

2020 Measures to Address Violence and Unrest in a Time of COVID-19

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Abstract

COVID-19 had a severe impact on the lives of South Africans. Despite lockdown measures, unrest and violence continued unabated. The South African Police Services' crime statistics reveal that, in some instances, less violent crimes were committed. Inquiries into taxi, police, and defence force violence during lockdown were also conducted. The *Khosa v Minister of Defence* case is dealt with in more detail in this regard. Violent protests continued despite lockdown measures. The Truth and Reconciliation Commission's assistance to victims of apartheid in relation to basic and higher education was increased. The Department of Correctional Services had to reassess its parole system to ensure that violent criminals released on parole do not commit additional crimes. Despite this, numerous prisoners were released to lessen the pressure on prisons in a time of COVID-19. The Constitutional Court also addressed the Judicial Inspectorate's lack of resources to conduct its work properly. The establishment of a National Security Council and its functions is addressed. The Firearms Control Regulations' amendments include provisions on the training and retraining of employees of official institutions in the handling of firearms. The note also discusses several cases in relation to the use of firearms. The provisions of the Victim Support Services Bill of 2019 published in 2020 are also investigated. The note also refers to lists of entities that the United Nations Security Council identified in terms of the Protection of Constitutional Democracy against Terrorist and Related Activities Act. The note concludes that unrest and violence (institutionalised or not) still underpin the South African society. The COVID-19 lockdown revealed more of these



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transgressions and limitations within the systems of the police, defence force, and correctional services. This note focuses on the most important 2020 measures and is a continuation of the annual reporting in this regard.

Keywords: unrest; violence; crime statistics; violent protests; truth and reconciliation; security services; arms and ammunition; domestic violence; terrorism; COVID-19 regulations

Introduction

The impact of the COVID-19 pandemic on South African citizens – on their well-being, socio-economic situation, and human rights – in the 2020 report period was immense. The declaration of a State of Disaster had a direct impact on basic human rights, with far-reaching implications, generally. On one hand, various transgressions occurred, which led to further violation of basic human rights. On the other hand, additional support had to be provided to ensure survival and to supplement livelihoods. The outbreak of the pandemic in South Africa occurred in March 2020 and by December 2020, a second wave – fuelled by a new variant – had hit the country, calling for stricter measures. By the end of 2020, South Africa was back on an amended alert level three, with 501 522 infections and a death toll of approximately 49 000 (World Health Organisation 2020).

Special measures were announced to deal with unrest and potential unrest in the Western Cape and Gauteng provinces. The measures dealt with taxi violence, under section 91 of the National Land Transport Act 5 of 2009. In the Western Cape, the first notice was published on 18 May 2020,¹ highlighting the intention to institute extraordinary measures in the declared area, followed by a second notice on 20 May 2020.² The problem to be addressed was complex and had developed over many years, following regular clashes between registered and unregistered taxi associations prominent in the Delft area. In this regard, the Delft area was declared a high-risk area in respect of taxi violence, leading to the closure of a number of taxi ranks in the area, both official and unofficial ones. A further list of taxi ranks was also provided; however, they could also be closed depending on the developments in the area. The closure of the taxi ranks coincided with the suspension of all taxi operating licences.

In Gauteng, a Commission of Inquiry into minibus taxi-type service violence, fatalities, and instability had already been established under Proclamation 101 of 2019, under section 2(1) of the Provincial Commissions Act 1 of 1997.³ In March 2020, due to the COVID-19 pandemic, the date for the completion of the Commission's work was

1 GG 43334 (18 May 2020) GN 279.

2 GG 43340 (20 May 2020) Gen N 283.

3 PG 284 (13 September 2019) Proc 101.

extended to 31 August 2020,⁴ and again to 31 January 2021.⁵ A notice similar to that published in relation to Delft, alluded to above, was published in relation to Gauteng under section 91 of the National Land Transport Act, for the period 1 August to 30 October 2020. The areas identified in the notice were characterised by violence, unrest, and instability and the measures published were intended to normalise the situation by inter alia, prescribing certain routes and demarcating areas and scopes of particular taxi ranks.

On 7 October 2020, the Western Cape Provincial Police Ombudsman gave notice under section 17(3) of the Western Cape Community Safety Act 3 of 2013 of an investigation by the Ombud Office concerning allegations that members of the South African Police Services (SAPS) in the Western Cape, in particular the Anti-Gang Unit of the SAPS, were abusing their powers when exercising their functions and performing their duties.⁶ This conduct was contrary to the SAPS Code of Conduct and the regulations of the SAPS and ultimately, their mandate to prevent, combat, and investigate crime and to protect South African citizens. Abuse by the South African National Defence Force (SANDF) was also noted in the reporting period.

In this article, the most important 2020 measures and court decisions are discussed. The issues addressed pertain to:

- unrest and violence,
- crime statistics,
- violent protests,
- national unity and reconciliation,
- security services (including police services, correctional services, military, and intelligence services),
- arms and ammunition,
- domestic and gender violence, and
- terrorism.⁷

Crime Statistics

In response to the COVID-19 pandemic and to curb the spread thereof in South Africa, President Ramaphosa announced a national lockdown on 23 March 2020 to commence on 26 March 2020. In short, various limitations restricted the movement of people.

4 PG 70 (20 March 2020) PN 340.

5 PG 186 (8 October 2020) Proc 84.

6 PG 8333 (7 October 2020) PN 99.

7 If pertinent, some cases or regulations of 2021 are also referred to.

International travel and travel between provinces within the country was restricted and prohibited. Citizens were confined to their homes, which eventually resulted in many people working from home or losing their jobs. Considering the imposition of the restrictions such as a national curfew as well as a strong SAPS and SANDF presence in the streets, an argument is made that the national crime statistics should be significantly lower than in previous years due to the restrictions on the movement of people. The strong SAPS and SANDF presence might have deterred criminals from committing certain crimes. (See Staff Writer 2021; Africa Check 2020.)

The crime statistics depict the crime situation for 12 months from April 2019 to March 2020 (referred to as a “year” for ease of reference) in South Africa. This section will be followed by an overview of the general trends for the above-mentioned period. Thereafter, focus will shift to a specific review of the statistics for the most common contact and contact-related crimes. It is important to note that these statistics are qualified by the SAPS as being inclusive of unfounded counts. As a result of the COVID-19 restrictions, these statistics could not be verified by means of a physical docket count. How this has an impact on the number of reported cases remains unknown.

Per definition, contact crimes include those where the victims are the target of the violence themselves, or where property is targeted with some victims in the vicinity exposed to the threats or use of violence (South African Police Service 2020a; South African Police Service 2020b). In general, the number of reported contact crimes cases increased by 0.7 per cent or 4 072 more cases in comparison with those in the 2018/2019 reporting. These crimes include murder, attempted murder, sexual offences, assault with aggravating circumstances (assault GBH), common assault, robbery with aggravating circumstances and common robbery. (The discussion is based on South African Police Service. 2020a; South African Police Service. 2020b.)

The number of reported murder cases increased by 1.4 per cent (303 more cases) in comparison with the number reported in 2018/2019. Worryingly, since 2010/2011, the number of reported murder cases has increased annually. The provinces with the highest number of reported murder cases are KwaZulu Natal (4 859), Gauteng (4 555), Western Cape (3 975), and Eastern Cape (3 879). To understand why and how murders are committed, one needs to consider the causative factors for the commission of murders, as well as the most common weapons used in this regard. The prominent causative factors for murder include arguments or misunderstandings between the parties (3 447), domestic-related issues (1 482), and vigilantism (1 202). Firearms (7 351), knives (4 531), and sharp instruments (1 823) are the most common instruments used to commit murder. This is indicative of the violent nature of the South African society.

The number of reported attempted murder cases decreased by 1.8 per cent in 2019/2020 from a 10-year high recorded in 2018/2019 with 18 970 cases. From a provincial viewpoint, Gauteng (4 639), KwaZulu Natal (4 161), and Western Cape (3 555) had the

most reported attempted murder cases. The reported number of attempted murder cases implies that regardless of the above-mentioned increase in the number of murders, fewer murders are committed. Criminals are deterred from completing the intended murder. The specific reason for the decrease in the reported cases remains unclear. The causative factors include arguments or misunderstandings between the parties (2 974), robbery (2 841), and gang-related violence (1 438). The most common instruments used during the murder attempts include knives (12 718), firearms (1 865), and motor vehicles (470).

Sexual offences include rape, sexual assault, attempted sexual offence, and contact sexual offence. In general, an increase in the number of reported sexual offences was recorded, which resulted in 1.7 per cent or 873 more cases than was reported in 2018/2019. Over the last three years, an increase in the number of reported sexual offence cases was recorded. This may indicate that more cases are reported and not that more sexual offences are committed. The victims of sexual offences often fear reporting these matters as the perpetrators might be a family member, friend, or even an acquaintance. This implies that a personal relationship exists between the victim and offender, which may result in underreporting of sexual offences.

Rape is the most prominent sexual offence. However, the number of reported cases gradually decreased over the last 10 years. Gauteng (10 810), KwaZulu Natal (9 809), and Eastern Cape (8 708) had the most reported sexual offences. In these provinces, there are more occurrences of rape sexual assault cases. Over the last three years, more rape and sexual assault cases were reported, which may be regarded as a positive step in the sense that the victims are speaking out and reporting sexual offences. Notably, almost 43 per cent or 18 231 reported rape cases were committed at some form of a private residence. This underlines the underreporting argument. As pointed above, some victims do not report these cases as a result of fear and the existence of some form of personal relationship with the perpetrators.

In the context of assault crimes, a distinction is drawn between contact crimes, common assault and assault with the intent to inflict grievous bodily harm (assault GBH). The year under review recorded an increase of 2.1 per cent or 3 482 more cases than the previous year. Contrary to this increase, assault GBH decreased by 2.5 per cent or 4 259 fewer cases than the previous year. Most assault cases were reported in Gauteng, Western Cape, and KwaZulu Natal provinces. The most common causes of these crimes include arguments or misunderstandings between the parties, domestic-related retaliation, or revenge. Owing to the more serious nature of assault GBH, it is important to mention the most common instruments used to commit these crimes. They are: knives, body parts, and bottles.

Both common (60) and aggravated (3 958) robbery increased. Gauteng, Western Cape, and KwaZulu Natal recorded the most common and aggravated robbery cases. Aggravated robbery showed a gradual increase from the 100 769 cases recorded in

2011/2012 to 143 990 cases recorded in 2019/2020; only in 2017/2018 an increase was not recorded in comparison with the previous year. In the context of aggravated robbery, the following crimes classified as such increased: carjacking, robbery at on-residential premises, and truck hijacking. A decrease in the number of reported robberies at residential premises and cash-in-transit robberies was recorded.

Women and children, often victims of serious and heinous crimes, are part of the vulnerable groups in society. These serious and heinous crimes include murder, attempted murder, sexual offences, and both common and aggravated assault. A general review of the number of reported crimes indicates a decrease in cases where the victim is either a woman or a child. This seems as if it is a step in the right direction in protecting some of the vulnerable members of society. However, it remains to be seen how these reported numbers are influenced by the restriction on the movements of people imposed by the COVID-19 lockdown. The argument is not made that these crimes only take place where people can freely move around. For example, 43 per cent cases of rape occurred at private residences. It can be argued that in those instances, movement was not necessary or perhaps limited movement was needed for the commission of the crime.

From the onset, it was argued that the national lockdown and subsequent restrictions on the movement of individuals by means of, for example, a national curfew as well as the strong SAPS and SANDF presence would have an impact on the crime statistics. A review of the crime statistics for 2019/2020 reveals that the national lockdown, especially level 5, did have an impact on the reported cases. This was regarded as a “hard” lockdown with the strictest restrictions. Predictably, when the country moved down to, for example, lockdown level 3, the reported crime statistics trend “reversed and slowly returned to normal levels as lockdown eased” (Staff Writer 2021).

Violent Protests

As indicated in the previous section on crime statistics, the national lockdown imposed various limitations on the movement of people. Furthermore, the national lockdown resulted in restrictions on the number of people permitted to gather, including gathering for protests. The number was limited to 50 people, and this limitation had an impact on the constitutionally protected right to protest (Malematja 2020). Regardless of the limitations on the number of gatherers at permitted gatherings, which unlawfully involved a process that required people to seek permission, protests still occurred (Lancaster and Mulaudzi 2020).

According to public order incidents reported to the SAPS, a decrease in the number of both unrest-related and peaceful incidents was recorded between April 2019 and March 2020. These statistics are not limited to protests, but include other public order incidents. Based on these statistics, an inference could be made that there was a decrease in the reported number of both peaceful and violent protests. (South African Police Service

2020a). About 60 per cent of protests were peaceful and did not require the police to intervene. Often, protests turn violent in response to the manner in which the police deal with them. Protests that start peacefully may turn violent; therefore, managing peaceful protests requires a level of meaningful engagement with the protestors and not heavy-handed policing (Lancaster and Mulaudzi 2020) or repression (Habib 2020). Obviously, some protesters are intent on violent protests. Criminals often use this as a cover to further engage in criminal activities. However, aggressive policing or actions may prompt violence to erupt or even escalate (Habib 2020). Protesters in North West, Mpumalanga, and Western Cape were, for example, exposed to being shot at with rubber bullets, assaulted by the police, and being hit with guns. Stun grenades and water cannons were also used against protesters (Malematja 2020). From a constitutional perspective,⁸ for protests to remain protected and legitimate, they should be free of any violence (Habib 2020).

In *Lingen and Others v Minister of Police*⁹, a group with no permission to protest illegally gathered (paras 1–2) and engaged in hostile singing and chanting. A truck had been overturned and was on its side, and tyres were being burnt in order to block a road at the protest location (para 1). The crowd was informed that their gathering was illegal and that they should not block the road. The crowd became aggressive and started pelting the SAPS with stones (para 2). Public Order Police Service (POPS) arrived as reinforcements. The crowd continued throwing stones at the police. A trailer used for traffic control was set alight (para 3). The crowd was eventually dispersed and the police chased after the protesters, which resulted in the arrest of the five plaintiffs (para 4). The plaintiffs were detained and later released on bail (para 5). The plaintiffs issued summons for their unlawful arrest and detention. The plaintiffs testified that they were not involved in the protests (para 6). Evidence to the contrary was presented and the Court accepted same (paras 11, 14, 18, 19, 22, 25, and 27). The Court found that the plaintiffs committed public violence by intentionally obstructing the road, throwing stones, burning tyres, and obstructing the use of a public road in the presence of the police. Subsequently, the police officers were justified in arresting the plaintiffs. Thus, the claim for unlawful arrest and detention failed (para 50).

As indicated above, it happens that protesters engage in violence. In such instances, the SAPS is justified to disperse the protesters through reasonable means and even arresting them for public violence.

National Unity and Reconciliation

Amendments to the regulations relating to assistance to victims in respect of basic education were published under section 27(2) of the Promotion of National Unity Act

8 Section 17 of the Constitution of the Republic of South Africa, 1996 (Constitution).

9 (1268/2015) [2020] ZANHC 19 (14 May 2020).

34 of 1995 on 6 November 2020,¹⁰ mainly due to the impact of COVID-19. In this context, the victims refer to the Truth and Reconciliation Commission's (TRC) identification of victims of apartheid, so declared by the TRC. These persons are encouraged to apply for financial assistance for basic education, as well as for higher education and training. The extant regulations were drafted in 2014, providing for assistance to qualifying TRC victims and their qualifying relatives and dependents. Only public entities are covered in the regulations. Given the impact of COVID-19 in 2020, the financial assistance was increased to enable enrolment for 2021.¹¹

Security Services

Police Services

During the COVID-19 lockdown,¹² police brutality and the use of force were once again under the spotlight. In May 2020, the Pretoria High Court¹³ sent a strong message to law enforcement officers and confirmed the constitutional rights of all South Africans and further directed that there must be compliance with the Bill of Rights and international conventions against torture during the COVID-19 lockdown (Bruce 2020). The African Policing Civilian Oversight Forum indicated that the limitations of section 49 of the Criminal Procedure Act 51 of 1977 have once again been exposed (Anon 2020a). It is clear that guidelines and proper training are essential, but to effect change, proper and consistent legislation, in line with international law, needs to be in place (Anon 2020a). Furthermore, it would be necessary to clearly define the circumstances in which armed law enforcement officials are permitted to use lethal force (Anon 2020a).

The violent incidents during lockdown resulted in the launch of various efforts to address police violence. These efforts include the guidelines on the use of force and torture (South African Police Service 2020c) and the South African Police Service Amendment Bill, 2020, which seeks to amend the section on the use of force.¹⁴

Correctional Services

In the reporting period, matters relating to parole and the treatment of prisoners came to the fore. Pangaker, who had a previous conviction for abduction and murder, killed a young girl, Tazne van Wyk, while he was out on parole. This incident sparked an outcry for the Department of Correctional Service to tighten its parole system (Anon 2020b). The commentators raised concerns that the parole board sometimes takes decisions that conflict with the suggestions of the Department of Correctional Services. The expertise

10 GG 43890 (6 November 2020) GN R1193.

11 See GG 43979 (11 December 2020) GN R1303 of and GG 44005 (18 December 2020) GN R1364 for the schedule of amounts available for financial assistance.

12 GG 43096 (15 March 2020) GN 313.

13 *Khosa v Minister of Defence and Military Defence and Military Veterans* 2020 (5) SA 490 (GP) – *Khosa* case.

14 Amendment of section 13 of Act 68 of 1995 by section 3 of Act 41 of 1997.

of the parole board was questioned, and it was suggested that this expertise should be re-evaluated to ensure that accurate decisions are made (Anon 2020b). Another concern was the assessment reports on which the parole board relied to make decisions. The reports were not professionally compiled (Anon 2020b). The communication and consultation process with the community on the release of the sentenced offender had to be revisited (Anon 2020b).

The COVID-19 pandemic led to the release of selected categories of sentenced offenders.¹⁵ Low-risk offenders, who were incarcerated by 27 April 2020, qualified to be placed on parole. This coincided with the release of the Correctional Services Amendment Bill [B32-2020] that amends some sections relating to the parole of offenders who were sentenced before Chapters IV, VI, and VII of the Act came into effect, following the Constitutional Court judgment in *Phaahla v Minister of Justice and Correctional Services (Tlhakanye Intervening)*.¹⁶ The Court ordered that section 136(1) be amended to reflect that parole should be considered based on the date of the commission of the offence and not the date of sentencing. Two regimes existed before. First, prisoners sentenced to life imprisonment before 1 October 2004 were eligible for parole after serving 20 years. Second, after 1 October 2004, prisoners with life sentences had to serve 25 years before they would be eligible for parole (para 6).¹⁷ The applicant was sentenced four days after the regime changed and the Court found that he was prejudiced in this regard. Parliament had to amend the Act within 24 months after the judgment, which would have lapsed in May 2021.

In another effort to improve the parole system, the Constitutional Court confirmed that sections 88A(1)(b) and 91 of the Correctional Services Act 111 of 1998 are constitutionally invalid. According to *Sonke Gender Justice NPC v President of the Republic of South Africa*,¹⁸ the effect of the impugned provisions was that the Judicial Inspectorate lacked the necessary structural, operational, and financial independence to discharge its functions effectively.¹⁹ In an application to confirm the order made by the High Court of South Africa, Western Cape Division, Cape Town (*Sonke Gender Justice NPC v President of the Republic of South Africa*),²⁰ the Court held that “the Judicial Inspectorate be independent of all external pressures from the very institution the Judicial Inspectorate must hold to account” (para 258). In conclusion, the Court held that it “confirmed the High Court’s declaration of invalidity for the reason that section 88A (4) falls short of the standard of independence required and thus does not pass constitutional muster” (para 259).

15 GG 43096 (15 March 2020) GN 313 and GG 43298 (8 May 2020) Proc 19.

16 2019 (2) SACR 88 (CC).

17 The Court explains the history of different measures pertaining to parole for life sentences in paras 5–8.

18 2021 (3) BCLR 269 (CC).

19 This case was discussed in detail previously (Du Plessis, Koraan, Pienaar, and Stoffels 2020).

20 2019 (2) [2019] 4 All SA 961 (WCC).

Defence

The initial level 5 lockdown had a huge impact on fundamental rights usually enjoyed by citizens, in particular the freedom of movement, the right to associate freely, and to participate fully in the economic and other activities usually linked to a democratic society based on freedom and equality. During this period (27 June to 30 September 2020), the SANDF was deployed to provide service in cooperation with the SAPS.²¹ The SANDF was specifically ordered to assist in maintaining law and order, to assist other state departments, and ensure border line control within the Republic during the period.

While assisting where necessary, the conduct of the SANDF, unfortunately in many instances, exceeded the standard required. Instead, its actions resulted in violations of basic human rights. In this regard, the Office of the Military Ombudsman was inundated by complaints from the public as well as serving and former members of the Force during the lockdown period (Ngqakamba 2020; Nyathi 2020). As people were turning to social media to report incidents, the Ombud Office posted notices urging persons to follow the correct procedure, available on its website, to report transgressions (Nyathi 2020). The majority of these complaints related to heavy-handedness, brutality, misconduct, undignified treatment and in many instances, unlawful confiscation of property by the SANDF (Karrim 2020). The SANDF was deployed specifically to various townships where protests over food parcels occurred. Routine patrolling of townships often resulted in confrontations and violent clashes with some community members. One such incident occurred in Alexandra, Johannesburg, in April 2020, which ultimately led to the death of Collins Khosa and subsequent litigation in the *Khosa* case. In the case, it was alleged that Collins Khosa died after sustaining injuries from an attack by members of the SANDF and Johannesburg Metro Police Department (JMPD) during a combined patrol of the military and police. A confrontation occurred in Mr Khosa's home after he was accused of breaking lockdown regulations. The security forces made this interpretation when they found a glass of partially consumed beer and a camp chair outside his home (para 34).

The matter was brought before the Court on an urgent basis by the deceased's family (para 2), seeking a declaration that members of the public are still entitled to have their fundamental rights upheld and protected by members of the security forces during the lockdown period and State of Disaster. The family also sought an order compelling all command officials of said security forces to "do what is necessary, reasonable and proportional to repress and prevent the prevailing lockdown brutality" (para 23). This was to take place by:

- immediately disarming and removing members of the security forces who were present during the attack on Mr Khosa;

21 GG 43502 (3 July 2020) GN 747.

- commanding members of the security forces to abide by the prohibition on torture and being warned of the consequences of failure to do so;
- developing a code of conduct and operational procedures as required by section 19(1)(c) of the National Defence Act 42 of 2002;
- developing a set of guidelines informing the public about what is expected of security forces when enforcing lockdown conditions and regulations;
- establishing an effective complaints mechanism enabling commanders to take swift and appropriate action when incidents of abuse occur; and
- instituting a rapid and impartial investigation into reported cases of abuse in order to keep members of the security forces in check during the lockdown.

Fabricius J scrutinises the Prevention and Combating of Torture of Persons Act 13 of 2013 (paras 54–56), various sections of the Defence Act, South African Police Service Act 68 of 1995, and the Criminal Procedure Act 51 of 1977, among others. He also referred to sections 38 (paras 69–76) and 172 of the Constitution (paras 77–81). However, at issue was the application of section 19 of the Defence Act, specifically (paras 106–130). This section provides for the deployment of the SANDF in cooperation with the SAPS in preventing and combating crime and maintaining and preserving law and order under section 201(2)(a) of the Constitution. Counsel for the applicants argued that section 19 of the Defence Act had to apply during lockdown as section 19(3)(c) specifically provided that such service in cooperation had to be performed in accordance with a code of conduct, operational procedures, and guidelines published by the Minister of Defence.

The power to adopt a code of conduct implied the power and duty to create appropriate and independent mechanisms to hold military personnel accountable to it (para 141). The respondents, however, argued that section 19 did not apply to the military's deployment in support of the SAPS during the COVID-19 crisis. Instead, existing accountability and investigation mechanisms, which include the Military Ombud and the Independent Police Investigative Directorate (IPID) were sufficient to deal with any abuse that may occur during military deployments (para 106).

With reference to international law and standards (para 131), the Court was satisfied that these two mechanisms were insufficient and inadequate (paras 132–141). In this light, the order was designed to ensure that South Africa complied with its constitutional and international obligations, having regard to the separation of powers principle (para 142). Essentially, the order underlined that everyone, all persons present within the territory of the Republic are entitled to certain rights, which are non-derogable, even during states of emergency; *inter alia*, the right to dignity, the right to life, the right not to be tortured in any way, and the right not to be treated or punished in a cruel, inhuman, or degrading way (para 146). The security forces must act and instruct their members to act in accordance with the Constitution and the law, including customary international law and international agreements binding the Republic.

As organs of state, the SANDF, the SAPS, and the MPDs were furthermore obliged to protect, respect, promote, and fulfil the rights in the Bill of Rights and to use only the minimum force that was reasonable to perform an official duty. The accused members who were present at or adjacent to the deceased's home were accordingly placed on precautionary suspension pending the outcome of disciplinary proceedings (para 146.3.1). The relevant functionaries were obliged to develop and publish a code of conduct and operational procedures relating to the conduct of the members of the SANDF, SAPS, and MPDs in giving effect to the declaration of the State of Disaster, as well as widely publish relevant guidelines about the circumstances when force may be used in strict compliance with section 49 of the Criminal Procedure Act. In addition, they were compelled to publish guidelines about the lockdown regulations and other regulations issued during the State of Disaster and guidelines about enforcing social distancing and the restriction of movement and other activities at each of the different stages of alert during the State of Disaster.

Furthermore, the functionaries were required to publish guidelines about when a person could be arrested and alternative means of securing their attendance at trial, as well as information regarding where members of the public could lodge complaints against members of the SANDF, SAPS, and other enforcement agencies or officers (para 146.4). A freely accessible mechanism for civilians to report allegations of torture or cruel, inhuman, and degrading treatment or punishment committed by members of the security services must be developed (para 146.5). All internal investigations into the specific listed incidents, including the death of Mr Khosa, must be completed and reports furnished (para 146.6). The judgment was crucial in providing the necessary parameters for the conduct of security forces as the employment of the SANDF was not short-term, given the longevity of the COVID-19 pandemic.

The Defence Amendment Act 6 of 2020, assented to on 5 August 2020,²² aims to achieve various objectives, inter alia to include the Chief of Staff in the Military Command of the Defence Force; to clarify the process regarding the implementation by the Chief of the Defence Force of the delegation of powers and assignment of duties to members by the Secretary for Defence as head and accounting officer of the Department; and to simplify matters regarding identification cards issued to military police officials. With regard to the Reserve Force, the amendment clarifies that a person does not need the consent of an employer to enrol as or to remain a member of the Reserve Force and with regard to the Regular Force, to regulate anew the termination of service of members.

National Security and Intelligence

The President established a National Security Council subject to section 101(1) of the Constitution.²³ The Council consists of some members of the National Executive (reg

22 GG 43606 (7 August 2020) GN 874.

23 GG 43083 (10 March 2020) Proc 13.

2(1)), for example, the ministers responsible for defence, police, home affairs, international cooperation, traditional affairs and housing. The President may coopt other members of the executive (reg 2(2)). The Council is, according to regulation 4, responsible for ensuring the national security of South Africa, as well as the approval of a National Security Strategy, the National Intelligence Estimate, and National Intelligence Priorities. The Council coordinates the work of the security services, law enforcement agencies, and other organs of state responsible for national security. The national security structures must provide the Council with integrated intelligence assessments. The South African National Security Secretariat, which consists of various director-generals, supports the Council (reg 3).

Arms and Ammunition

In 2020, regulation 79 of the Firearms Control Regulations was amended²⁴ to provide for regular training for employees of official institutions that handle firearms in discharging their duties. Employees had to undertake at least one training session every 12 months, but the amendment will ensure that more training within the 12 months can be provided, where necessary. Regulation 79(3) was included to deal with the sustained competency of employees. Employees must undertake practical training in relation to the proper and safe handling of firearms and ammunition every 60 months or within a shorter period as prescribed by the institution. Government again granted amnesty for the submission of firearms and ammunition²⁵ and also indicated that it intends to destroy arms and ammunition that were voluntarily surrendered to the State.²⁶

The National Conventional Arms Control Regulations 2012, issued in terms of the National Conventional Arms Control Act 41 of 2002, was amended to provide for on-site verification of the controlled items via diplomatic processes.²⁷

In the reporting period, several cases dealt with the possession or use of firearms. The licensing of firearms was also challenged. In *Leshilo v S*,²⁸ the Supreme Court of Appeal (SCA) interpreted whether joint possession of a firearm was possible. Relying on previous decisions,²⁹ the Court found that the facts of each case should determine whether joint possession was possible: “Even accepting that the appellant knew that his co-perpetrator possessed the firearm and knew that he would use it in the execution of a common purpose to commit the housebreaking, he cannot be considered a joint possessor ... Knowledge of the firearm, and even acquiescence to its use for fulfilling

24 GG 26156 (26 March 2004) GN R345, amended by GG 43081 (9 March 2020) GN 275.

25 GG 43576 (31 July 2020) GN 845.

26 GG 43310 (13 May 2020) GN 525.

27 GG 35283 (20 April 2012) GN R326 - Items 3 and 4 of the End User Certificate amended by 43303 (11 May 2020) GN 520. End User Certificates are issued when the controlled items are exported (reg 11).

28 345/2019 [2020] ZASCA 98 (8 September 2020).

29 E.g. *S v Mbuli* 2003 (1) SACR 97 (SCA); *S v Molimi and Another* 2006 (2) SACR 8 SCA; *Ramoba v S* 2017 (2) SACR 353 (SCA).

the common purpose of robbery, is insufficient to establish guilt as a joint possessor” (para 15). In *National Commissioner of Police v Gun Owners of South Africa*,³⁰ the Gun Owners of South Africa (GOSA) initially applied for an interim interdict to prevent the South African Police Service from accepting or demanding the surrender of unlicensed firearms or firearms where the licences expired in terms of the Firearms Control Act 60 of 2000 (paras 3–6, Anon 2020c). The SCA found that the requirements for an interim interdict were not met, and that such an interdict interferes with the exercise of a statutory power and infringes on the principle of the separation of powers. The Court also stated that the gun owners were at fault for not applying for the renewal of their licences and that no urgency was constituted (paras 36–52). The presiding officer in the Court *a quo* amended the final relief with the approval of the applicant. According to the SCA, this was inappropriate and could render the “court susceptible to allegations of bias” (paras 20–29).

In *S v Osmond*,³¹ the Court reiterated that the presiding officer has to hold a proper inquiry into the fitness of a person to possess a firearm. In this specific circumstance, the Court did not sufficiently take the circumstances of children into account where the holder of the firearm was also the primary caregiver of the minor children.

The Constitutional Court dismissed an appeal application that a representative of the French arms company, Thales, not be prosecuted with former President Zuma in his corruption trial that was set for July 2019 (Davis 2020).³² The trial will deal, among others, with the bribery allegations against former president Zuma in relation to the so-called 1999 Arms Deal. It seems that subsequent to the Arms Deal, other possible dubious arms deals also took place, but did not necessarily involve the former president (Reddy 2020; Thakur 2020). The findings of the Seriti Commission into the 1999 Arms Deal were also challenged in an application of review in the High Court case of *Corruption Watch v Arms Procurement Commission*.³³ The Court, with reference to foreign case law, found that the commission of inquiry exercised a public power (paras 5–16, 51) and that its findings may be reviewed on the basis of rationality and legality. The applicants’ case was that “the Commission failed to gather relevant material to properly consider and investigate matters raised in this regard, failed to admit evidence which was highly material to its inquiry and which was in its possession, failed to seek and allow information or material evidence from key witnesses, and failed to test the evidence of witnesses who appeared before it by putting questions to them with the required open and enquiring mind” (para 18).

The Court reiterated that the case “does not concern the merits of the SOPP, nor the veracity of any allegation of corruption or wrongdoing pursuant thereto. This Court is only required to determine whether the Commission, in undertaking its task, failed to

30 2020 (6) SA 69 (SCA).

31 2020 (1) SACR 357 (ML).

32 Note that by April 2021, the trial had not commenced yet.

33 2020 (2) SA 165 (GP).

comply with the requirements of legality and rationality which are the tests to be applied in respect of an application to review the Commission’s findings” (para 50). On the basis of legality and rationality, the Court found that the Commission did not interrogate key issues; it did not allow critical reports, “it accepted facts as common cause” and did not interrogate the evidence; it ignored the evidence in the Shaik Shabir trial records; it did not appreciate that the rules of evidence and procedure are not as strict as in an ordinary trial and that “Commissions are designed to allow an investigation which goes beyond what might be permitted in a Court” (para 69). The Court indicated that it acknowledged that commissions of inquiry have their own flexible procedures, but that “where the uncontested evidence reveals so manifest a set of errors of law, a clear failure to test evidence of key witnesses, a refusal to take account of documentary evidence which contained the most serious allegations which were relevant to its inquiry, the principle of legality dictates only one conclusion, that the findings of such a commission must be set aside” (para 70).

Subsequently, two non-governmental organisations also lodged complaints to the Chief Justice against the judges involved in the Commission (Open Secrets and Shadow World Investigations 2020). In 2020, an additional commission of inquiry was appointed in terms of the Commissions Act 8 of 1947 to address allegations of state capture, corruption, and fraud in the public sector and organs of state.³⁴ This Commission’s focus is wider and does not merely focus on the arms deal aspect.

Domestic and Gender Violence

A Victim Support Services Bill of 2019 was introduced on 17 July 2020.³⁵ The Bill was published to address implications of, specifically, gender-based violence, femicide, and abuse of women and children. The overarching aim of the Bill is to provide a statutory framework for the promotion and upholding of the rights of victims of violent crimes. The aim of the Bill is thus to bring the victims to the fore, so as to embody comprehensive victim empowerment legislation (clause 2).

While manifold crimes are extant and a variety of victims are encountered, this Bill is specifically focused on the victims of violent crimes (clause 3). Indirect victims of violent crimes are included, albeit within the family context only. Accordingly, for purposes of providing psychosocial services, the scope of “victim” is thus restricted for purposes of this particular Bill (clause 4), also by way of providing a screening process under clause 6. Clause 7 states that secondary victimisation is illegal and that it has to be prevented at all times. A list of services available to the victim is set out in clause 8. Because different departments and a variety of services are relevant, each department must provide services in line with its constitutional mandate. At the centre are psychosocial services, although medical services and witness protection services are also

34 GG 43563 (28 July 2020) Proc R24.

35 GG 43528 (17 July 2020) GN 791.

provided for. Because there are so many departments and service providers involved in providing support to victims, these institutions and service providers have to register with the Department of Social Development.³⁶

The publication of legislative measures dedicated to providing essential support for victims of violent crimes and ensuring that those victims have rights on par with those of, ironically, the perpetrators, is long overdue. Various services are essential for providing support and preventing further victimisation. Since a rather broad spectrum of services is envisaged, multiple role players will be involved. These will include a variety of departments and functionaries, as well as various service providers, both departmental and on a contractual or partnership basis. In this context, effective coordination is crucial. Clear directives, effective guidelines, and best practices are thus non-negotiable for the effective operation of the Act. Furthermore, the provision of these services is costly and must be budgeted for. Unfortunately, experience with state-supported and state-driven services is generally poor to dismal. In this regard, the acquisition of vaccines for the COVID-19 virus and the roll-out of the vaccination programme, is a case in point. While it is crucial to get the provision of victim services up and running, the question remains whether there is sufficient funding, especially given the massive pressure on government funds amid COVID-19 and capacity, generally.

Terrorism

Despite COVID-19 or perhaps as a result thereof, terrorist activities escalated worldwide. South Africa published lists of entities that were identified by the United Nations Security Council as potentially involved in terrorist and related activities in terms of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004.³⁷

Conclusion

Clearly, unrest and violence still underpin the South African society – whether it is institutionalised, protest action, or household violence. The COVID-19 pandemic brought new regulations and, therefore, more transgressions – not only by members of the public but also by the security services. The activities of the parole board and parole for prisoners remain contentious. The courts remain vigilant in their protection of people against state abuse and are prepared to severely criticise the work of commissions of inquiry into the Arms Deal.

36 Clauses 20–21, read with clauses 22 and 30–39.

37 GG 43869 (3 November 2020) GN 1165 and GG 43950 (1 December 2020) Procs 33–36.

References

- Africa Check. 2020. "Factsheet: South Africa's Crime Statistics for 2019/20." Accessed 1 April 2021. <https://africacheck.org/fact-checks/factsheets/factsheet-south-africas-crime-statistics-201920>.
- Anon. 2020a. "COVID-19 Crisis: Laws, not Guidelines, must Limit Use of Force." *Legalbrief*, May 25.
- Anon. 2020b. "General: Gaps must be Closed in Parole System – Department." *Legalbrief*, 2 March.
- Anon. 2020c. "Police Appeal to Illegal Firearm Owners to Take Advantage of New Amnesty." *TimesLive*, 1 August. Accessed 11 April 2021. <https://www.timeslive.co.za/news/south-africa/2020-08-01-police-appeal-to-illegal-firearm-owners-to-take-advantage-of-new-amnesty/>.
- Bruce, D. 2020. "Draft Bill will not Solve Police Brutality." *GroundUp*, 7 October. Accessed 5 May 2021. <https://www.groundup.org.za/article/draft-police-bill-will-not-solve-police-brutality/>.
- Davis, R. 2020. "Last Obstacle Falls Ahead of Zuma Corruption Trial as Thales Case Dismissed by ConCourt." *Daily Maverick*, 8 May. Accessed 11 April 2021. <https://www.dailymaverick.co.za/article/2020-05-08-last-obstacle-falls-ahead-of-zuma-corruption-trial-as-thales-case-dismissed-by-concourt/>.
- Du Plessis, W., R. Koraan, J. M. Pienaar, and M.C. Stoffels. 2020. "Unrest and Violence 2019." *Journal of Law, Society and Development* forthcoming.
- Habib, A. 2020. "Understanding Violent Protest in South Africa and the Difficult Choice Facing Leaders." *The Conversation*, 8 November. Accessed 1 April 2021. <https://theconversation.com/understanding-violent-protest-in-south-africa-and-the-difficult-choice-facing-leaders-148751>.
- Karrim, A. 2020. "SANDF Members Slammed, Complaints to Military Ombudsman Stream in." *News24*, 30 March. Accessed 5 May 2021. <https://www.news24.com/news24/SouthAfrica/News/lockdown-sandf-members-slammed-complaints-to-military-ombudsman-stream-in-20200330>.
- Lancaster, L and G. Mulaudzi. 2020. "Rising Protests are a Warning Sign for South Africa's Government." Institute for Security Studies, 6 August. Accessed 1 April 2021. <https://issafrica.org/iss-today/rising-protests-are-a-warning-sign-for-south-africas-government>.
- Malematja, S. 2020. "Government has Used Lockdown to Decide Who may Protest." *GroundUp*, 17 August. Accessed 1 April 2021. <https://www.dailymaverick.co.za/article/2020-08-17-government-has-used-lockdown-to-decide-who-may-protest/>.

- Ngqakamba, S. 2020 “SA Military Ombud Office has Received 28 Complaints since Lockdown.” *News24*, 19 April. Accessed 5 May 2021. <https://www.news24.com/news24/SouthAfrica/News/sa-military-ombud-office-has-received-28-complaints-since-lockdown-20200419>.
- Nyathi, A. 2020. “Military Ombud Urges Citizens to Follow Procedure when Lodging Complaints.” *Eyewitness News*, 20 May. Accessed 5 May 2021. <https://ewn.co.za/2020/05/20/military-ombud-urges-citizens-to-follow-procedure-when-lodging-complaints>.
- Nyathi, A. 2020. “Military Ombudsman Probing at Least 53 Lockdown Complaints against Members.” *Eyewitness News*, May 19. Accessed 5 May 2021. <https://ewn.co.za/2020/05/19/military-ombudsman-probing-at-least-52-lockdown-complaints-against-members>.
- Open Secrets and Shadow World Investigations. 2020. “Why we have Complained to the Chief Justice about Judges Willie Seriti and Hendrick Musi.” *Daily Maverick*, August 20. Accessed 11 April 2021. <https://www.dailymaverick.co.za/article/2020-08-20-why-we-have-complained-to-the-chief-justice-about-judges-willie-seriti-and-hendrick-musi/>.
- Reddy, M. 2020. “Part One: The Hollow Man.” amaBhungane, 17 September. Accessed 11 April 2021. <https://amabhungane.org/stories/200917-the-hollow-man/>.
- Socio-Economic Rights Institute of South Africa. 2020. “*Khosa & Others v The Minister of Defence and Military Veterans and 10 Others (‘Khosa’)*.” SERI, 2020. Accessed 5 May 2021. <http://www.seri-sa.org/index.php/19-litigation/case-entries/1013-khosa-v-the-minister-of-defence-and-military-veterans-and-others-khosa>.
- South African Police Service. 2020a. “Crime Statistics 2019/2020.” Accessed 1 April 2020. <https://www.saps.gov.za/services/crimestats.php>.
- South African Police Service. 2020b. “Minister Bheki Cele: Annual Crime Statistics 2019/2020.” Accessed 1 April 2021. <https://www.gov.za/speeches/minister-bheki-cele-annual-crime-statistics-20192020-31-jul-2020-0000#>.
- South African Police Service. 2020c. “Use of Force and Torture: Guidelines on the Implementation and Enforcement of Regulations and Directives Issued in terms of Section 27 of the Disaster Management Act, 2002 (Act No. 57 of 2002): Containment and Management of COVID-19.” Accessed 5 May 2021. https://legalbrief.co.za/media/filestore/2020/05/Police_document.pdf.
- Staff Writer. 2021a. “Crime Levels before South Africa’s Lockdown – and What They Look Like Now.” *Business Tech*, 2021. Accessed 1 April 2021. <https://businesstech.co.za/news/lifestyle/391877/crime-levels-before-south-africas-lockdown-and-what-they-look-like-now/>.

Staff Writer. 2021b. "South Africa Crime Stats 2020: Everything you Need to Know." *Business Tech*, 2021. Accessed 1 April 2021.
<https://businesstech.co.za/news/government/421424/south-africa-crime-stats-2020-everything-you-need-to-know/>.

Thakur, C. 2020. "Advocacy Comment: Why amaB is Challenging Liquidation Inquiry Secrecy." amaBhungane, September 10. Accessed 11 April 2021.
<https://amabhungane.org/stories/200910-advocacy-comment-why-amab-is-challenging-liquidation-inquiry-secrecy/>.

World Health Organisation. 2020. 2020 COVID Statistics, South Africa. Accessed 13 May 2021. <https://covid19.who.int/region/afro/country/za>

Cases

Corruption Watch and Another v Arms Procurement Commission and Others 2020 (2) SA 165 (GP).

Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others 2020 (5) SA 490 (GP).

Leshilo v S (345/2019) [2020] ZASCA 98 (8 September 2020).

Lingen and Others v Minister of Police (1268/2015) [2020] ZANHC 19 (14 May 2020).

Maswanganyi v Minister of Defence and Military Veterans 2020 (4) SA 1 (CC).

Minister of Defence and Military Veterans and Others v Maswanganyi 2019 (5) SA 94 (SCA).

Minister of Police and Another v Stanfield and Others 2020 (1) SACR 339 (SCA).

National Commissioner of Police and Another v Gun Owners of South Africa 2020 (6) SA 69 (SCA).

Phaahla v Minister of Justice and Correctional Services and Another (Tlhakanye Intervening) 2019 (2) SACR 88 (CC).

Ramoba v S 2017 (2) SACR 353 (SCA).

S v Mbuli 2003 (1) SACR 97 (SCA).

S v Molimi and Another 2006 (2) SACR 8 (SCA).

S v Osmond 2020 (1) SACR 357 (ML).

S v Thobela 2020 (2) SACR 222 (GJ).

Legislation

Commissions Act 8 of 1947.

Constitution of the Republic of South Africa, 1996.

Correctional Services Act 111 of 1998.

Correctional Services Amendment Bill [B32-2020].

Criminal Procedure Act 51 of 1977.

Defence Amendment Act 6 of 2020.

Disaster Management Act 57 of 2002.

Draft South African Police Service Amendment Bill, 2020.

Firearms Control Act 60 of 2000.

Firearms Control Regulations, 2004.

Gauteng Provincial Commissions Act 1 of 1997.

National Conventional Arms Control Act 41 of 2002.

National Conventional Arms Control Regulations, 2012.

National Defence Act 42 of 2002.

National Land Transport Act 5 of 2009.

Prevention and Combating of Torture of Persons Act 13 of 2013.

Promotion of National Unity Act 34 of 1995.

Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004.

South African Police Service Act 68 of 1995.

South African Police Service Amendment Act 41 of 1997.

Victim Support Services Bill of 2019.

Western Cape Community Safety Act 3 of 2013.

Gazette Notices

GG 43334 of 18 May 2020 Gen N 279.

GG 43340 of 20 May 2020 Gen N 283.

GG 43869 of 3 November 2020 GN 1165.

GG 43081 of 9 March 2020 GN 275.

GG 43096 of 15 March 2020 GN 313.

GG 43303 of 11 May 2020 GN 520.

GG 43310 of 13 May 2020 GN 525.

GG 43502 of 3 July 2020 GN 747.

GG 43528 in of 17 July 2020 GN 791.

GG 43576 of 31 July 2020 GN 845.

GG 43606 of 7 August 2020 GN 874.

GG 43890 of 6 November 2020 GN R1193.

GG 43979 of 11 December 2020 GN R1303.

GG 44005 of 18 December 2020 GN R1364.

GG 35283 of 20 April 2012 GN R326.

GG 26156 of 26 March 2004 GN R345.

Gauteng PG 284 of 13 September 2019 Procl 101.

GG 43083 of 10 March 2020 Procl 13.

GG 43298 of 8 May 2020 Procl 19.

Gauteng PG 186 of 8 October 2020 Procl 84.

GG 43563 of 28 July 2020 Procl R24.

GG 43950 of 1 December 2020 Procl 33-36.

Gauteng PG 70 of 20 March 2020 PN 340.

Western Cape PG 8333 of 7 October 2020 PN 99.