

**Making the Law Count:
A Five Country Judicial Audit**



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ACORD is a Pan African organisation working for social justice and development. Our mission is to work in common cause with people who are poor and those who have been denied their rights to obtain social justice and development and be part of locally rooted citizen movements. We are present in 17 countries in Africa, working with communities on livelihoods and food sovereignty, women’s rights, conflict and HIV/AIDS. We also advocate and campaign at Pan Africa level.

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ACRONYMS

ACORD	Agency for Co-operation and Research in Development
ACHPR	African Charter on Human and Peoples Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ADDF	Association pour la Défense des Droits des Femmes (Association for the Defence of Women's Rights)
AI	Amnesty International
AIDS	Acquired Immune Deficiency Syndrome
Art	Article
ASADO	Association africaine de défense des Droits de l'homme (African association for the Defence of Human Rights)
BINUB	United Nations Integrated Office in Burundi
CDF	Centre pour le développement de la femme (Centre for Women's Development)
CDPF	Convention on the Political Rights of Women
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDOVIP	Centre for Domestic Violence Prevention
CID	Criminal Investigation Department
CSTPEPO	Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others,
CTC	Care and Treatment Centres
DEVAW	Declaration on the Elimination of All Forms of Violence against Women
DNA	Deoxyribonucleic Acid
DRC	Democratic Republic of Congo
DV	Domestic Violence
DW	Defence Witness
ECP	Emergency Contraception Pill
FCDD	Femmes Chrétienne pour la Démocratie et le Développement (Christian Women for Democracy and Development)
FGM	Female Genital Mutilation
FIDA	Federation of Women Lawyers
GBV	Gender Based Violence
HIV	Human Immune Deficiency Virus
ICC	International Criminal Court
ICGLR	International Conference on the Great Lakes Region
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IDP	Internally Displaced Person
IPCPR	International Pact on Civil and Political Rights
IRC	International Rescue Committee
JPO	Judicial Police Officer (OPJ: Officier de la Police Judiciaire)
LC	Local County Council
LHRC	Legal and Human Rights Centre
LIFDED	Ligue des femmes pour la démocratie et le développement (Women's League for Democracy and Development)
LIZADEEL	Ligue pour la Défense des Droits des Enfants et des Elèves du Congo (League for the Defence of Children and Pupils' Rights in Congo)



LRA	Lord's Resistance Army
MCH	Maternal and Child Health
NGO	Non-Governmental Organisation
NOLA	National Organisation for Legal Assistance
OCD	Officer Commanding Defence
OFEDICO	Organisation des Femmes pour la Dynamique Communautaire (Women's Organisation for Community Dynamics)
P3 Form	Police Form Number 3
PC	Penal Code
PEP	Post-exposure prophylaxis
PIRDESC	International Pact on Economic, Social and Cultural Rights
PP	Public Prosecutor
PW	Prosecution Witness
RAF	Réseau Action Femme (Women's Action Network)
RMP	Public Prosecutor's Register
RP	Criminal Register
RPC	Regional Police Commander
SGBV	Sexual and Gender Based Violence
SH	Sexual Harassment
SOA	Sexual Offences Act (Kenya)
SOSPA	Sexual Offences Special Provision Act
SPP	Primary Criminal Sentence
STI	Sexually Transmitted Infection
TPFnet	Tanzania Female Police Network
TRCS	Tanzania Red Cross Society
UDHR	Universal Declaration of Human Rights
UNFPA	United Nations Population Fund
UNHCR	United Nations High Commission for Refugees
UNIFEM	United Nations Development Fund for Women
UNO	United Nations Organisation
UPDF	Uganda People's Defence Force
UPT	Urine Pregnancy Test
URT	United Republic of Tanzania
USAID	United States Agency for International Development
USD	United States Dollar
VAW	Violence Against Women
WHO	World Health Organisation
WLAC	Women's Legal Aid Centre

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This comprehensive five-country study would not have been possible without the support and effort of a range of individuals and institutions.

We would like to begin by recognising the MDG3 Fund of the Dutch government. This audit is enabled by this financial support in the context of a five country sub regional project that the Agency for Cooperation and Research in Development (ACORD) is implementing and which aims to address gender justice¹. This judicial audit forms the first of a series of core baseline research that will inform our work and that of our partners over the next two years and beyond.

We would like to acknowledge our country programme staff in Burundi, Democratic Republic of Congo, Uganda, Tanzania and Kenya who have dedicated immense time not only towards gathering the data relevant for this study but also in laying the necessary foundation for the successful implementation of this project. We would like to recognise the institutional leadership within the area programmes for continued stewardship.

This work would not have been possible without the support of partners on the ground in all of these five countries who have over years informed ACORD's interventions and engagements on the ground. We would like to specifically thank: National Organisation for Legal Assistance (NOLA), Women's Legal Aid Centre (WLAC) and International Rescue Committee (IRC) in Kasulu district in Tanzania, l'Association des Femmes Magistrates de la République Démocratique du Congo and le Réseau Action Femme in the DRC, **Gulu Women's Economic Development and Globalisation (GWED-G), Ker Kal Kwaro Acholi (KKA) and Women and Rural Development Network (WORUDET) in Uganda and the Association des Juristes Catholiques du Burundi**. We are equally indebted to all the key informants and survivors who participated in the interviews. The information, insight and knowledge received inform the findings of this study.

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Like with all processes of this nature, many people have contributed to getting things done, from reviewing, logistical support to those who sit and do the tedious work of budgeting, all of these energies were critical to this process and though we may not mention you individually, we are indebted to you.

¹ "The Hidden War Crimes: Challenging the Impunity on Sexual and Gender Based Violence in Countries of the International Conference on the Great Lakes Region (ICGLR)"

PREFACE

The Agency for Cooperation and Research in Development (ACORD) is a pan-African organisation working for social justice and development. With its headquarters in Nairobi, Kenya, ACORD is implementing development initiatives in 17 countries in Africa with a focus on the poorest and most marginalised areas. ACORD's interventions comprise relief, rehabilitation, and sustainable capacity building programmes for local and national organisations, as well as government institutions. ACORD has moved from addressing the consequences of poverty and exclusion, to more fundamental issues. The organisation focuses on four thematic areas, namely, Gender, Conflict, Livelihoods as well as HIV/AIDS.

ACORD's research history in the area of gender and conflict dates back many years. ACORD has made several notable contributions in these areas through publications and research documents such as **Gender Sensitive Programme Design and Planning in Conflict-affected situations² Research Report; Cycles of Violence; Gender Relations and Armed Conflict³ and A Lost Generation: Young People and Conflict in Africa⁴**. From 2006, ACORD has given priority to sexual and gender based violence (SGBV) in conflict and post-conflict societies as the focus for its gender theme. The goal of this emphasis was to facilitate the development of a culture of effective and efficient gender justice in the states that are in, or have emerged from, conflict. ACORD aims to do this by challenging impunity and bringing perpetrators of sexual and gender based crimes to justice while restoring the health and livelihoods of the survivors.

ACORD's recent sub regional project funded by the MDG3 Fund of the Dutch government is an initiative geared towards combating violence against women with the focus being on women and girls in situations of conflict. Targeting five countries: DRC, Burundi, Kenya, Tanzania and Uganda, its three key outcomes are cultural change and practice on impunity as it relates to sexual abuse of women and girls in pre, conflict and post conflict circumstances; strengthening the institutions and mechanisms of justice and uphold of the rule of law to protect women and girls against SGBV and punish perpetrators; and facilitate restitution for survivors of sexual crimes perpetuated particularly in conflict and post conflict situations. A key outcome of the project will be establishing a community oriented fund and provision of vocational training for survivors of SGBV for entrepreneurship development and improved livelihoods.

This project builds upon our broad development work in the five countries and proposes to create platforms for enhancing women's rights work in the countries where our work on gender based violence (GBV) is nascent. We will build on the existing momentum in some of the implementing countries such as: ACORD in Burundi has conducted documented testimonies of girl ex-combatants and survivors of SGBV, which was published in the book *Lost Generation* in addition to developing reintegration projects through the Community Social Contract model developed in post conflict Burundi. Through partners ACORD assists in the provision of free legal assistance to SGBV survivors and enhance the capacity of judicial authorities and the police through sensitization and education on SGBV. We have also facilitated the civil registration of children born out of sexual violence as they are characteristically denied identity due to the patriarchal nature of legal and societal structures.

In Uganda, several interventions have been undertaken to raise the issue of the prevailing impunity in relation to sexual crimes particularly in the context of the conflict in the Greater North of Uganda. Highlighting sexual crimes and the needed justice for women and communities need to be integrated into the discussions and the accountability frameworks that will be established for Uganda to have true reconciliation. In Tanzania, ACORD has undertaken various gender based initiatives for the displaced including promoting awareness on gender relations in refugee hosting communities; establishing district gender forums; supporting local government authorities in gender analysis, mainstreaming gender into development programmes and gender audits; gender-focused poverty mapping for monitoring progress under the national Strategy for Growth and Reduction of Poverty (NSGRP).

This study is therefore a continuation of ACORD's focus on sexual and gender-based violence and builds upon a foundation that we have laid in alliance with other organisations. This study recognises that much work has been done in the general area of advocacy and service delivery for survivors of sexual and gender based violence. We recognise that across the continent multiple layers of activism exist to address sexual and gender based violence, whether in situations that are deemed to be overtly in conflict or otherwise. However, through a consolidated view of the five countries and an informed situation analysis we believe that the adoption of sub regional approaches that address the structural problems rather than isolated country processes are critical to advancing the SGBV agenda forward.

² Judy El-Bushra, Asha El-Karib and Angela Hadjipateras, ACORD, January 2002

³ Judy El Bushra & Ibrahim Sahl, 2005

⁴ ACORD, May 2007.



EXECUTIVE SUMMARY

The history of women's rights actors' engagement with statecraft has over the years gone through various waves and as a result varied strategies have been adopted. One of the most common approaches across the continent has been to target the legal and policy environment of the state as a means through which the rights of women can be entrenched. The rationale to such an approach was that that a reform oriented approach that worked to incrementally change the system was favoured rather than one that radically overhauled it. This period saw the visibility of work on violence against women increase, with domestic violence acting as the strategic entry point that the women's movement deployed to reform state structures. These changes came in the form of legislative frameworks, in the form of gender awareness training, in the creation of gender desks in the police stations and massive campaigns geared towards making visible the agency of women and ascertaining that the rights of women were at the top of the state's agenda.

The increase in the level and type of violence against women in the last decade or so has shown that while the law and hence the legal framework has been important it has not been enough. The evidence and extent of violence that pervades overt conflict and non conflict situations is an indicator that an incremental approach to legislative work has had its success but it has also worked against the very problem that it was designed to deal with. New challenges have emerged and these include but are not limited to: the sub regional nature of conflicts, the spread of those conflicts across borders, the realities of trafficking of persons across porous borders and the particularity of fragile states that lends them open to manipulation. In order to devise strategies the respond to the new challenges it is imperative that we have an understanding of the status quo.

In the last five years, some responses have taken account of this dynamic and the most notable has been the establishment of the intergovernmental body, The International Conference of the Great Lakes Region (ICGLR) which through its eleven⁵ members states have ratified the protocol on the suppression of sexual and gender based violence and have gone further to develop a model legislation to address sexual violence across the Great Lakes region. This judicial audit is undertaken with a view to informing the process of implementing this model legislation by coming to grips with the peculiarities and similarities across the five countries of interest (Kenya, Uganda, Tanzania, DRC and Burundi).

This audit seeks to understand the intersections, the gaps and linkages or lack thereof within the actors that form part of the framework that makes a legal case successful. This audit assessed in each of the five countries:

- How and where the legal frameworks locate SGBV
- How judicial officers interpret the law and the factors influencing their adjudication on SGBV
- The role of the police and the factors that determine whether they investigate SGBV and what the protocols of investigation and prosecution are
- The role and capacity of health institutions in SGBV
- How non-state actors engage to prevent SGBV.

The first section of this report outlines the methodology and structure of the audit. The second section sums up the historical development of Sexual and Gender based violence as a crime against humanity, which leads to a summary of the findings in the third section. The fourth and final section presents consolidated recommendations.

It is evident that most of the strategies in place are reactive and are not effective enough to act as deterrents nor are they able to prevent incidences of gender based violence. In essence the mechanism in place respond to the problem as it presents itself rather than to the roots of the problem which in most instances is located at a structural level – the premises from which our communities, governments and states are structured and operate, which is one that positions women as second class citizens. In recognizing this major gap we also take cognisance that the gains made thus far in legislative procedures should not be lost, but rather that efforts should be increased towards developing processes that address the cross border nature of the problem and that where systemic gaps are identified the task at hand should not be to respond to the system but address the structural causes of SGBV.

The comprehensive audit that includes country specific analysis of the legal frameworks judicial environment, cases and intersections with other service providers is to be found at www.acordinternational.org.

⁵ Kenya, Uganda, Tanzania, Rwanda, Burundi, Sudan, Congo Brazzaville, Central African Republic, Democratic Republic of Congo, Zambia and Angola



I. OBJECTIVES AND METHODOLOGY OF THE AUDIT

Overall objective

The objective of this process was to develop a comprehensive audit that offers an opportunity to analyse the possibilities of advocating for the adoption of the model legislation for SGBV in the region adopted by the International Conference for the Great Lakes Region.

Specific objectives

- Assess the legal framework within the five countries with regard to their ability to address SGBV. This involved an analysis of the gaps and strengths of the said systems by interacting with legal precedents: hallmark cases that have been tried with regard to SGBV and have succeeded in providing awards or otherwise, as well as sampling cases that have been dismissed due to technicalities. The goal was to arrive at an understanding of common loopholes within the system.
- To gain an understanding of the reportage of SGBV cases. Of necessity this involved an assessment of other institutions (police, health institutions, amongst other service providers) that are critical to the chain of evidence, their efficacy and synergies with legal institutions or lack thereof and best practices.

Mobilisation and training of researchers

Researchers from the various countries were recruited amongst ACORD partners with specific expertise in the area. A three day researchers' training workshop was conducted in Nairobi, Kenya that created the space for field visits, testing of the tools and validation.

Audit methodology

The audit was a qualitative study that utilised:

- Literature review: an assessment of the legal statutes and case law in the five countries over the last three years.
- Key informant interviews: These were interviews with key persons: police officers, prosecutors, judges, medical staff, staff of international and national NGOs/institutions involved in preventing and addressing SGBV, national and provincial government authorities.
- Focus Groups Discussions: were conducted with women and human rights organizations and specialised discussions with internally displaced persons and survivors of SGBV.
- Participant observation: Guides were developed and used for observation of service providers at health facilities and police stations

Sites:

The study sites were purposively selected and identified by ACORD in consultation with local partners.

Country	Site
Burundi	Bujumbura
Democratic Republic of Congo	Tshangu District
Kenya	Nairobi & Naivasha
Tanzania	Kasulu District
Uganda	Gulu & Kampala

II. DEVELOPMENT OF SEXUAL AND GENDER BASED VIOLENCE AS A CRIME AGAINST HUMANITY

Globally, the twentieth century has earned its distinction of being the bloodiest in all of human history. The rise of fascism graphically witnessed in the Second World War and increasing identity politics has done much to destroy the potential for human co-existence.

At the outset, it is crucial to note that over the last 50 years, the character of armed conflict and war has significantly changed. During World War I, civilians accounted for only ten percent of casualties; today they account for ninety percent. Since the Second World War, concentrated attempts have been made to prevent abuse of power as well as providing for the lives of people and respecting communities of people.⁶ The development of the language of human rights has been one such attempt. The Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10th December 1948 signified the critical point in the evolution of human consciousness while establishing universally accepted principles of human dignity. This however was not able to curb the practice of violence and violations even in genocidal dimensions as witnessed in Bosnia and Rwanda, nor protracted civil wars as witnessed in the Democratic Republic of Congo or Southern Sudan for instance.

In terms of recognising crimes against women, The 1945 Statutes of Nuremberg and Far East Tribunals failed to recognise rape as a war crime. The Tokyo War Tribunal charged rape as an offence relating to “family honour”. The Geneva conventions when adopted in 1949 referred to sexual violence in similar language that is one of honour and dignity as captured in Article 3 and 27. It was not until 1990 when the former “comfort women” broke their silence about their sexual enslavement by the Japanese military in the Second World War that an international movement was sparked seeking reparations, accountability and apology.⁷ The 1993, Vienna World Conference on Human Rights recognized the need to address grave violations of women’s rights within the United Nations agenda. In 1995, the Fourth World Conference on Women in Beijing confirmed rape as a war crime.

The world community in seeking to bring to trial mass violators set up two ad hoc tribunals with an after-the-fact listing of crimes that could be tried. The Statutes of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) Ad hoc tribunals defined rape as a crime against humanity alongside murder, extermination, enslavement, deportation and persecution on political, racial and religious grounds. The jurisprudence emerging from Akayesu case⁸ (ICTR) affirmed this by defining rape for the first time – rape was found to be a form of genocide as well as torture and could amount to enslavement. The ICTY through the Delalic⁹ and Furundzija¹⁰ judgments affirmed Akayesu and found rape to be a form of torture. The establishment of the International Criminal Court (ICC) constitutes a departure from this ad-hoc and retrospective justice experience of trial and accountability. The ICC is the world’s first permanent international tribunal that will try individuals for serious crimes of an international nature. The ICC has jurisdiction over cases of genocide, war crimes, crimes against humanity and aggression. The court acts as the court of last resort.

The ICC statute, drawing upon experience elaborates on what constitutes war crime and crimes against humanity¹¹. The definition of crimes has universal application, meaning that when an act is defined as a crime in the ICC statute, it would be a crime in the eyes of the court whether or not any state so defines or whether or not a state is a party to the statute. The most detailed codification of rape, sexual violence and other serious violations are found in the ICC, defined as crimes against humanity. These categories of crimes are broad and all encompassing, and include gender specific violence perpetrated on women during wartime and peace time.¹² The ICC provides the best framework for prosecuting gender based crimes under international law.¹³ For the first time under international law, gender based persecution is included as a crime against humanity. In the past, the marginalisation of crimes against women in the exercise of universal jurisdiction has been starkly evident¹⁴.

⁶ **Combating Impunity, Vahida Nainar and Saumya Uma, Women’s Research and Action Group 2007**

⁷ **Murungi Betty, Ending Impunity for Gender Crimes – Regional Tribunals and the International Criminal court, FIDA Kenya annual report, “Staking our Claim” 2002**

⁸ **Prosecutor v. Jean Paul Akayesu 2nd September 1998 Case Number ICTR-96-4-T**

⁹ **Prosecutor v. Delalic et al 16th November 1998 Case Number IT-96-21T**

¹⁰ **Prosecutor v. Anto Furundzija 10th Dec 1998, Case Number IT-95-17/1**

¹¹ **Crime against humanity includes extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity, enforced disappearance of persons...**

And it includes “other inhuman acts of similar character intentionally causing great suffering or serious injury to body or to mental or physical health”

¹² **Combating Impunity, Vahida Nainar and Saumya Uma, Women’s Research and Action Group 2007**

¹³ **Murungi Betty, Ending Impunity for Gender Crimes – Regional Tribunals and the International Criminal court, FIDA Kenya annual report, “Staking our Claim” 2002**

¹⁴ **Ibid**

At the regional level, The International Conference on the Great Lakes region has adopted the landmark protocol and model legislation in the areas of Prevention and Suppression of Sexual Violence against Women and Children. The Protocol is designed to fill the legal void that prevails in most of the legal systems in the countries of the region as a response to the systemic rape of women and children in the Great Lakes Region. Under the milestone initiative of the International Conference for the Great Lakes Region (IC/GLR), the eleven¹⁵ Heads of State and Governments have committed themselves to set up regional mechanisms to protect women and children and provide legal and material assistance for victims and survivors of sexual violence.

This legislation, the first in the area of protection against sexual violence in time of conflict and post conflict establishes international standards to address the crime of sexual violence in regions affected by conflicts. The legislation further defines the offence of sexual violence based on the definition provided under the Statutes of the International Criminal Tribunal for Rwanda and Yugoslavia and the International Criminal Court. The legislation further establishes links between the crime of sexual violence and the offences of trafficking; slavery, genocide and war crimes. The protocol further incorporates preventive aspects as encapsulated in such statutes as CEDAW, the African Union and UN Convention on the Rights of the Child. Counselling procedures are also provided for as part of the rehabilitation of victims of sexual violence. The protocol also advocate for maximum sentencing as per the domestic legislation of individual states.

With the entry into force of the Pact on Security, Stability and Development in the Great Lakes Region, the Protocol on Sexual Violence has the force of law. This essentially means that there is a strong legal basis for full implementation of the Programme of Action for Eradicating Sexual Violence.¹⁶

Other regional initiatives also providing opportunities for advocacy towards ending SGBV include: the Nairobi communiqué of 9 November 2007 signed between DRC and Rwanda; the Tripartite Plus Joint Commission (Burundi, DRC, Rwanda and Uganda) as well the Goma Accord (L'Acte d'Engagement) of 21 January 2008 signed between the DRC and Congolese armed groups.

All the 5 Countries under this audit namely: Burundi, Democratic Republic of Congo, Kenya, Uganda and Tanzania are signatories of various international and regional human rights instruments that promote the respect and protection of women's human rights.

Annex 1 is a table showing the countries' commitments to these instruments.

¹⁵ Angola, Burundi, CAR, Congo, DRC, Kenya, Rwanda, Sudan, Tanzania, Uganda and Zambia

¹⁶ Liberata Mulamula, Sex and Gender Based Violence in the Great Lakes Region

III. RATIONALE FOR COUNTRY CHOICES:

This overview of the countries does not in any way capture the complex historical democratic and political dynamics that have shaped their political, social and economic histories. It nonetheless contextualises the focus on these countries by ACORD within the MDG3 project. The interdependence of the countries is illustrated by the damaging effect the disruption of Kenya's highway had on the whole region as was witnessed during the unrest in 2008/09. This is the key conduit (through the port and rail) for essential goods and services to Uganda, Rwanda and Burundi. The conflict in the Eastern part of Congo implicates three countries (DRC, Rwanda and Burundi) and Northern Uganda's conflict has similarly spilled over into Sudan and the DRC highlighting the significance of approaches that offer analysis that is comprehensive and cuts across geographical and juridical borders. Kenya and Tanzania have at different points been refugee receiving countries which has had an impact on communities and has larger policy implications on issues such as citizenship and trafficking.

KENYA:

Kenya is classified as a low income, food-deficit country ranking 152nd out of 177 countries in the Human Development Index (UNDP Human Development Report 2006). Only about 20% of the Kenya landmass consists of medium to high potential agricultural land and supports 80% of the population. The remaining 20% of the population lives on 80% of the land, which is arid and semi-arid. Only 20% of Kenya's land is arable, which leads to severe tensions over access to land for habitation and agricultural use.

Kenya has witnessed a range medium to low level conflict situations since 1992 that have been characterised as either land or ethnic clashes. The origin of the lack of access to land for large proportions of the population lies both in the British colonial and Kenya's post-independence land policies. The colonialists and in Kenya's case the British used tribes as the administrative blocks of their colonies. The entire concept of indirect-rule was based on the idea that indigenous political categories should be preserved and pressed into the service of the colony (Broch-Due. V. 2005: 7).

The tribe was therefore written into the bureaucratic and constitutional framework of the colonial administration and this later formed the basis for power block building with postcolonial states. Ethnic boundaries were given a solidity and administrative reality they had never possessed in the past (Broch-Due. V. 2005: 7).

The fact that Kenya was a settler colony also contributed a great deal to the fact that all ethnic groups had to be put in their place. The colonial state was therefore characterised by various decrees and agreements that created distinct boundaries and these in turn determined relations and connections amongst ethnic groups. Amisi (1997) asserts that the ethnicisation of issues played a significant role in Kenya's politics because of the nexus between ethnic and economic interest and the colonial legacy of unequal socio-economic development in the country. It is in this unequal socio-economic development that the major 'ethnic' rivalries have been rooted since independence.

The post-colonial government therefore inherited a number of problems, the most prominent being the alien land and agricultural policies that were put in place by the British. The vagaries of landlessness and resettlement are still a thorny issue in Kenya, forty years into independence. In the hasty retreat of the British the question of bureaucratised ethnicity was never addressed and two years into the new African governed state, the constitution was amended to turn Kenya towards a centralised form of government. The constant argument being that as a new nation focus should be on development and growth and that ethnocentric discourse would render the country ungovernable. The post election crisis crystallised years of disenfranchisement on the part of a majority of the population.

DEMOCRATIC REPUBLIC OF CONGO:

The history of the Democratic Republic of Congo (DRC) is one characterised by collapse of the governance system and exclusion of the majority of the population in the fight for control over the country's rich natural resources. The involvement of neighbouring countries and foreign multinationals fuelled the conflict that culminated in the partition of former Zaire in 1988. Today, DRC struggles to implement the peace accord that was finally secured in April 2002. Community tensions remain high, particularly in the eastern provinces, while in the west, political instability is a source of fear and recurrent disorder. While civil society was instrumental in pushing for the peace accord, it is today negatively affected by political divisions. Moreover, DRC suffers from extremely poor infrastructure and communications and a crisis in public service delivery, including for the education sector. This coupled with bad governance has led to physical and psychological marginalisation of remote areas. In the absence of state responsibility and accountability, communities have had to come up with their own coping mechanisms and local systems that allowed them to survive. HIV & AIDS is a problem, particularly in the fast growing rural-urban centres and among the IDPs.

UGANDA:

The conflict in northern Uganda has created cycles of violence and a legacy of missed opportunities for peace. The peace talks of 1988, and the Betty Bigombe talks of 1994 and 2004 are all examples of such missed opportunities that could have ended the long running violent conflict in Uganda. The people of northern Uganda are fatigued by these processes. As such, through a series of consultations the people lobbied

government for a comprehensive and blanket amnesty for all the LRA combatants. On 17 January 2000 the President of Uganda signed into law the Amnesty Act. The Amnesty created an excellent environment for dialogue. However, the government of Uganda continued to use both dialogue and military pressure to force the LRA to surrender and benefit from the Amnesty or come to the negotiation table. The conflict is complex and has so far eluded all efforts for military or peaceful solutions. The 20-year armed conflict between the Government of Uganda with the Lord's Resistance Army (LRA) in the Greater North of Uganda and its predecessors has displaced almost 2 million people in northern Uganda. The Northern Uganda conflict has spilled over into the Democratic Republic of Congo and Southern Sudan. The Government of Southern Sudan under the leadership of its Vice-President Riek Machar have attempted to broker peace talks between the Government of Uganda and the LRA which the people of northern Uganda and southern Sudan welcomed. To date the conflict remains unresolved with the Juba talks having failed.

TANZANIA:

North Western Tanzania continues to host close to half a million refugees from Burundi and DRC putting additional strain on social services and natural resources in the area. Mwanza City, which is the commercial hub for East and Central Africa, is confronted with challenges resulting from urbanisation, particularly the mushrooming of unplanned settlements without basic social services and land tenure rights. Rural-urban areas are also emerging in relation to growing industrial mining in Geita, Kahama and Biharamulo Districts, creating fertile new ground for the spread of HIV. Degradation of the environment in the Lake Victoria Basin and pollution of both surface and underground water have increased the levels of poverty among local communities. Although over 80% of the population in the area depends on agriculture for livelihoods, the current production systems are threatened by climate change, imposition of genetically modified crops and poor regulatory systems for trade in food. Despite the introduction of the Local Government Reform Programme in 2000, implementation of decentralised pro-poor policy responses has been slow. Moreover, local communities are benefiting little from the large-scale commercial exploitation of mining and fishing resources in the region.

BURUNDI:

Since independence in 1962, Burundi has been plagued by tension between its two major groups, Hutu and Tutsi. The governance system inherited from the Belgian colonial power created systemic social exclusion and deep disparities that were among the root causes of the conflict. With the support of the UN, AU and the international community, the country is now beginning to reap the dividends of the peace process. Political power sharing has been agreed upon in a referendum on a new constitution which ensures Tutsis 40 per cent of the seats in the national assembly and Hutus 60 per cent, while they will have an equal share in the senate. A new national government was democratically elected in August 2005, marking the start of a new era that is expected to end decades of turbulence. Decentralisation of authority to the local level is underway through "la Loi Communale" and there is a gradual change from the traditionally centralised environment towards more participatory policy making. The challenges for the ruling political party CNDD/FDD, originally a rebel group, include the economic and social reintegration of a large number of IDPs and returning refugees as well as the demobilisation and reintegration of hundred thousands of ex-combatants, ex-soldiers and community militia. How issues of justice and impunity of the authors of massacres and killing are handled will be critical for maintaining security and political stability. Moreover, the majority of the population struggles to make a living as farmers and pastoralists, in the aftermath of conflict, recurrent droughts and in a difficult economic environment.

IV. SUMMARY OF JUDICIAL AUDIT FINDINGS

The incidence of sexual gender based violence (SGBV) has continued to rise at alarming levels, whilst the arrest of perpetrators and convictions are negligible. Embarking on a journey in the form of auditing structures that respond, manage and adjudicate sexual gender based violence boldly questions the level of the states' human rights commitment and obligations. The Judicial audit has examined five (5) countries namely; Burundi, the Democratic Republic of Congo, Kenya, Tanzania and Uganda. The countries under this study though diverse also illustrate several commonalities, which are elaborated in fuller detail in the report.

Normative frameworks

The human rights normative framework in all the five countries should facilitate preventing and protecting survivors of SGBV. All the countries have signed and ratified relevant international and regional human rights instruments and protocols that condemn SGBV. At the regional level, the International Conference on the Great Lakes Region formulated the landmark protocol and model legislation for the region in the areas of Prevention and Suppression of Sexual Violence against Women and Children. The Protocol seeks to fill the legal void that prevails in most of the legal systems in the countries of the region as a response to the systemic rape of women and children in the Great Lakes Region.¹⁷ At the national levels, different legal and policy frameworks are in place. The Burundi and Democratic Republic of Congo legal systems are based on civil law, whilst in Kenya, Uganda and Tanzania they are based on common law. Burundi and Uganda rely on the Criminal Codes as the basis of prosecution of SGBV offenders, whilst DRC, Kenya and Tanzania rely on specific legislation relating to SGBV. One of the significant differences between the Criminal Codes and Sexual offences laws is that the latter requires stricter corroboration of rape or other SGBV crimes, whereas, specific sexual offences laws recognise the impracticality of strict corroboration or the imposition of a high burden of proof on the survivor. It is crucially important to note that whilst legal and judicial sectors play a preventive role in so far as SGBV is concerned, they have been criticised for their leaning toward punishing the perpetrator, rather than restoring the safety of the survivor.

Case:

The Government of Tanzania in collaboration with Civil Society Organizations (CSOs), for the past 20 years, has made significant efforts to reform governance, justice and the legal sector. Such efforts include an affirmative increase in seats for women representatives in the parliament to 30.4% in 2007. Pressure from CSOs has resulted in increased government responsiveness to gender sensitive budgeting. However, interviews with key respondents from Human Rights watchdogs in Kasulu District indicated that, although Tanzania has ratified a number of international conventions regarding women's rights, there are no explicit steps to incorporate them into the domestic legal framework. The existing norms and customary practices are hindrances for women to access justice and where statutory and customary law differ women are always on the losing side. Similarly in DRC, despite the fact that there exists a new law on sexual violence since 2006, the main challenge for women's organisations advocating against sexual violence has been to ensure its effective implementation.

Policy & legal gaps

This audit demonstrates the constraints of national legal frameworks, whether they be criminal codes or specific legislation in addressing SGBV. Whilst international and regional human rights instruments, protocols, declarations and resolutions adopt a stern approach towards SGBV, the application of the national frameworks are intercepted by weak structures and systems accompanied by socialised cultures that close their eyes to SGBV and in particular violations against women. Even though SGBV is captured in policy and legal documents as having priority stature, [that is, recognised as a human rights violation] in terms of political will and resource allocation this prioritisation is not clearly evident. Where political will is voiced in the form of a law, the weak institutional capacities and minimal resources to adequately investigate, prosecute, sentence as well as heal survivors undermines the effectiveness of such laws.

Case:

The United Republic of Tanzania is the pioneer amongst the three East African States analysed in this study to legislate specifically against SGBV. This feat was accomplished by the enactment of the Sexual Offences (Special Provisions) Act of 1998, (the SOSPA), which repealed certain provisions of inter alia the Penal Code's minimal provisions against SGBV which had simply been termed as "Offences against Morality" and included new provisions geared specifically towards Sexual Offences by providing for both the ingredients of the crimes and penalties thereto. It also amended the Evidence Act to provide for more survivor friendly evidence requirements during prosecution. In Burundi, the government's commitment to the fight against gender-based violence is expressed in speeches of the highest authorities and MPs' interventions on the issue. However, with regard to policy implementation, inconsistencies are noted. On one hand, the President has expressed his political will by enacting a new Penal Code punishing much more gender-based violence. On the other hand, his willingness to implement an effective fight against gender-based violence has not been materialised through the allocation of adequate resources.

¹⁷ Liberata Mulamula, *Sex and Gender Based Violence in the Great Lakes Region*

Conflict

When political stability is fragile in any of these countries, there are ramifications in the entire region as fighting groups migrate across the porous borders and survivors flee to neighbouring countries in search of peace. The incidents of gender-based violence tend to increase due to social upheaval and mobility, disruption of traditional social protection mechanisms, changes in gender roles, and widespread vulnerabilities. This audit reveals the range of difficulties survivors face in seeking justice and redress in situations of conflict, such as the mobility of perpetrators, the “flight mode” of survivors thus their inability to report incidents, the lack of facilities to store any evidence, or services to help heal emotional and physical wounds. Likewise, during a relatively calm period, the study reveals that challenges faced by survivors seeking justice are numerous. For instance, the manner in which Kenyan society is ordered, (largely male dominated and embracing patriarchy) has significant effects on the service seeking behavioural patterns in survivors. Socialisation has resulted in most cases of SGBV remaining shrouded in secrecy and silence. Inadequate linkages and feedback mechanisms between health institutions, government doctors, police and other judicial officers undermine potentially effective strategies for the management of SGBV. There is currently no manual detailing protocol to be observed in maintaining of the chain of evidence and lack of utilisation of the existing documentation procedures by the police. Insufficient judicial training and community awareness of the new provisions in the Sexual Offences Act will hinder advances anticipated for survivors of SGBV.

Classifications of SGBV

A review of the types of SGBV cases that are presented in the courts indicates that rape and defilement are the highest prosecuted offences in all the 5 countries. For instance in: Uganda out of the 22 cases reviewed 91% were classed as defilement whilst 9% as rape; Burundi out of the 62 cases reported¹⁸ in Bujumbura Mairie, 58 of them were classed as rape; the study sites of the Democratic Republic of Congo; Kinshasa and Tshangu rape was reported to be highest offence reported for prosecution; Tanzania all the 20 cases reviewed were rape cases, whilst in Kenya out of the 54 cases reviewed 28 were classed as defilement and 8 as rape cases. In addition, the court analysis presented in the audit demonstrates that in very rare circumstances will courts impose the maximum sentence on the perpetrators.

Case

The SOSPA's amendment of the Penal code and Evidence Act has legislated against the following forms of SGBV: Rape, attempted rape, abduction, abduction of girls under sixteen, sexual assaults, defilement, sexual exploitation, and sexual abuse, indecent sexual abuse, sexual harassment, procuring prostitution, trafficking of person, procuring rape, permitting defilement, detention in any premises with intent, or in a brothel, prostitution or persistent soliciting, conspiracy to induce unlawful sexual intercourse, attempts to procure abortion, unnatural offences¹⁹ and incest.

In Kenya, the enactment of the Sexual Offence Act (SOA) by the 9th Parliament was lauded, by all, as a major achievement because it remedied patent shortfalls within the provisions of the Penal code on sexual offences under the misleading heading of “Offences against Morality” by inter alia: Expanding the list of sexual offences legislated against to incorporate offences such as the rape of men, sexual harassment, gang rape, child sex tourism, and child pornography amongst others;²⁰ Including minimum sentencing provisions to curb the inconsistent and largely lenient sentences previously handed out by the judiciary to convicted offenders; Eliminating the requirement of corroboration in sexual offences cases; Recognising the need to safeguard the privacy of survivors of SGBV crimes when prosecuting these matters in a court of law by enacting provisions that amongst others allow certain witnesses to be declared vulnerable and restricting the type of questions that can be asked of a witness and integrating technological developments such as the use of DNA profiling in the detection and proof of sexual offences amongst many others.

¹⁸ These are figures for 2007 only.

¹⁹ While Tanzania to be lauded the broad description of unnatural sexual offences in most African contexts includes same sex relationships which are deemed as unlawful and hence make non-heteronormative practices liable for prosecutions. Such silence in most of our legal regimes leaves room for further discrimination against a significant portion of the population who do not have legal recourse and who are also unable to receive adequate services in mainstream health facilities.

²⁰ Annex 4 in the comprehensive audit comprises the entire list of amendments and new offences introduced by the Sexual Offences Act

Profile of perpetrators

The profile of perpetrators varies though it is largely male. In the DRC, Tshangu, uniformed men, adult men and relatives were found to constitute the largest number of perpetrators, whilst in Kinshasa they are largely wealthy adult men seeking out young casual partners aged between 12 and 17 years. In Uganda, defilement of school going children by teachers and their fellow boy students has intensified, particularly in Northern Uganda. In Tanzania's Kasulu Police Station, rape between men and against minors aged below 10 years is common and ranks highest amongst the types of SGBV in Kasulu District.

Case

Statistics on gender-based violence are almost non-existent at the level of commune police in Burundi. In the communes surveyed, only Rango stated that it had received 4 cases in the years 2007 and 2008, which is inadequate compared to the cases stated by organisations working in the area of SGBV, particularly as this commune is on the border of Kibira Forest, which used to serve as a corridor for the FNL rebels. It is really difficult to establish figures if there are no appropriate records for gender-based violence. Statistics on gender-based violence were not found in the communes surveyed in Bujumbura-Mairie as all cases are directly routed to the police intelligence department.

Sentencing

Where specific sexual crimes laws are in place, the wide discretion by courts is largely minimised and stricter sentencing is observed. For instance in Tanzania, when an adult accused person is found guilty of rape the minimum sentence is imposed. In Kenya, prior to the Sexual Offences Act, stiff sentences were often reversed and minimised upon appeal.

In DRC, 60% of the victims acknowledged that they were satisfied with the court rulings made in their favour. However, to date, they have not received any compensation.

In Uganda, as a result of the study period being restricted to the last 3 years and because only online sources of case law could be accessed in addition to the dire state of law reporting²¹, only 22 cases dealing with SGBV were obtained for analysis. Of these, 9 are High Court decisions, 12 are Court of Appeal and 1 is a Supreme Court decision. It is this sample of jurisprudence that shall be employed to give a general view of the manner in which SGBV cases are handled by the Ugandan Judiciary. Of the 5 types of SGBV recognised by the Ugandan Penal Code, only 2 forms manifested themselves in the sample used for this study. 20 of the 22 cases (91%) dealt with the offence of defilement contrary to Sections 123(1) and 129 (1) of the Penal Code Act. The other 2 cases, (9%), dealt with the offence of rape contrary to sections 123 and 124 of the Penal Code Act.

*As is the case with other progressive jurisdictions, the standard of proof set down by the Tanzanian judicial system in SGBV cases is the proverbial "proof beyond reasonable doubt". This was recently reiterated by the Court of Appeal in *R v Kijonju*²² a case in which the appellant was challenging his conviction of attempted rape by the District Court of Kibaha, contrary to section 132 (1) of the Penal Code. In allowing the appeal on the grounds that the standard of proof was not discharged, the appellate court enunciated itself thus;*

"To begin with, even the trial Senior District Magistrate does not appear to have found the prosecution case proved beyond a reasonable doubt and his words which we have deliberately quoted at the beginning of this judgment are testimony for this view. The words: "make a decision one way or the other" and "I am inclined to say there is enough evidence" do not portray a state of mind of being satisfied beyond reasonable doubt about the guilt of the appellant. They are in fact alien to criminal standard of proof".

In Kenya, the SOA has been faulted in that the excessive description of the offences/ ingredients may make it increasingly difficult for the prosecution to demonstrate their case in accordance with the requisite standard of proof²³. For example, with regard to the offence of rape, contrary to Section 3(1) of the SOA, three things must be proved for the burden to be met: That penetration occurred; that such penetration was intentional and unlawful²⁴ that no consent was given or that such consent was obtained through threats or intimidation.

²¹ Note 7 above. The writer explains that Law reporting in Uganda has been very weak and thus very few law reports have been published in Uganda since 1958. Although the Law Development Centre in Uganda is mandated to prepare and publish law reports and other legal material, it has so far published only High Court Bulletins. As a result there is a void in the availability of published judgments as lawyers and other stake holders are forced to depend on photocopies of judgments which they request from the Courts.

²² (Criminal Appeal No. 63 of 2002) [2006] TZCA 72 (28 June 2006)

²³ Digest Of New Acts Of Parliament: The Sexual Offences Act 2006

²⁴ Section 43.(1) of the SOA provides that an act is intentional and unlawful if it is committed -

(a) in any coercive circumstance;

(b) under false pretences or by fraudulent means; or

(c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.

In *Jacob Odhiambo Omumo vs R*²⁵ where the accused person was charged with the offence of defilement, the Court of Appeal stated that based on the definition of the offence, the act of penetration by the offender is a vital ingredient, which must be proved by the prosecution. In this case, the report of the medical officer showing penetration had indeed occurred coupled with the straight forward and unshakable evidence of the child (the survivor) which the trial court found to be truthful was sufficient to discharge the burden as set.

Inadequacy of laws

An assessment of the challenges experienced within the judiciary in determining SGBV cases are largely similar in all the 5 countries. Firstly there is the inadequacy of the law where some internationally recognised sexual offence crimes are not captured in the domestic law such as marital rape, domestic violence and the rape of men. Thus a survivor who testifies to such violations can only get redress through normal assault or other sexual offence provisions. The detailed provisions of offences in each of the audited countries is analysed in the comprehensive report.

Case

In the DRC the new formulation of article 10 of the Penal Code Procedure resulting from this modification states: « The Judicial Police Officer or Magistrate of the Public Prosecutor's Office who receives a complaint or denunciation on an infraction from a magistrate, a senior public or judicial administration officer, a parastatal head, a district commissioner, a burgomaster, head of a sector or a person representing them shall not proceed to arrest the accused person before informing their superior, unless it is a case of flagrant or sexual violence offences.» The provisions of article 10 under review indicate that, the legislator has clearly cited a certain category of court beneficiaries, while excluding others. The law remains silent of these personalities and there is no provision to remedy the situation. The consequence is that the above category of personalities is excluded from the scope of application of Article 10.

Withdrawal of cases

Secondly, the provisions that allow survivors to withdraw charges against the accused person undermine survivors' redress. In all the five countries, it has been found that most SGBV survivors withdraw their cases due to family pressure, threats and trauma they experience in testifying in courts.

Case

In the DRC, the level of support given to sexual violence victims varies depending on the interventions. The percentage of victims that declared they had received support was very high in terms of medical care (68.7%) and psychosocial assistance (72.4%). This is not surprising since psychosocial and medical components are the main entry points to holistic care. The percentages were low for re-integration (14.2%) and protection (13.9%). The percentage in the area of legal support was also relatively low (6.8%)²⁶.

In 2007, Kinshasa provided the following services for the entire country:

- medical support for 69.2% of SGBV cases;
- legal support for 38.4% of SGBV cases;
- psychosocial support for 53.6% of SGBV cases.

Competency

The other challenge is the court process of determining cases, which takes unduly long, at times up to 5 or 10 years. In operational terms, the weak court infrastructure such as inadequate computer skills, traditional methods of recording evidence in writing, inadequate courts, few magistrates and judges all factor against efficient prosecution.

Case

The Tanzanian judiciary is faced with an enormous and seemingly insurmountable backlog problem that sees most cases take upwards of 10 years to be heard and finally determined. The LHRC report quotes the Chief Justice of Tanzania, the Hon. Mr. Justice Augustino Ramadhani, noting in 2008 that: "the judicial process in this country is going at a snail's pace as the numbers of cases keep piling at the courts – some for over a decade – before judgment is passed" The delays are attributed to lack of resources and lack of capacity in the judicial system, explaining that Tanzania lacks sufficient judicial staff at all levels. It notes that, as at May 2008, the total number of judges appointed to the Tanzanian High Court bench was approximately 58 and the total number of judges on the Court of Appeal bench was 17²⁷. In a country with an estimated population of over 38 million people, having only 75 judges is clearly unsatisfactory and is a prime factor for the myriad of problems facing the entire justice system. Lack of sufficient infrastructure, such as courthouses and libraries is also blamed for the dire situation. The report notes that, at present, the Tanzanian judiciary faces a critical shortage of court buildings. The entire population is served by 1105 Primary Courts, 88 District Courts, 22 Resident Magistrate Courts, 13 High Courts, one Court of Appeal and one juvenile court. Clearly, these numbers are not adequate.

²⁵ [2008] eKLR

²⁶ UNFPA, *Sexual Violence in DRC, 2007*

²⁷ LHRC Report above at page 26

Service provision

The assessment of service provision for survivors of SGBV reveals that both health and police centres are ill equipped to respond to the needs of SGBV survivors in all the five countries. At the level of the police, there is insufficient knowledge that SGBV is a crime as well as low empathy and skills towards handling survivors of SGBV particularly in terms of sensitivity and confidentiality. In nearly all the countries audited most prosecutions of perpetrators fail as a result of inadequate investigations namely evidence collection and preservation. The inadequate resources availed to the police sector hinders their ability to respond to SGBV as well as other crimes. For instance in Uganda, at the Gulu District Police station, there are only 2 motorbikes for outreach to the whole district and only one motor vehicle. In Burundi, whilst the government has made specific allocation to gender based violence, the amount for 2009 is US 80,000, which still falls short of meeting the needs for effectively handling SGBV.

Forensic evidence is needed to confirm the occurrence of sexual assault and to prove or disprove a link between the alleged perpetrator and the assault²⁸. Forensic examination, specimen collection, analysis and documentation provide the link between the health and the criminal justice system²⁹. These are crucial elements in securing a successful prosecution and appropriate sentencing. The unavailability of health services in most of the regions of the audit greatly compromises the physical, mental and emotional well being of survivors of SGBV. In DRC for example, accessing a specialised health centre or hospital dealing with SGBV for this survey was as difficult as they are rare. In Tshangu, one of the study sites, there was no health centre dealing with SGBV. The nearest health centre identified was Saint Joseph's Hospital in Limete, Funa District. Most patients and/or survivors of SGBV were drawn from very remote communes. Most of the health centres reviewed for this audit reveal that health personnel are not well equipped (in terms of skills and equipment) to manage the full range of consequences due to SGBV. Health centres that are private or operate as non-governmental organisations do have the entire range of services such as PEP, ARVs, emergency contraception as well as trauma counselling. Examples of these are found in Burundi's Rwibaga Hospital, Kenya's Nairobi Women's Hospital, DRC's Saint Joseph's Hospital and Tanzania's Mtabila Hospital. When a survivor decides to report an SGBV incident, they are faced with the additional challenge of having an appropriate record from the police, it varies in name for instance in Tanzania it is known as the P4, whilst in Kenya it is known as the P3 Form. Essentially, this is the document upon which any prosecution is based on.

Case:

Generally, there seems to be a lack of information on facilities that offer comprehensive post-sexual violence care and treatment. During health centre visit to Kenyatta National Hospital, it was difficult to gain a clear understanding of the protocols used to medically manage the needs of survivors, (including the provision of first aid and referral), indicating a need for capacity-building to ensure that multiple health centres throughout Nairobi can provide comprehensive sexual violence medical management services. Another major concern is that most medical services are not free in many facilities, if they are offered at all, except at Kenyatta National Hospital (out-patients services) and Nairobi Women's Hospital. Service providers (Kenyatta National Hospital and Nairobi Women's Hospital) reported that they know that sexual violence escalated after the post-election violence, but that the actual reports/cases they have received have been low. Interviewees believe that, a significant number of rapes that occurred early after the post-election crisis, are likely not to have been treated because many women in the slum areas are still fearful of moving around. It is also possible that many of these women may have been referred to health facilities that do not treat sexual violence cases.

Protection of Survivors

The need for national sexual offences laws cannot be over estimated. The comprehensive analyses of the specific legal provisions are presented in fuller detail in the country chapters in the comprehensive judicial audit report. Overall, in countries where these laws are in place, they provide a range of protection to survivors of SGBV and to some extent ameliorate the challenges survivors have had to face when confronting the Criminal Penal Codes. In DRC for example, the Criminal Code obligates fast track measures to ensure prosecution as well as providing for legal assistance throughout the process. In the first instance the Judicial Police officer who receives a complaint of a sexual crime is obliged to report to the Public Prosecutor within 24 hours, secondly, courts are obliged to ensure that the proceedings are completed within a month and a ruling is made within three months.³⁰ In addition, the DRC Criminal code excludes sexual violence from settlement by way of a transactional fine thereby ensuring that the Public Prosecutor prosecutes and ultimately contributing to combating impunity. In Kenya, the Act makes provision for the concept of "vulnerable witnesses"³¹ through a range of measures³² including: allowing such witness to give evidence under the protective cover of a witness protection box; directing that the witness shall give evidence through an intermediary; directing that the proceedings may not take place in open court; prohibiting the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family.

²⁸ 2003, World Health Organisation, 2004, Kenya Ministry of Health

²⁹ 2005, Kilonzo and Taegtmeier

³⁰ Article 7, Congolese Code of Penal Procedure

³¹ Section 31, Sexual Offences Act 2006

³² Section 31(3) of the SOA

In Tanzania, Sexual Offences Special Provision Act provides that proof of the offence of rape does not require corroborated evidence; except for the expert evidence from a hospital showing that penetration occurred, which evidence as shown above need not include evidence of injury of the victim.³³ The law also provides protection to children of “tender years”; the only requirement is that voire dire examination of the child must be undertaken by the trial court to ascertain that the child understands the nature of an oath and the importance of telling the truth.

In Burundi, the amended Penal Code has expanded and clarified the definition of rape to include vaginal, anal, and oral penetration by the male sexual organ, as well as penetration of the female sexual organs by an object. The elements of protection are found in the provisions enhancing the sentences for rape between five years to life imprisonment, with the longer sentences applicable to persons in positions of authority over the victim (including teachers, doctors, and family members), persons who know they are HIV positive, and persons found guilty of rape of a minor or other vulnerable person. In most instances, the survivors of SGBV have to withstand pressure exerted by the Judicial Police Officers (JPOs) so that they withdraw their complaints and accept an out-of-court arrangement as this is not forbidden by the law. In Uganda, the Criminal Code stipulates that corroborative evidence of the victim’s sexual assault must be tendered in proving SGBV. There is no specific provision under Ugandan law that caters for the protection of a victim of SGBV. All that is provided under the substantive law is the ingredients of the offence and the penalty upon conviction. The only protection that seems to apply is that accorded to children under Section 102 of Ugandan Children Act³⁴, which prohibits publication of details of any child involved in the court process.

In all the countries where the sexual offences laws are in place, the consent of the victim does not constitute an exoneration of the perpetrator of a sexual violence offence. It is analysed in relation to the general climate under which the crime was committed, which must be free of influenced consent through force, drugs or threats inter alia. All cases are required to be heard in camera in a bid to protect the identity of the survivors.

Vibrant civil society

In all 5 countries, there is a vibrant civil society movement working on a variety of campaigns to end impunity on SGBV. They use a variety of methods including rights awareness to equip communities to know and claim their rights, legal aid services to represent SGBV survivors to seek redress, advocacy for improved law enforcement practices that are sensitive and appropriate for SGBV survivors. Lack of basic information on rights inhibits many survivors from seeking support from institutions, persevering with medical services and legal procedures. The absence of structured and strong referral linkages hinders survivors’ access to appropriate care and support.

³³ Section 127 of the Evidence Act, 1967, as amended by section 27 of the SOSPA

³⁴ CAP 59 Laws of Uganda

V. RECOMMENDATIONS

The audit recommends a variety of interventions that would work towards addressing SGBV within the legislative framework as well as affording sufficient and adequate protection to survivors of SGBV within larger connected structures.

(i) National legislation on sexual crimes and accountability mechanisms in place

For Uganda and Burundi it is recommended that domestic legislation on sexual gender based violence be put in place. The template designed to provide an administrative framework for the implementation of the Protocol on the Prevention and Suppression of Sexual Violence against Women and Children contains the necessary ingredients for addressing SGBV³⁵. Additionally, as signatories to the ICGLR, they are obliged to honour their governments' commitment to "harmonise all relevant national laws and criminal procedures in accordance to the provisions of this Protocol".³⁶ For Kenya, DRC and Tanzania where domestic legislation is in place, it is recommended that stricter accountability mechanisms are in place to monitor effective delivery of justice to SGBV survivors. These measures could include judicial accountability reports or institutional performance reporting to capture the number and trends in SGBV cases, highlighting challenges in prosecutions and recommending structural amendments to enhance access to justice for SGBV survivors. Additionally in recognition of the alarming rates of sexual gender based violence, governments in the three countries should include sexual violence legislation compliance reporting as part and parcel of the obligations of Parliamentary committees concerned with Legal Affairs and Administration of Justice. This can be accompanied by designated task forces on sexual offences laws to support the effective implementation of these laws through awareness raising on application of provisions and monitoring attitudinal changes.

(ii) Facilitating transformation interventions within the Informal Justice Systems

As SGBV occurs amongst communities and households where perpetrators are often known, interventions should be encouraged and promoted from the community level, where local community leaders and faith based organisation leaders are located. In most instances survivors prefer to do so at the family level and/or go to the cultural leaders and chiefs. The implementers of customary law such as village and community elders, opinion leaders and local chiefs have a potentially influential reach. Therefore, interventions targeting chiefs and community elders as part of a social transformation agenda would be most appropriate. As custodians of cultural norms, intensified action in the "sites" where potential transformation of discriminatory attitudes is likely to occur is recommended. Awareness on rights and particularly on SGBV should be designed so as to ensure that the gravity of SGBV is understood amongst such leaders who often act as arbiters at local levels. It is integral that at this level, leaders understand that quite apart from punishing the perpetrator, there is need to promote survivors' confidence and comfort so that the stigma that is likely within the community is halted.

(iii) Reformed and sustained skills building for handling SGBV within the police force

With a view to enhancing sensitivity and responsiveness of the police in handling SGBV a variety of initiatives would be required. In the first instance, policy guidelines and protocols on handling SGBV would effectively anchor other necessary reforms in the sector. Such guidelines would be developed through consultative processes with a multi-sectoral expert group drawn from the police force, health sector, social workers, psychologists, judiciary, justice, finance and economic planning ministries as well as rights activists. Comprehensively designed protocols that are informed by their specific sectoral experiences of the challenges of SGBV survivors would be critical. For the applicability of such protocols, intensified training of the police on the protocols as well as the broad human rights issues would facilitate appropriate grounding and adaptation. Alongside this, should be the allocation of specially targeted resources within the security sector to handle and respond to SGBV. These resources should comprehensively correspond to the collective needs of the entire police force including relevant infrastructure for the police work as well as basic welfare such as housing, medical insurance and sufficient pay. As this audit reveals, most police stations are ill equipped in terms of vehicles, motorbikes and necessary forensic equipment. Through the specially targeted resources to handle SGBV, it is recommended that in each police station specialised gender units that would handle SGBV survivors are set up. Where the units work, this audit confirms that they are effectively responding to SGBV survivor needs. Within the police sector, appropriate collaborative protocols should also be in place with health facilities, particularly in relation to the relevant medical reporting form that is the basis of any prosecution. Some of the requirements elaborated in the protocols would include: commitment to protect the complainant at all times; commitment to respect confidentiality; commitment to give testimony when called upon to; sharing of as much information as necessary for effective agency intervention, understanding and respect for each agency's competence and authority as well as agreed mechanisms for conflict management (in a sensitive manner)

³⁵ The model legislation on the Prevention and Suppression of Sexual Violence Against Women and Children, September 2006

³⁶ Article 6(10) Protocol on the Prevention and Suppression of Sexual violence against women and children

(iv) Judicial Training

Judicial training is also another potential area of intervention. The continuum of administration of justice is not complete without magistrates and judges. Once police investigations lead to prosecution of sexual gender based violence crimes they are forwarded to the courts for hearing and determination. Without sufficient training judicial decisions like many others in Africa are likely to be influenced by patriarchal notions. Unless sufficient punitive measures around sexual gender based violence crimes are meted out to perpetrators, levels of impunity would thrive. Thus investing in capacities for judicial officers to interpret and formulate new jurisprudence that is gender responsive would strategically reform the practices around gender based violence. It is also recommended that judiciaries in the region reform their court rules and procedures so as to accommodate the specialised needs of SGBV survivors. These include hearings of SGBV cases in camera or special divisions so as to ensure that special procedures for prosecution of SGBV are sensitive to the emotional state of victims and survivors. The use of a survivor's character as a basis or excuse to place responsibility of SGBV crimes should also be highly discouraged³⁷ Compensation of survivors as a means of recognising and acknowledging the gravity of the crimes committed to them should also be promoted. The Judicial Training Institute in Kenya would be appropriately positioned to design and deliver such training. In addition, the Women Judges Associations in Uganda and Tanzania could model the Equality on Jurisprudence Training undertaken by several affiliate members of the International Women Judges Association.

In terms of accountability, it is recommended that both the police and judiciary be obliged to produce gender disaggregated data on the cases they handle, so as to adequately inform policy and legislative reforms.

(v) Promoting and modelling SGBV sensitive health infrastructure

The appreciation and recognition by survivors of violence of the valued addition of responsive health structures cannot be underestimated. It is recommended that intensified advocacy efforts be initiated towards obtaining a regional commitment by all the countries under this audit to establish health centres that are responsive to SGBV as a priority. Such health centres should embrace current model health infrastructures as illustrated through the Nairobi Women's Hospital in Kenya, Panzi Hospital in DRC and to a small extent the Mtabila Hospital in Tanzania. Alongside this, it is also recommended that all health provider curricula be reviewed comprehensively to integrate health workers' skills training on managing SGBV. The training and attitudes of health providers exert considerable influence on survivors' experience of care. Thus, there is need to strengthen the health institutions' ability to readily provide a first line of critical intervention for women's protection and well being, particularly clinical management for survivors of rape and other forms of sexual violence. Undoubtedly, an efficient "chain of evidence" that facilitates forensic evidence collection at the health centres is critical to assure successful police intervention.

(vi) Strengthened NGO and CBO capacity for advocacy and monitoring

It is also recommended that where agencies are working to respond to SGBV, stronger coordination mechanisms are put in place. More specifically, for SGBV survivors, rapid referral interventions are necessary so as not to undermine the "window of opportunity" for forensic examination and medical management. The process of seeking help may at times increase the vulnerability of the survivor where it may not be safe for health personnel to advise a woman to file a complaint alone, as they may be violated again or the perpetrator becomes aware of it and threatens him or her. In most instances, referrals assist where community based organisations (CBOs) and non-governmental organisations (NGOs) are working collaboratively and keenly aware of each organisation's core competence. Promoting rights awareness at the community levels needs to be supported and intensified so that survivors of SGBV are aware of their rights and how to protect them. This education would enable survivors and their families learn how to overcome stigma associated with SGBV as well as understand that sexual crimes attract criminal liability and punishment and are not subject to "settlements".

(vii) Legislative Advocacy

As a collective thematic group working on SGBV, there is opportunity for effective and more sustained advocacy. Hence it is recommended that where such working groups are present, intensive advocacy skills particularly legislative advocacy are strengthened. The members of these groups would be drawn from women's rights organisations working on policy and legal reform, human rights advocacy organisations, health rights organisations working on policy and legal reform, existing gender based violence cluster groups and other institutions working towards ending sexual and gender based violence. Such a regional advocacy group would focus on national legal reform and compliance to stated international and regional commitments would significantly accelerate the pace of governments' response in adapting and resourcing initiatives to end SGBV.

³⁷ Article 6 (5) Protocol on the Prevention and Suppression of Sexual violence against women and children

(viii) Gender Budgeting and National Development Plans

Knowledge on gender responsive budgeting and analysis allows for consistent monitoring on governments with regard to appropriate allocation of resources (human and financial) and commitment to end SGBV. NGOs and CBOs would thus be equipped to monitor compliance and adopt regional naming and 'shaming' tactics for governments that are not performing. Skills to analyse the security, health and justice sector budgets would help inform advocacy initiatives in a variety of ways particularly in the identification of specific resource allocations to improve SGBV services. For instance, within the health sector gender budget analysis would reveal relevant data on national resource allocation to manage sexual and reproductive health complications including access for emergency contraception and PEP as well as trauma counselling departments and skills building for trauma management. Whilst in the security sector reviews of the percentage of resources to gender based crimes would be analysed in terms of targeted resources for special gender units, support to training, increased equipment and vehicles to police stations inter alia. In the justice sector, gender budget analysis would reveal increased prosecutorial training on SGBV management, increased financial and personnel allocations for judicial officers handling SGBV cases. In all these sectors, where gender budgeting is applied, requirements to supply gender disaggregated data in terms of accounting for expenditure as well as in requisitions ultimately improving the terrain for SGBV survivors.

(ix) Political will – Developing and utilising diagnostic tools to monitor governments

There is a need to fortify regional approaches towards lobbying governments. There is scope for utilising a diagnostic tool in the form of an SGBV index that measures much in the same manner as that used for states levels of corruption, namely their zero tolerance on SGBV. Such mechanisms allow for the development of sufficient data, pool public opinion and mobilisation of a critical mass that pushes for accountability from the lowest to the highest rank of government as a duty bearer.

(x) Engagement in the democratisation process

All the recommendations above are contingent on a civil society and citizenry that are informed and aware of how their governments function, their obligations to citizens and their ability to hold the state culpable for failing to meet its end of the bargain. Being part of state rebuilding processes is central to transforming the structures that normalise sexual and gender based violence. Where transitional justice initiatives are taking place, they provide opportunities to challenge and reshape the structural and systemic discrimination. For instance the newly established Truth, Justice and Reconciliation Commission of Kenya in reflecting and interpreting its mandate, gender dimensions towards addressing historical injustices have formed substantive elements of their discourse, more specifically in terms of reparations, where they have resolved to prioritise the vulnerability and severity of continued suffering as a way of advancing justice for women³⁸.

(xi) Partnerships with the media.

The media has the potential to play a lead role in changing perceptions of sexual gender-based violence that in turn can help galvanise a move for change. There is need to invest in building the capacities of media personnel so as to assist in changing the culture of acceptance that surrounds sexual gender-based violence, for instance, in building skills around responsible and sensitive publishing of articles about perpetrators and victims. Organisations working in the SGBV arena should of necessity partner with the media as part of the implementation of their advocacy campaigns. The media should be encouraged to play their role in ending the stigma of talking about sexual gender-based violence by writing about it and interviewing law enforcement professionals, medical personnel, experts, perpetrators, survivors and victims. In terms of creating awareness of services, the media can also play a critical role in educating the public by offering information about programmes that address sexual gender-based violence.

³⁸ Truth Justice and Reconciliation Commission Induction Retreat 21st – 24th September 2009 - Plenary discussions and resolutions based on presentations on Policy Frameworks for TJRCs by Carla Ferstman and Gender and Reparations by Jane Kiragu

VI. INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

Countries' Commitments

Instrument	Burundi	DRC	Kenya	UG	TZ
African charter on Human and People's Rights 1981	✓	✓	✓	✓	✓
African Union Solemn Declaration on Gender Equality in Africa 2004	✓	✓	✓	✓	✓
Beijing Declaration and Platform of Action 1995	✓	✓	✓	✓	✓
Convention against Torture and other cruel, inhuman or degrading treatment or punishment 1984	✓	✓	✓	✓	✓
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1948	✓	✓	✓	✓	✓
Convention on the Elimination of all Forms of Discrimination Against Women CEDAW 1979	✓	✓	✓	✓	✓
Convention on the Prevention and Punishment of the Crime of Genocide 1948	✓	✓	✓	✓	✓
Convention on the Rights of the Child 1989	✓	✓	✓	✓	✓
Convention relating to the status of refugees 1951	✓	✓	✓	✓	✓
Declaration of the Rights of the Child 1959	✓	✓	✓	✓	✓
Declaration on the elimination of Discrimination against women 1967	✓	✓	✓	✓	✓
International Covenant on Civil and Political Rights ICCPR 1966	✓	✓	✓	✓	✓
International Covenant on Economic, Social and Cultural Rights 1966	✓	✓	✓	✓	✓
Protocol Relating to the status of refugees 1967	✓	✓	✓	✓	✓
Protocol to Prevent, Suppress and Punish trafficking of persons, especially women and children supplementing the United Nations Convention against Trans national Organised crime 2000	✓	✓	✓	✓	✓

Rome Statute on the International Criminal Court 1998	✓	✓	✓	✓	✓
The Protocol to the African Charter on Human and Peoples Rights on the Rights of women 202	✓	✓	✓	✓	✓
Optional Protocol of the International Pact on Civil and Political Rights 1966	✓	✓	✓	✓	✓
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2000	✓	✓	✓	✓	✓
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict 2001	✓	✓	✓	✓	✓
Organisation of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa 1969	✓	✓	✓	✓	✓
Ouagadougou Protocol on June 1998 on the Establishment of the African Court on Human and Peoples' Rights		✓			
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956		✓			
The United Nations Resolution 1325	✓	✓	✓	✓	✓

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