

A critical analysis of article 16 of the UN refugee convention in relation to victims of sexual violence in refugee camps in Africa

Geert Philip Stevens

LLB LLM LLD

Professor of Criminal Law & Statutory Crimes, University of Pretoria

Oghenerioborue Esther Eberechi

RN RM DPON LLB LLM LLD

Postdoctoral fellow, Nelson R Mandela School of Law, the University of Fort Hare

SUMMARY

This article analysed article 16 of the United Nation convention relating to the status of refugees 1951, which provides free access to courts in the contracting states for all refugees, in relation to victims of sexual violence in refugee camps. However, it was found that with the current state of affairs in the domestic criminal justice system, a victim of crime has no legal standing to have direct access to a court for the enforcement of his or her rights. Instead, the crime is considered as against the state and not against the individual victims, and this has caused severe hardships for victims of sexual violence in refugee camps. Thus, for a victim to benefit maximally and enjoy the requisite free access to court, we argue that victims of sexual violence in a refugee camp should be accorded the *locus standi* and made a co-party to the prosecution of their perpetrators, as a paradigm shift from the current domestic and international criminal justice system that uses victims as a witness for the state prosecution, so that victims can assert their rights and plead for the required remedy and reparation that will ameliorate their plight. In order to achieve this, the authors are advocating for law reform of both the domestic and international criminal justice system to reflect victims' rights as co-prosecutor of their assailant.

1 Introduction

Refugees have been empowered under the Universal declaration of human rights (UDHR) to seek asylum in any state of their choice where it declares, "Everyone has the right to seek and to enjoy in other countries asylum from persecution."¹ In addition, UDHR also protects against the violation of the rights and dignity of all human beings.² Furthermore, UDHR upholds the tenets of equal opportunity before the law, devoid of "discrimination against equal protection before the law."³

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- 1 Art 14(1) of the Universal Declaration of Human Rights 10 December 1948, 217 A (III).
 - 2 Art 1 of the Universal Declaration of Human Rights.
 - 3 Art 7 of the Universal Declaration of Human Rights.

It also accords all humans a “right to recognition before the law”⁴ and for “an effective remedy by a competent national court of law for acts violating the fundamental rights granted to an individual by the Constitution or by law.”⁵ Additionally, UDHR asserts that equal opportunity to a fair and public hearing before an autonomous and unbiased court, in the determination of his or her “rights and obligations”,⁶ should be made available to all humans, including refugees.

Based on the above provisions the legal protection and the enforcement of the rights of refugees by states were created through the Convention Relating to the Status of Refugees (UN refugee convention 1951).⁷ It defines refugees, as persons, “who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his or her nationality and is unable to, or owing to such fear is unwilling to avail himself or herself of the protection of that country.”⁸ Moreover, the convention prohibits the “expulsion or return (refoulement)” of a refugee to their home countries, in terms of article 33(1)(2).⁹ Thus refugees have a right to seek protection and the enforcement of their rights in a country of refuge.

Accordingly, refugees are hosted in various types of facilities, for this article the word “camps” will be utilised.¹⁰ These camps have been denoted as places that breed lawlessness and crime.¹¹ In anticipation of the enforcement of the rights of refugees, article 16 of the UN refugee convention, extends access to a judicial institution in host states as follows:

1. A refugee shall have free access to the courts of law on the territory of all Contracting States;

4 Art 6 of the Universal Declaration of Human Rights.

5 Art 8 of the Universal Declaration of Human Rights.

6 Art 10 of the Universal Declaration of Human Rights.

7 Art 1 of the Convention Relating to the Status of Refugees (1951) United Nations Treaty Series, Vol.189, p.137 (entered into force on 22 April 1954) art 1.

8 UN Refugee Convention 1951.

9 UN Refugee Convention 1951.

10 Here as camps, settlements, detention facilities, where ever refugees live whether on the streets, including urban refugees.

11 Allison, “Africa: Analysis: Kenya’s Dadaab, the world’s largest refugee camp, isn’t going anywhere yet” Daily Maverick (2015) available at <https://www.dailymaverick.co.za/article/2015-04-12-analysis-kenyas-dadaab-the-worlds-largest-refugee-camp-isnt-going-anywhere-yet/#.WPYyf4iGOM8> (accessed 2017-04-18); ANA “Biggest Somali refugee camps turned into terror breeding ground” SABC 2016 <http://www.sabc.co.za/news/a/44fb4a004c85d445a480eef73ffe3ce9/Biggest-Somali-refugee-camps-turned-into-terror-breeding-ground-20162404> (accessed 2017-04-18); Opelka “Justifying OWS Philly rape? ‘The rates of rape seem to be much lower than in Refugee Camps’” *Theblaze* 2011 available at <http://www.theblazecom/news/2011/11/13/justifying-ows-philly-rape-the-rates-of-rape-seem-to-be-much-lower-than-in-refugee-camps/> (accessed 2017-04-18).

2. A refugee shall enjoy in the Contracting State in which he or she has his or her habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*;
3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he or she has his or her habitual residence the treatment granted to a national of the country of his or her habitual residence;¹²

Regardless of the above provisions, refugees have been known to suffer various kinds of violence, especially sexual violence in camps.¹³ International Criminal Court (ICC) has described sexual violence,¹⁴ as situations where:

the perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.¹⁵

The consequence of violence experienced by these refugees as victims,¹⁶ of these heinous crimes may be physical, psychological, and other injustices. These may lead to homicide, serious injuries, unwanted or early pregnancies, sexually transmitted diseases (STDs)/infections (STIs) including infertility and infections with human immunodeficiency virus and acquired immune deficiency syndrome (HIV/AIDS), cervical cancer and venereal diseases.¹⁷ Victims also suffer from psychological trauma, suicide, mental health problems,¹⁸ and post-traumatic stress disorders (PTSD),¹⁹ miscarriages if raped and pregnant, prolonged haemorrhage, vesico-vaginal and recto-vaginal fistulas, insomnia, nightmares, chest

12 UN Refugee Convention (1951).

13 The word camps here represent, camps, settlements, detention facilities, where ever refugees live Weather on the streets, including urban refugees.

14 Art 7(1)(g) - 6(1) of the ICC Elements of Crime "Crime against humanity of sexual violence" International Criminal Court (2011) available at http://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45_bf9de73d56/0/elementsofcrimeseng.pdf (accessed 2014- 07-31).

15 ICC Elements of Crime, art 7(1)(g) - 6(1).

16 In this article includes the individual that suffer the harm, their relatives and guardians.

17 United Nations High Commissioner for Refugees (UNHCR) "Sexual violence against refugees: guidelines on prevention and response" 8 March 1995 available at http://www.unhcr.org/3b9c_c26c4.html (accessed 2017-01-14); Office of the United Nations High Commissioner for Refugees (OUNHCR) "Guidelines on the protection of refugee women," prepared by the Office of the United Nations High Commissioner for Refugees, Geneva (1991) para 94.

18 UNHCR (1995) 1.5; Ramji-Nogales 'Questioning Hierarchies of Ham: Women Forced Migration and International Criminal Law' 2011 Intentional Criminal Law Review, 820, Social Science Research Network Electronic Paper Collection: <http://ssrn.com/abstract=1753758> (accessed 2014-06-22).

19 UNHCR (1995); Ramji-Nogalis (2011) 821.

and back pains, painful menstruation, complications resulting from unsafe abortions and death.²⁰

Refugees who are victims of sexual violence in refugee camps are also stigmatised, ostracised or even sanctioned by their families, which may worsen their physical and psychological injuries.²¹ Some of these consequences outlive the victims, for instance, children born out of the act may be stigmatised, discriminated against or even suffer sexual assaults.²²

Unfortunately, these victims may never have access to courts in countries of refuge to seek redress for this harm suffered. Since most refugee camps do not have court facilities for seeking redress and in camps with mobile court facilities, such as the Nakivale refugee settlement in Uganda,²³ the facility has been coined as inadequate and inaccessible to victims of sexual violence, because it serves only one refugee settlement in Uganda.²⁴ The latter implies that other refugees in Kyangwali, Adjumai, Kirandongo, Rwamwanga, Arua, Kyaka II and Oruchinga refugee settlements,²⁵ may never obtain justice. Besides, there are yet to be records of prosecuted cases in sexual violence by the mobile court.

In addition, the concept of access to courts which is a fundamental right, has been enshrined in most Constitutions of various nations, for instance, section 34 of the Constitution of the Republic of South African provides that: “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”²⁶ Also, under the Constitution of the United Republic of Tanzania, this phrase is referred to in sections 13(6)(a) as a measure to ensure equality before the law and to a fair hearing.²⁷ In addition, the

20 Mabuwa, Seeking Protection: Addressing sexual and domestic violence in Tanzania’s refugee camps, Human Right Watch (2000) 39; Vigaud-Walsm “Women and girls failed: The Burundi refugee response in Tanzania” Refugee international (2015) 1 <http://www.refworld.org/docid/568cf1e64.html> (accessed 2017-11-07).

21 Mabuwa 39; Vigaud-Walsm “Women and girls failed: The Burundi refugee response in Tanzania” Refugee international.

22 Mabuwa 39; Vigaud-Walsm “Women and girls failed: The Burundi refugee response in Tanzania” Refugee international.

23 UNHCR Uganda “SGBV Fact Sheet | Southwest Uganda | 2014” 2014 available at <https://data2.unhcr.org/en/documents/download/48494> (accessed 2016-11-23); Powell “Activists: rape in Africa driven by inequality and weak prosecution” Voice of America (2013) available at <http://learn.ingenglish.voanews.com/a/south-africa-rape-uganda-refugee-camp-drcunhcr/1794666.html> (accessed 2016-11-30).

24 UNHCR Uganda.

25 Action African Help International “Kyangwali Refugee Settlement” Action African Help Uganda Country Programme 2016 available at <http://www.actionafricahelp.org/kyangwalirefugeesettlement> (accessed 2016-11-22).

26 S 34 Constitution, see also The Constitution of the Republic of Ghana 1992 art 33; art 97 of the Constitution of the Arab Republic of Egypt of 2014.

27 The Constitution of the United Republic of Tanzania, 1977.

right to litigate in courts is considered as one of the indispensable civil rights of the citizen of a nation, of a necessity must be conferred on each citizen by states, and to other nationals similar to what is enjoyed by their people in this respect.²⁸

The provision of article 16,²⁹ is general and ambiguous to all refugees who require court access with no definition of what access to court is. It is submitted that the concept of access to court was not conceptualised to capture the needs of refugees who are victims of crime, specifically those of female victims of sexual violence in refugee camps. This is because, in criminal proceedings, the state has the *locus standi* to prosecute the case, while the victims are used as witnesses. Consequently, victims of crime lack the legal standing to sue and this is a constraint on access to courts. However, the only channel they may have is to obtain formal authorisation that will empower them to hire the services of a private prosecutor, which is if they are wealthy enough to do so, to prosecute the case. Nevertheless, this does not give them the legal standing to pursue their rights, because the private prosecutor will still represent the interest of the public or state.

Thus, this article analyses article 16 of the UN Refugee Convention,³⁰ in relation to the victims of sexual violence in refugee camps. In examining this, the article discusses the theories of the rule of law as a foundation of access to courts, the basic principle of *locus standi*, as it relates to standing in the court and concludes with the proposition that victims of sexual violence in refugee camps should be conferred with legal standing, so that in criminal proceeding they can represent their interest.³¹

2 Theoretical foundation for access to courts

The doctrine of the rule of law without victim's access to courts signifies the catastrophe of democracy, thus this article will be built on the theories of the rule of law. The rule of law is the legal principle that asserts that law should govern a nation, as opposed to be governed by the arbitrary decisions of individual government officials. Primarily, it refers to the influence and authority of law within society, particularly as a constraint upon behaviour, including actions of government officials,³²

28 *Chambers v Baltimore & O.R.R.*, 207 US 142, 148 (1907); *McKnett v St. Louis & S.F. Ry.*, 292 US 230, 233 (1934).

29 UN Refugee Convention 1951.

30 UN Refugee Convention 1951.

31 Note that victims of sexual violence are used as a test case for other victims of crimes, because of the invasive nature of the crime and the lifelong consequence on the victims.

32 Soanes and Stevenson "Rule of Law" in *Concise Oxford English Dictionary* (2006) 1258.

with the basic principle that “no person is above the law.”³³ The Secretary-General of United Nations opines that:³⁴

The rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.³⁵

Historically, the expression can be traced back to 16th century Britain and in the following century the Scottish theologian Samuel Rutherford, who used the phrase in his argument against the divine right of kings.³⁶ The rule of law, was further promoted in the 19th century by British jurist Dicey, who described the rule of law as,³⁷ the overall sovereignty or prevalence of regular law as conflicting with the influence of illogical power and discounts the reality of unpredictability, of right, or “even of wide discretionary authority on the part of the government ...”.³⁸ Again, the rule of law signifies parity before the law or the equal subjugation of all classes of human beings to the regular law of the nation managed by the “courts ...”.³⁹ Lastly, it signifies that “the ideologies of private law have with us been by the action of the courts and legislature so extended as to regulate the position of the crown and of its servants; thus, the Constitution is the result of the ordinary law of the land”.⁴⁰

Moreover, Dworkin holds that the theory of rule of law,⁴¹ assumes that citizens have ethical rights and obligations towards each other and political rights against the government.⁴² He contends that these moral and dogmatic rights be accepted in positive law, so that they can be

33 LexisNexis “What is the Rule of Law” 2017 available at <https://www.lexisnexis.co.za/news/rule-of-law/What-is-the-rule-of-law> (accessed 2019-01-11).

34 Secretary-General, United Nations “The rule of law and transitional justice in conflict and post-conflict Societies” Report of the Secretary-General S/2004/616 2004 [http://daccess-dds-ny.un.org/doc/UNDOC/G EN/N04/395/29/PDF/N0439529.pdf? OpenElement](http://daccess-dds-ny.un.org/doc/UNDOC/G%20EN/N04/395/29/PDF/N0439529.pdf?OpenElement) (accessed 2016-01-11).

35 Secretary-General, United Nations “The rule of law and transitional justice in conflict and post-conflict Societies.”

36 Rutherford, *Lex, rex: The law and the Prince, a Dispute for the just prerogative of king and People* Edinburgh, printed by A. Murray, Milne square, (1644) 237.

37 Dicey, Introduction to the Study of the Law of the Constitution (1961) 202; Principle “Albert Venn Dicey and the Principles of the Rule of Law: Is Justice Blind? A Comparative Analysis of the United States and Great Britain” 2000 *Loyola of Los Angeles International and Comparative Law Review* 357.

38 Dicey 202; Principe 2000 *Loyola of Los Angeles International and Comparative Law Review* 357.

39 Dicey 202.

40 Dicey 202.

41 Dworkin “Political Judges and the Rule of Law” 1978 *Proceedings of the British Academy*, open Access archive of volumes 51-111, 259, 262.

42 Dworkin 1978 *Proceedings of the British Academy* 262.

enforced and demanded by individual citizens through the courts or other judicial institutions as far as this is feasible.⁴³ This conception of the rule of law by Dworkin is the paradigm of rule by a precise public conception of individual rights.⁴⁴

As per Allan, the rule of law consists, mainly of a body of rudimentary philosophies and standards, which collectively offer some consistency and lucidity to “the legal order ...”.⁴⁵ Furthermore, it is a blend of ideals, potentials, and objectives that incorporate traditional thoughts about distinct freedom, natural justice and largely, thinking about the requirements of justice and fairness amongst the ruler and ruled.⁴⁶ There is no distinction between substantive and procedural fairness because both are “premised on respect for the dignity of the individual person ...”.⁴⁷ The inkling of the rule of law is also intimately connected with the fundamental belief of equality, which lies at the heart of our persuasions about justice and fairness. It underscores “an equal voice for all ... citizens in the legislative process: universal suffrage may today be taken to be a central strand of the rule of law.”⁴⁸

From the doctrines stated above it is trite to argue that without the rule of law, there cannot be access to courts, since the rule of law promotes accountability for a crime against any section of human beings, which includes female refugees, through the subjection of states, individuals and corporate perpetrators to the law. The principles also lay emphasis on individual rights and provide the mechanisms for the enforcement of such rights. If these principles are incorporated into the running of a refugee camp, the current culture of impunity by the violators of female refugees will be curtailed. In addition, they serve as the foundation on which female refugees who are victims of sexual violence will gain access to court. The rule of law also promotes equal protection before the law; this implies that refugees should be accorded the protection against sexual violations as accorded to the females in host states.

43 Dworkin 1978 *Proceedings of the British Academy* 262.

44 Dworkin 1978 *Proceedings of the British Academy* 262.

45 Allan *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (1993) 21-22.

46 Allan 22.

47 Allan 22.

48 Allan 22.

3 Analysis of article 16 of the UN convention 1951

3 1 Article 16(1)

Of the UN Convention 1951,⁴⁹ provides that a refugee shall have free access to the courts of law on the territory of all Contracting States.⁵⁰ The question is what is free access to a court?

3 1 1 Free

The word “free” has numerous connotations depending on the context in which it is being employed. In English, it basically means, a person who is not or no longer in bondage, servitude or in subjection to another and has liberty as a member of a society or state;⁵¹ alternatively, it symbolises an individual of a noble, honourable, gentle birth and breeding,⁵² denotes the ‘ability to act from one’s own will or choice and not compelled or constrained and determining one’s own action without outside motivation.’⁵³

Additionally, the word “free” also represents, “a lack of impediment, restrained, restriction in action, activity or movement; unhampered, unfettered, allowed or permitted to do something, unbiased, open-minded, clear of obstruction, not blocked, open, unobstructed, clear of something regarded as objectionable or an encumbrance.”⁵⁴ Furthermore, the word “free” has been described by Black’s law dictionary as having legal and political rights, enjoying political and civil liberty, not subjected to constraint or domination of another, enjoying personal freedom; emancipation, characterised by choice rather than by compulsion or constraint, unregulated and costing nothing.⁵⁵ Can it be held that these literal meanings of the word “free” as discussed in this section, are what the UN convention is conveying and asserting that it should be granted to these refugees? If the answer is in the affirmative, then this reveals that refugees should have access to courts in accordance with all the meanings of the word “free” as discussed in this section in the strictest sense.

However, this is a broad and general provision for all refugees and implies that there is no need to pay court process fees, whilst not meeting the needs of refugees who are victims of sexual violence in a host state. However, in relation to victims of a sexual violation, they do not have the

49 UN Refugee Convention 1951.

50 Allan 22.

51 Brown (ed.) “Free” in Brown (ed) *The New Shorter Oxford English Dictionary on Historical Principles* (1993) 1022.

52 Brown 1022.

53 Brown 1022.

54 Brown 1022.

55 Garner “Free” in Garner *Black Laws Dictionary*, 8th Edition, Thompson West (2004) 688.

freedom to approach the court to enforce their rights as they are; they have a lengthy process before the case is taken to court by the state prosecutor. For instance, rape cases must have to be reported to the police in South Africa, per adventure, as the police do not believe their testimony; therefore, the case might not lead to prosecution. However, if their testimony is believed, then the victim is sent to the hospital for examination, the collection of evidence before the perpetrator is arrested, and the case is later handed over to the state prosecutor, who prosecutes the case, while the victim is the principal witness. Thus, this freedom is not practicable in cases of victims of sexual violence.

3 1 2 Access to court

Access to court has been defined in many circumstances; it could be physical or procedural.

3 1 2 1 Physical access

“Access to court” is a broad term and for clarity sake, the phrase will be divided into words and defined separately. Thus, the word “access” denotes “an opportunity or ability to enter, approach, pass to and communicate with, for instance, accessing the court.”⁵⁶ In addition, access is described, as the right or opportunity to use or look at something or the method or possibility of getting near to a place or person.⁵⁷

The word “court” is demarcated as a governmental institution consisting of one or more judges who sit to decide disputes and administer justice.⁵⁸ Likewise, Hughes describes a court as “... a permanently, organised body, with independent judicial powers delineated by law, meeting at a time and place fixed by law for the judicial public administration.”⁵⁹ In addition, a court is defined as a “locale for legal proceeding.”⁶⁰

In summary we declare “access to court” to mean a right, opportunity or ability for a violated individual to approach, enter, pass to and from a demarcated governmental institution consisting of one or more sitting judges who decide disputes and administer justice over one grievance; or a right, opportunity or ability of a victim to, approach, enter, pass to and from an enduring, organised body of independent judicial powers delineated by law to meet at a particular time and place prescribed by law for the judicial public administration; or a right, opportunity or ability

56 Garner “Court” in *Black’s Law Dictionary*, 8th edition Thomson West (2004) 14.

57 Cambridge University Press, Meaning of “access” in the English Dictionary, available at <http://dictionary.cambridge.org/dictionary/english/access> (accessed 2017-04-03).

58 Garner “Court” in *Black’s Law Dictionary* (2004) 378

59 Hughes *Federal Practice, Jurisdiction & procedure, civil and criminal with forms* Assisted by Thorpe GC. 7 (1931) 8; Garner 378.

60 Garner (2004) 374.

to communicate with, approach, enter, pass to a facility for legal proceeding.

3 1 2 2 Procedural access

Procedural process is a right, opportunity or ability for violated individuals to communicate with and participate in a legal proceeding that could enforce their rights and provide them with a remedy. Thus, in the European case of *Oerlemans v The Netherlands*,⁶¹ the European Court of Human Rights,⁶² describes access to court as giving an applicant an opportunity to challenge the lawfulness of an order.⁶³ In that case, the government of Netherlands created some areas of their land as protected locations, comprising the property belonging to the applicant.⁶⁴ The order required that certain agricultural activity required permission before it could be accepted. The European Court of Human Rights had to determine whether the applicant has a right and whether the right is of a civil character. The court agreed that there was a dispute because the applicants' rights to use their property were being restricted.⁶⁵

In addition, the other issue the court had to resolve was whether the Netherlands, gave the applicant the opportunity to challenge the lawfulness of the order pursuant to the European Convention in article 6(1),⁶⁶ which provides that: in deciding about civil rights and obligations or of any criminal charge against an accused the applicants must be granted the right to voice their opinions.⁶⁷ The court must consider that every person is eligible for an impartial and civic hearing within a realistic period by an autonomous and unbiased law court created by law.⁶⁸ Likewise, that the decision of the court must be declared overtly, without the media and public watching all or some part of the proceeding.⁶⁹ Furthermore, that in the interests of ethics, public order or national safety in an independent society, wherever the protection of youths or of private life of the parties to proceedings is required, or where the court is of the opinion that publicity would prejudice the interests of justice, thus the privacy of proceedings should be respected.⁷⁰

61 *Oerlemans v The Netherlands* 15 EHRR 561 1991.

62 Note that the cases cited in this article which are outside the jurisdiction of Africa, were utilised in the light of their germane principles with this article.

63 *Oerlemans v The Netherlands*.

64 *Oerlemans v The Netherlands*.

65 *Oerlemans v The Netherlands*.

66 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

67 The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

68 The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

69 The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

70 The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

The court further specified that under the Netherlands case law, where an administrative petition to a higher authority does not guarantee fair procedure, it is possible to have a recourse to the civil courts for a full review of the lawfulness of the administrative decision.⁷¹ Similarly, in the case of *J.J. v The Netherlands*,⁷² the right of access to courts was also violated in a taxation proceeding in the supreme court of Netherland.⁷³ In this case, the plaintiff was inept to reply to the advisory opinion of the Advocate General's appeal against fiscal penalty on grounds that he did not pay the court's registration fee, and it was held as an infringement of article 6(1),⁷⁴ of the European Convention for the Protection of Human Rights and Fundamental Freedoms. These aforementioned rights provide for fair hearing, which is tantamount to the violation of access to court.⁷⁵ Since article 50 declares that, "the expenditure on the court shall be borne by the Council of Europe." This implies that access to court includes a right to fair hearing in the instant case and the right to reply to an adversarial proceeding.

Likewise, another challenge of access to courts was in the case of *Golder v The United Kingdom*,⁷⁶ where a prisoner who craved to take a civil action for defamation against a prison guard, who had allegedly falsely accused him of instigating a prison riot had his letters to both a legal representative and the European Commission of Human Rights censored and withheld by the prison authorities.⁷⁷ However, the European Court of Human Rights pronounced that censoring and withholding the letters of the prisoner was a violation of both of his rights to communication under article 8 and his right of access to court under article 6(1).⁷⁸

Furthermore, in the case of *Campbell and Fell v The United Kingdom*,⁷⁹ the European Court of Human Rights, in the same way, held that the absence of privileged consultation between an attorney and client amounted to meddling with the right of access to court and a contravention of article 6(1) of the Convention.⁸⁰ The accused were prisoners charged with the offence of participating in a protest, but they were prevented from hiring the services of a legal practitioner to defend

71 *Oerlemans v The Netherlands*.

72 *J v The Netherlands* (9/1997/793/994) 27 March 1998,

73 *JJ v The Netherlands*.

74 The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

75 *JJ v The Netherlands*.

76 *Golder v The United Kingdom*, Application No 4451/70, Judgement of 21 February 1975.

77 *Golder v The United Kingdom*.

78 European Convention for the Protection of Human Rights and Fundamental Freedoms.

79 *Campbell and Fell v The United Kingdom*, Application No 8342/95, Judgement of 28 June 1984.

80 European Convention for the Protection of Human Rights and Fundamental Freedoms.

them.⁸¹ Even when, they were eventually granted access, the prisoners were made to consult their lawyer in the presence and hearing of a prison officer.⁸²

This phrase “access to court” is ambiguous, because it did not state who could access the court and the subject matters that refugees can bring before the court of law. In addition, victims of sexual violations have no legal standing to institute a criminal proceeding against their assailant in a court directly in the current practice, for criminal proceedings in domestic courts. Instead, they must overcome all hurdles of other administrative and procedural bureaucracy, before a prosecutor can bring the case to court. In the event that they are not believed by the administrative organs, then they will be robbed of the opportunity to assert their rights, and accordingly, it is submitted that victims should be conferred a *locus standi* to be joined as co-prosecutor of their perpetrators, in the criminal proceeding against the assailant.

3 1 2 3 *Locus Standi*

For individuals to access a court physically or procedurally, they must possess a standing before a court of law.⁸³ This implies that access to court is not absolute to all human beings and it is a preliminary issue, which some courts usually address, without which the substantive case may not proceed. *Locus standi* also referred to as “standing to sue” or “title to sue”⁸⁴ had been described as “the right of an individual, “to have a court adjudicate a dispute taken before it and instituted by the individual or group.”⁸⁵ In theory, the standing is in effect “procedural or adjectival, rather than substantive,” because it has to do with physical access to the courts for the resolution of disputes and not with the legal rules and principles which regulate how disputes ought to be resolved.⁸⁶ However, in practice, they are intertwined.⁸⁷

Furthermore, the issue of standing has been denoted to be strictly applicable in private law for instance in intermediary recipient disputes.⁸⁸ Nevertheless, in public law, it occurs in cases where secondary statutes or legal institutions are confronted either for acting *ultra vires* or for constitutional and excessive jurisdictional basis.⁸⁹ The issues of standing also surface in cases of the common law of public nuisance, actions where declarations and injunctions are needed, and in

81 *Campbell and Fell v The United Kingdom*

82 *Campbell and Fell v The United Kingdom*.

83 Legere “*Locus Standi* and the Public Interest: A Hotchpotch of Legal Principles” 2005 *Judicial Review* 128

84 Stein, “The theoretical foundation bases of *locus standi*” in Stein LA (ed.) *Locus standi*, the law book company Sydney Melbourne Brisbane Perth (1979) 3.

85 Stein 3.

86 Baxter *Administrative Law* (1984) 647.

87 Baxter 644.

88 *Vandervell Trustee Ltd. v White* [1970] All E.R. 16 A at 31 (H.L.)

89 Stein 3.

situations where a person is authorised by law to take part in a decision made by way of trial, objections or appeals.⁹⁰

However, for a person to possess *locus standi*, the person must have a legal interest in the relevant relief sought,⁹¹ and the “capacity to sue.”⁹² This implies that the claim must be grounded on a lawfully enforceable right and the applicant is entitled to enforce that right. Moreover, for an initiator of a dispute to succeed, the applicant is required by the courts to pass a certain assessment to have a standing in a case. For instance, the instigator of a proceeding may be required to pass the “sufficient interest test” which entails that the claimant must demonstrate that he or she has an adequate interest both in fact and in law in relation to the suit.⁹³ Thus, victims of sexual violence, for instance, could be said to have sufficient interest, because they are the ones that directly suffered the harm, as a result of this harm the public has also indirectly suffered.

Furthermore, the originator of the proceeding may also be required to succeed with the “person aggrieved” test,⁹⁴ for instance an applicant who owns a land in a particular location who has been affected by the decision of the authorities is a person aggrieved, therefore has every right to institute an action against the orders of an authority.⁹⁵ This provision has been challenged in courts, for instance, in *Morbaine Ltd v (1) Secretary of State (2) Stoke on Trent City Council*.⁹⁶ The court held that a person who does not have an interest in land and is hoping to have an interest in the future is not a person aggrieved. The principle to be imbibed here is that of a person with interest in a matter. Thus, it is submitted that a victim of sexual violence is a person directly affected by the crime because the crime of sexual violence is directly against the victim. Therefore, a victim of sexual violation is a person aggrieved and should be joined to prosecute the assailant.

In addition, the other impediment, a litigant, has to get through in order to establish his or her standing before the court which is the “victim’s” test. This is provided for under article 34 of the European Convention on Human Rights,⁹⁷ and the United Kingdom Human rights act that a victim of an unlawful act has a standing in legal proceedings.⁹⁸ In *R v (1) Secretary of State for the Home Department (2) Lord Chief Justice*

90 Stein 3.

91 Loots “*Locus Standi* to claim relief in the public interest in matters involving the enforcement of Legislation” 1987 *SALJ* 131; *Attorney-General Federation v Attorney-General of the 36 States of Nigeria (2001)*9 *SCM* 45 59.

92 Beck “*Locus Standi* in *Judico* or *Ubi Ib Remedium*” 1983 *SALJ* 278 283.

93 Legere 2005 *Judicial review* 126.

94 S 288 of the Town and Country Planning Act 1990.

95 Legere 129.

96 *Morbaine Ltd v (1) Secretary of State (2) Stoke on Trent City Council* [2004] *EWHC* 1708 (Admin)

97 Council of Europe European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

98 Chapter 42, sec 7(1)(a) of the Human Rights Acts 1998.

of *England and Wales ex p. Ralph Bulger*,⁹⁹ the father of a murdered toddler Jammie Bulgar applied for the review of the lord chief justice decision on the fee fixed by the court. The court of appeal held that the father of the victim did not have an interest in the matter, thus had no standing.¹⁰⁰

However, Rose LJ,¹⁰¹ was of the view that if the family of a victim could contest the sentencing process, then the family of the defendant could also do so. This decision is unfair and contrary to the principles of human rights and it robs victims of their rights, because if the criminal justice which favours perpetrators and gives them the opportunity to plead their case and even appeal against the decision of a court, then why should victims be deprived of this favour? Therefore, it is submitted that the deprivation of a victim from asserting their rights against their assailant as co-prosecutor or appealing against the sentences is unfair, impartial and it is a contravention of the fundamental human rights of the victim. In addition, why should the criminal justice system give a fair hearing to a perpetrator, whereas the victims of crime receive the same fair hearing? Furthermore, the court held that in criminal cases there was no need for a third party to intervene to uphold the rule of law.¹⁰² This aspect of the judgment is also ironical because the rule of law is meant to promote, equality, impartiality and the rights of an individual. Therefore, we submit that the rule of law without the promotion of the right of individuals that constitutes the public is a mirage. Going further, the option of asking Mr. Bulger to challenge the decision on the impact of his son's death on him is equally unfair, a waste of time and resources and it amounts to an infliction of a fresh injury on a scar plus emotional pain on him. This on its own is a further violation of his right to access the courts.

Therefore, it is argued that, if a victim can be conferred with the right to legal standing under the UK human rights act,¹⁰³ then a victim of sexual violence should be accorded a legal standing in a criminal proceeding as a co-prosecutor, so that she can enforce her rights as a paradigm shift from the usual criminal proceedings where victims are used as mere prosecution witness. The reasons are that the crime of sexual violence is directly against the victim and likewise as against the rule of law,¹⁰⁴ as a secondary victim, so victims of sexual violence should

99 *R v (1) Secretary of State for the Home Department (2) Lord Chief Justice of England and Wales ex p. Ralph Bulger* [2001] EWHC Admin 119.

100 *R v (1) Secretary of State for the Home Department (2) Lord Chief Justice of England and Wales* 119.

101 *R v (1) Secretary of State for the Home Department (2) Lord Chief Justice of England and Wales* 21-22.

102 *R v (1) Secretary of State for the Home Department (2) Lord Chief Justice of England and Wales* 21-22.

103 A 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms; chapter 42, sec 7(1)(a) of the Human Rights Acts 1998

104 *R v (1) Secretary of State for the Home Department (2) Lord Chief Justice of England and Wales* 21-22.

be authorised to protect their individual rights during the criminal proceedings, while the state prosecutor should be allowed to defend the rule of law.

3 1 3 The territory of all contracting states

A “Contracting State” has been indicated as a state, which has consented to be bound by a treaty, whether the treaty has entered into force, or not;¹⁰⁵ while a “Party” denotes a state, which has consented to be bound by the treaty and for the reasons, the treaty was promulgated.¹⁰⁶ This provision has excluded refugees who are in a third state that is a non-contracting state.¹⁰⁷ This literally suggests that a refugee cannot enjoy the provision of article 16(1) if they are not located in countries that are not parties to the refugee convention. Thus, this will bring hardships for refugees in those nations. Consequently, it is submitted that where a refugee is located in a non-contracting state, the principle of customary international law should be invoked to bind that state.

With reference to paragraph (1) of article 16,¹⁰⁸ the jurisdiction for the enforcement of refugee rights is the court of host states or contracting states. The limiting factor here is that this article did not specify the subject matter to be arraigned before the court whether it is civil or criminal. However, it is easier for an individual to access the court, for the enforcement of their rights in civil cases, while victims of sexual violence who do not possess *locus standi* in a criminal proceeding cannot access the court directly.

3 2 Article 16(2)

Declares that “a refugee shall enjoy in the contracting state in which he or she has his or her habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*”. It has been stated that paragraph 2 confers an obligation on a contracting state only in respect of refugees who have their habitual residence within its territory.¹⁰⁹

3 2 1 Treatment as a national

This clearly reveals that the destiny of refugees concerning access to courts are tied to the way in which the nationals of the contracting states are treated. It indicates that if the citizens of a host state are denied access to court, then refugees will be treated likewise. This indicates that,

105 A 2(1)(f) of the Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23May1969<https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> (accessed 2016-09-25).

106 A 2(1)(g) of the Vienna Convention on the Law of Treaties 1969.

107 “Third State” means a State not a party to the treaty in A 2(1)(h) Vienna Convention on the Law of Treaties 1969.

108 UN Refugee Convention 1951.

109 UN Refugee Convention 1951.

if the nationals of contracting states have access to courts then refugees should be accorded with the same access.

3 2 2 *Legal assistance*

The current practice is that legal assistance also known as legal aid is made available to perpetrators who cannot afford to employ the services of a legal practitioner for their defence in criminal cases. This is usually provided by the government in the interest of fair hearing. However, there are yet to be documented criminal cases where a victim is given a legal assistance in criminal cases except for the preparation of the victim as a prosecution witness. Nevertheless, in the European Court of Human Rights in *Airey v Ireland*,¹¹⁰ established that a denial to grant legal aid to an impoverished woman seeking a judicial separation from her abusive husband violated her right of access to court under article 6(1).¹¹¹

The court also added that although access is exercised actively by the individual, access is equally important to the proper conduct of criminal cases given that, it provides protection against the determination of a criminal charge by a body not meeting the standards dictated by article 6.¹¹² Therefore, it is submitted that if the woman in the instant case is accorded access to court in order to prevent a crime, then it is logical to advance legal aid to her and to victims of sexual violence as a co-prosecutor of their perpetrator.

3 2 3 *Cautio judicatum solvi*

The second ambit of subsection 2 states that refugees should be exempted from *cautio judicatum solvi*. This is a cautionary fee of a certain amount of money required, at the discretion of a court to be deposited by a foreigner who is a party to suit, which is sufficient to cover the cost of litigation that he or she might be compelled to pay to the party peradventure he or she loses the case.¹¹³ Grahl-Madsen explained that in certain countries, persons have only access to the courts as plaintiffs if they are nationals of that country or of another country with which there exists a reciprocity arrangement.¹¹⁴ However, other countries may admit foreigners to their courts of law but request them, in the absence of reciprocity, to deposit an amount, which at the court's discretion is

110 *Airey v Ireland* 52 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305.

111 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

112 European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

113 UN High Commissioner for Refugees (UNHCR) "Commentary of the Refugee Convention 1951 (articles 2-11, 13- 37)" 1997 available at: <https://www.refworld.org/docid/4785ee9d2.html> (accessed 2019-04-26); Weis (ed) *The Refugee Convention 1951* (1995) 134.

114 Weis (ed) 131.

sufficient to cover the costs he or she will be compelled to pay the other party if he or she loses the case.¹¹⁵

This implies that it does not matter whether the home country of a refugee has a reciprocity agreement with the host state or not, they are exempted from depositing any amount to the court as security.

3 3 Article 16(3)

Article 16(3) advocates that a refugee shall be given equal access in the matters referred to in paragraph 2 in countries other than that in which he or she has his or her habitual residence and treatment granted to a national of the country of his or her habitual residence.¹¹⁶ This implies that whatever benefits that accrue to the citizens of a host state, concerning access to court should be made applicable to refugees. This suggests that refugees in a host country are to enjoy the same rights and privileges concerning access to courts; this indicates that refugees will have better treatment than other aliens will in the same country. It can also be inferred from paragraph 1 that in countries where nationals have no free access to courts the refugees will, in this respect be treated even more favourably than nationals.¹¹⁷ The rule that refugees should be treated as nationals of the country is mostly on the issue of their eligibility for legal assistance and exemption from *cautio judicatum solvi*.¹¹⁸

In respect of legal assistance, the article can only apply to such welfares, which are granted by the national authority, under a state-supported system.¹¹⁹ It also symbolises that in countries where legal aid is solely granted by bar associations the provision may not be applicable.¹²⁰

4 Conclusion

This paper analysed the article 16 of the UN refugee convention and its applicability to victims of sexual violence in refugee camps. It discusses the theory of the rule of law as the foundation of access to courts. It concluded, that article 16 of the UN Refugee Convention was not conceptualised to accommodate the victims of crime especially the victims of sexual violence in refugee camps. Since the current domestic criminal procedure for prosecuting crimes has no room for victims to

115 Weis (ed.) 134.

116 UNCHR "Commentary of the Refugee Convention 1951 (articles 2-11, 13-37)".

117 UNCHR "Commentary of the Refugee Convention 1951 (articles 2-11, 13-37)".

118 UNCHR "Commentary of the Refugee Convention 1951 (articles 2-11, 13-37)".

119 UNCHR "Commentary of the Refugee Convention 1951 (articles 2-11, 13-37)".

120 UNCHR "Commentary of the Refugee Convention 1951 (articles 2-11, 13-37)".

freely have access to courts either, physically or procedurally, because victims lack *locus standi* to freely access courts in criminal proceedings.

Instead, they are used as prosecution witnesses, because crime is treated as against the state and public, and not against the individuals who have suffered harm. This caused hardships for victims of sexual violence, because the prosecution of perpetrators serves the interest of the state and the public, thereby robbing the victims of their rights and remedy. Although the wealthy victims could obtain a fiat in order to employ the services of a private prosecutor, victims are used as witnesses and not as parties to the suit.

Thus, the concept and principles of *locus standi*, which apply to civil cases, were discussed and it is submitted that victims of sexual violence should be afforded a standing as a co-prosecutor of their offenders. This is based on the “victim’s test” as discussed above, so that while the state represents and defend the rule of law, the refugee who is a victim of sexual violence in camps should be provided with legal aid that can enforce the right of the victim and plead for a remedy that will ameliorate the right of the victim. In order to achieve this, the authors are suggesting the reform of domestic and international criminal legal system to reflect, victims of crimes as co-prosecutor of their offenders.