kahn, appointed a senior prosecutor and a senior state advocate from the Attorney General's office to develop guidelines for prosecutors regarding the handling of sexual offence cases. In September 1992, a Task Group on Rape was set up consisting of government and nongovernmental organizations.<sup>292</sup> This was the first time that the nongovernmental community had been consulted by the government on the issue of sexual assault.<sup>293</sup>

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<sup>292</sup> The Task Group was to identify problem areas in treatment of rape victims at the hands of police, hospital staff, district surgeons, prosecutors and judicial officers. It was asked to find ways to end the secondary victimization suffered by rape survivors. Since the inception of the Task Group, a number of reform initiatives have been devised by government agencies in the Western Cape. These have included the introduction of police rape specialists; new guidelines for the handling of rape cases; the opening of the Sexual Offences Court at the Wynberg Regional Magistrates Court; and the selection of seven Regional Court prosecutors to deal with rape cases in other courts. The efforts of the Task

The Sexual Offenses Court was set up by then acting Attorney General Kahn in order to address the trauma experienced by sexual assault complainants, to increase the reporting of such crimes, to improve coordination between criminal justice agencies and to reduce public criticism of the criminal justice system.<sup>294</sup> According to Mr. Kahn, the changes were introduced to deal with "the classic complaints," including long waits for district surgeons in the police station, having to touch the accused during identification parades, waiting in the corridor together with the accused at court, complainants not being consulted before the court case and insensitive prosecutors.<sup>295</sup>

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Group have also contributed to the recognition of the Rape Trauma Syndrome (RTS) at the sentencing stage in the Cape Supreme Court, which is now binding on all courts in the Cape Provincial Division. Since December 1993, the Task Group has evolved into an open quarterly forum. Sharon Stanton and Margot Lochrenberg *Justice for Sexual Assault Survivors?* (Cape Town: University of Cape Town Institute of Criminology, Rape Crisis and Lawyers for Human Rights, October 1994), p.4.

<sup>293</sup> Ibid., p.3.

<sup>294</sup> Many of the women's organizations in the area believe that while the effort by the attorney-general's office was welcome, it lacked the necessary prior consultation and planning with all concerned agencies, governmental and non-governmental, which would have further strengthened the initiative.

<sup>295</sup> Stanton and Lochrenberg, *Justice for Sexual Assault Survivors?*, p.13.



In the Wynberg Sexual Offenses Court, women assessors are used to offset possible male bias and specially trained regional court prosecutors deal with cases. The two prosecutors have lighter case loads to allow them more time to consult with rape complainants so as to better prepare their cases. In addition, a police officer from each of the Criminal Investigation Units in the Western Cape has been trained as a police rape specialist. The court is located upstairs, away from the rest of the courts in the building, so rape survivors can wait in private. There is a separate waiting room so that the accused and the complainant do not have to wait in the same room until the case is called.<sup>296</sup> Lynette Myburgh, a prosecutor at the court noted:

There has been a remarkable improvement in the manner in which rape cases are prosecuted here. It's not perfect. But it is an improvement. Because we have one more prosecutor, we can prepare our case load better. As a result, conviction rates are almost 20 percent higher than other courts in the country. It is because our cases and witnesses are better prepared. The six rotating magistrates who hear these cases have become more sensitive to the trauma of rape survivors and no longer make rude or offensive comments to rape victims or allow inadmissible questions.<sup>297</sup>

Ms. Myburgh continued to state that, although the cases were better prepared, the case load was still too heavy and that another court was necessary. Despite the extra prosecutor at the Wynberg Court, the case load for rape cases is extremely high. In the past three years, the court has prosecuted over one thousand

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<sup>296</sup> Site visit to the Wynberg Sexual Offenses Court, Cape Town, February 10, 1995.

<sup>297</sup> Interview with Lynette Myburgh, prosecutor, Wynberg Court, Cape Town, February 10, 1995.

cases.<sup>298</sup> In February 1995, there was a back-log of 193 cases outstanding. Elsabé Durr-Fitschen, the Victims Support Services Coordinator at the court, said that whenever there was a back-load, the sexual offenses cases involving minors were dealt with first and so adult women who were raped ended up waiting longer. "If you put women and children together like that, it is always the children that will win out. There should be a separate children's court." She also stated:

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<sup>298</sup> Ibid.

The court was designed to prevent the secondary victimization that raped women face in the justice system. But now, because the case load is so high, we have a back-log. The overflow gets sent downstairs to the regular courts. But that defeats the purpose of having a Sexual Offenses Court. We have asked the Attorney General for a second court, but so far one has not been created.<sup>299</sup>

Another problem is the location. Larger numbers of rape cases are reported in the near-by townships. The cost for women to organize transportation to the court severely limits its accessibility to those who need it most.

The Wynberg Court model has been considered by other attorney generals' offices. The office of the Attorney General for the Transvaal, for example, considered the establishment of a similar court, but decided that it was not feasible, largely for lack of resources. The Wynberg court requires two full time prosecutors, so that one can be consulting while the other is in court; at the same time, the throughput of cases is low, because of the extra time given to each case. In the context of an understaffed prosecuting department, the establishment of specialized courts for all areas of the Transvaal was regarded as impractical, although it would represent the ideal. Instead, the attorney general's office made the decision to identify and train prosecutors throughout the region to specialize in sexual assault cases.<sup>300</sup> If the benefits of specialized handling of cases of rape and sexual assault, including the higher conviction rate, are to be extended countrywide, additional resources must be devoted to the criminal justice system.

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<sup>299</sup> Interview with Elsabe Durr-Fitschen, Victims Support Services Coordinator, Wynberg Sexual Offenses Court, Cape Town, February 10, 1995.

<sup>300</sup> Interview, attorney general's office, September 6, 1995; undated memorandum headed "Specialized Rape Courts" prepared by the office. As regards the throughput of cases, the Wynberg court averages less than one case finalized per day, while the Pretoria Regional Court averages approximately 2.5 cases a day.

### Rape Reporting Centers: Hillbrow and Newcastle

In November 1994, a centralized sexual offenses center run by the South African Police Service was established in inner city Johannesburg. The Hillbrow Rape Reporting Center was set up due in large part to the efforts of district surgeon, Dr. Lorna Martin, in conjunction with the organization People Opposing Women Abuse (POWA). Existing police and medical staff responsibilities were reorganized requiring no extra staff to be hired.<sup>301</sup> The aim of the center was to ensure that the reporting of rape was less traumatic while offering social and psychological support. In addition to taking statements related to the charge, the center provided immediate medical examinations and counseling to raped women. Women who came to the center could file a charge, get a medical exam and take a bath at the center before leaving. Medical forensic samples were taken by a district surgeon and women were referred to social workers and psychologists for counseling. An information pamphlet for rape survivors was produced by the center. Raped women could also obtain HIV tests and take pregnancy prevention pills. The center was staffed by trained female police officers twenty-four hours a day. Doctors who examine rape survivors are issued a protocol book produced by the center which outlines the steps which doctors should take in conducting the examination.<sup>302</sup>

At the time of Human Rights Watch visit, the center dealt with an average of three sexual assaults a day. In December 1994, the center received seventy-five rape cases and sixteen child abuse cases. In January 1995, forty-five rape cases and nine child abuse cases were reported.<sup>303</sup> As Sergeant Avril Davis, a police officer working at the center, said: "These figures are horrifying when one considers that we only deal with rapes reported in the inner-city and northern suburbs, and that most sexual assaults are not reported."<sup>304</sup> Disappointingly, however, Human Rights

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<sup>301</sup> Interview with staff member (name withheld by request), Hillbrow Reporting Center, Johannesburg, February 17, 1995.

<sup>302</sup> Site visit to the Hillbrow medico-legal clinic, February 17, 1995, and interview with Lorna Martin, senior medical officer, district surgeon, Hillbrow medico-legal clinic, Johannesburg, February 17, 1995. *District Surgeon Medico-Legal Clinic Protocol Book*, compiled by Dr. Lorna Martin, October 1994 (2nd ed.).

<sup>303</sup> "New Refuge for Rape Victims," *Star*, January 27, 1995.

<sup>304</sup> "Centre Eases Rape Trauma," *Sunday Times*, January 8, 1995.

Watch has learned that this encouraging initiative has largely collapsed. Internal disagreements within the police resulted in insufficient personnel being available to staff the center on a full time basis, and on occasion the district surgeon would have to call round the two police stations involved to find out which officer should be on duty. Attempts to resolve the problems have largely failed, and the full time center has been replaced by two dedicated female police officers from the Hillbrow police station, who carry pagers on a twenty-four hour basis.<sup>305</sup>

A similar initiative, the Newcastle Crisis Centre, was established in KwaZulu-Natal in January 1994. Human Rights Watch did not have the opportunity to visit the centre, but was provided with a copy of the December 1994 "Progress Report" by police headquarters in Pretoria. The Crisis Centre aims to provide a complete service to women victims of all types of violence, whether family violence or rape by a stranger, by coordinating the responses of various state departments and the nongovernmental sector. A room has been set aside at the casualty department of the hospital where medical examinations of rape and violence survivors may be carried out. Local businesses were persuaded to assist in funding the project, and local state agencies, including social workers, doctors, psychologists, nurses and police officers were motivated to draw up a working document setting out their role at the center. A workshop for twenty-eight female police officers was held, to sensitize them to their role, and guidelines were issued to all police, including radio control room staff, in how to handle domestic violence or rape cases. Abused women may contact the center directly or be referred by the police or another agency. The choice of reporting to the police or laying a charge is left to the woman, after her options have been explained, and she will be referred also to victim support agencies.

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<sup>305</sup> Interview, Lisa Vetten, September 20, 1995.

Such initiatives have not always received the funding or support that they deserve. A rape trauma centre was set up in Durban in August 1994, but was abandoned after three months because of financial difficulties. Women's organizations contend that had it been a priority, money would have been found. Attempts were made for three years to set up a special unit for rape victims by a police major, Lynette Prinslow, who believed that rape victims were not getting treated properly in regular charge offices. She attempted to set up a unit to provide compassionate police treatment and referral services for counseling as well as workshops to educate women on avoiding rape and protecting themselves. The center was closed in October 1994.<sup>306</sup>

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<sup>306</sup> "Hot on the Trail of Rapists," *Sunday Tribune*, September 18, 1994.

Spokespersons for the police have acknowledged the need for such reporting centers to be duplicated. Sergeant Davis noted that the Hillbrow center changed the manner in which raped women are treated: "Before, women would have to wait at police stations for an officer to take their statements before they saw a district surgeon. Sometimes police officers were unsympathetic and the experience of reporting a sexual assault often worsened the victim's trauma."<sup>307</sup> Johannesburg North district commissioner Brigadier Jacques de Vries stated "Women in the past didn't receive the best treatment and for that reason many women don't report the offenses against them. They need sympathy, comfort and understanding."<sup>308</sup> Captain Sharon Schutte of police headquarters in Pretoria expressed the hope that the type of treatment many women received at the Hillbrow center should become standard for all women in South Africa seeking assistance from the police. These comments, from the police themselves underlie the great need for centers such as Hillbrow to be reinstated and duplicated around the country. Unfortunately, the South African government has yet to give these sorts of successful initiatives the necessary political and financial support to ensure that they become the norm.

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<sup>307</sup> Ibid.

<sup>308</sup> "Sexual Offenses Centre Opens Today," *Star*, November 25, 1994.

**APPENDIX**  
**The Declaration on the Elimination of Violence against Women**

The General Assembly,

Recognizing the urgent need for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human beings,

Noting that those rights and principles are enshrined in international instruments, including the Universal Declaration of Human Rights,<sup>1</sup> the International Covenant on Civil and Political Rights,<sup>2</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>3</sup> the Convention on the Elimination of All Forms of Discrimination against Women<sup>4</sup> and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>5</sup>

Recognizing that effective implementation of the Convention on the Elimination of All Forms of Discrimination against Women would contribute to the elimination of violence against women and that the Declaration on the Elimination

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<sup>1</sup> Resolution 217 A (III).

<sup>2</sup> See resolution 2200 A (XXI), annex.

<sup>3</sup> Ibid.

<sup>4</sup> Resolution 34/180, annex.

<sup>5</sup> Resolution 39/46, annex.



of Violence against Women, set forth in the present resolution, will strengthen and complement that process,

Concerned that violence against women is an obstacle to the achievement of equality, development and peace, as recognized in the Nairobi Forward-looking Strategies for the Advancement of Women,<sup>6</sup> in which a set of measures to combat violence against women was recommended, and to the full implementation of the Convention on the Elimination of All Forms of Discrimination against Women,

Affirming that violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms, and concerned about the long-standing failure to protect and promote those rights and freedoms in the case of violence against women,

Recognizing 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,

Concerned that some groups of women, such as women belonging to minority groups, indigenous women, refugee women, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women and women in situations of armed conflict, are especially vulnerable to violence,

Recalling the conclusion in paragraph 23 of the annex to Economic and Social Council resolution 1990/15 of 24 May 1990 that the recognition that violence against women in the family and society was pervasive and cut across lines of income, class and culture had to be matched by urgent and effective steps to eliminate its incidence,

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<sup>6</sup> *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, Nairobi, 15-26 July 1985* (United Nations publication, Sales No. 3.85.IV.10), chap. I, sect. A.

Recalling also Economic and Social Council resolution 1991/18 of 30 May 1991, in which the Council recommended the development of a framework for an international instrument that would address explicitly the issue of violence against women,

Welcoming the role that women's movements are playing in drawing increasing attention to the nature, severity and magnitude of the problem of violence against women,

Alarmed that opportunities for women to achieve legal, social, political and economic equality in society are limited, inter alia, by continuing and endemic violence,

Convinced that in the light of the above there is a need for a clear and comprehensive definition of violence against women, a clear statement of the rights to be applied to ensure the elimination of violence against women in all its forms, a commitment by States in respect of their responsibilities, and a commitment by the international community at large to the elimination of violence against women,

Solemnly proclaims the following Declaration on the Elimination of Violence against Women and urges that every effort be made so that it becomes generally known and respected:

#### Article 1

For the purposes of this Declaration, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

#### Article 2

Violence against women shall be understood to encompass, but not be limited to, the following:

(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation

and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution.

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

### Article 3

Women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. These rights include, inter alia:

- (a) The right to life;<sup>7</sup>
- (b) The right to equality;<sup>8</sup>
- (c) The right to liberty and security of person;<sup>9</sup>
- (d) The right to equal protection under the law;<sup>10</sup>
- (e) The right to be free from all forms of discrimination;<sup>11</sup>

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<sup>7</sup> Universal Declaration of Human Rights, article 3; and International Covenant on Civil and Political Rights, article 6.

<sup>8</sup> International Covenant on Civil and Political Rights, article 26.

<sup>9</sup> Universal Declaration of Human Rights, article 3; and International Covenant on Civil and Political Rights, article 9.

<sup>10</sup> International Covenant on Civil and Political Rights, article 26.

<sup>11</sup> Ibid.

(f) The right to the highest standard attainable of physical and mental health;<sup>12</sup>

(g) The right to just and favourable conditions of work;<sup>13</sup>

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<sup>12</sup> International Covenant on Economic, Social and Cultural Rights, article 12.

<sup>13</sup> Universal Declaration of Human Rights, article 23; and International Covenant on Economic, Social and Cultural Rights, articles 6 and 7.

- (h) The right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment.<sup>14</sup>

Article 4

States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should:

(a) Consider, where they have not yet done so, ratifying or acceding to the Convention on the Elimination of All Forms of Discrimination against Women or withdrawing reservations to that Convention;

(b) Refrain from engaging in violence against women;

(c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;

(d) Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered; States should also inform women of their rights in seeking redress through such mechanisms;

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<sup>14</sup> Universal Declaration of Human Rights, article 5; International Covenant on Civil and Political Rights, article 7; and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

(e) Consider the possibility of developing national plans of action to promote the protection of women against any form of violence, or to include provisions for that purpose in plans already existing, taking into account, as appropriate, such cooperation as can be provided by non-governmental organisations, particularly those concerned with the issue of violence against women;

(f) Develop, in a comprehensive way, preventive approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence, and ensure that the re-victimization of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions;

(g) Work to ensure, to the maximum extent feasible in the light of their available resources and, where needed, within the framework of international cooperation, that women subjected to violence and, where appropriate, their children have specialised assistance, such as rehabilitation, assistance in child care and maintenance, treatment, counselling, and health and social services, facilities and programmes, as well as support structures, and should take all other appropriate measures to promote their safety and physical and psychological rehabilitation;

(h) Include in government budgets adequate resources for their activities related to the elimination of violence against women;

(i) Take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitize them to the needs of women;

(j) Adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women;

(k) Promote research, collect data and compile statistics, especially concerning domestic violence, relating to the prevalence of different forms of violence against women and encourage research on the causes, nature, seriousness and consequences of violence against women and on the effectiveness of measures implemented to prevent and redress violence against women; those statistics and findings of the research will be made public;

(l) Adopt measures directed towards the elimination of violence against women who are especially vulnerable to violence;

(m) Include, in submitting reports as required under relevant human rights instruments of the United Nations, information pertaining to violence against women and measures taken to implement the present Declaration;

(n) Encourage the development of appropriate guidelines to assist in the implementation of the principles set forth in the present Declaration;

(o) Recognize the important role of the women's movement and non-governmental organisations world wide in raising awareness and alleviating the problems of violence against women;

(p) Facilitate and enhance the work of the women's movement and non-governmental organisations and cooperate with them at local, national and regional levels;

(q) Encourage intergovernmental regional organisations of which they are members to include the elimination of violence against women in their programmes, as appropriate.

#### Article 5

The organs and specialized agencies of the United Nations system should, within their respective fields of competence, contribute to the recognition and realization of the rights and the principles set forth in the present Declaration and, to this end, should, inter alia:

(a) Foster international and regional cooperation with a view to defining regional strategies for combatting violence, exchanging

experiences and financing programmes relating to the elimination of violence against women;

(b) Promote meetings and seminars with the aim of creating and raising awareness among all persons of the issue of the elimination of violence against women;

(c) Foster coordination and exchange within the United Nations system between human rights treaty bodies to address the issue of violence against women effectively;

(d) Include in analyses prepared by organisations and bodies of the United Nations system of social trends and problems, such as the periodic reports on the world social situation, examination of trends in violence against women;

(e) Encourage coordination between organisations and bodies of the United Nations system to incorporate the issue of violence against women into ongoing programmes, especially with reference to groups of women particularly vulnerable to violence;

(f) Promote the formulation of guidelines or manuals relating to violence against women, taking into account the measures referred to in the present Declaration;

(g) Consider the issue of the elimination of violence against women, as appropriate, in fulfilling their mandates with respect to the implementation of human rights instruments;

(h) Cooperate with non-governmental organisations in addressing the issue of violence against women.

#### Article 6

Nothing in the present Declaration shall affect any provision that is more conducive to the elimination of violence against women that may be contained in the legislation of a State or in any international convention, treaty or other instrument in force in a State.