



**Access to justice for victims of sexual violence
in refugee camps**

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Declaration

I the undersigned declare that the work contained in this study for the degree of Doctor of Laws (LLD) at the University of Pretoria, is my own independent work and that I have not previously in its entirety, or in part, submitted it to any university for a degree.

Signed at the University of Pretoria on November 2017

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Dedication

To **Almighty God**, the maker of Heaven and earth, the author of knowledge, for his mercy that endures forever, for endowing me with inspiration, provision, resilience, good health and sustenance.

To my late sister **Miss Avwersuoghene Origho**, who was pushed out of a moving vehicle in resisting rape, and for whom we could not obtain justice. Thus, her death served as motivation and a driving force to ensure that other victims of sexual violence obtain justice.

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Mode of citation and reference to sources

In the current thesis the author designates the use of the following style of citation and reference to sources depended upon in support of this study:

- Footnotes are used throughout the progression of this study to credit the various authorities used, to credit their authors and to ensure the accessibility of the sources to other researchers.
- In every chapter the footnotes recommence at footnote 1 with the goal of making the reading of the respective chapters stress-free and more coherent.
- Where there are multiple sources with the same author and date of publication, the first part of the title, is included in the cross reference, e.g. Gatrell, *A Whole Empire Walking* (n 130 above) 156.
- Where there are multiple sources with the same author, the year of publication is added to the cross reference, e.g. Holborn (1988) (n 29 above).
- A comprehensive list of authorities used during this study has been incorporated as part of the reference list at the end of the thesis. This will make the sources available to the reader in cases of multiple authors, e.g. Cassese A, Gaeta P, Baig L, Fan M, Gosnell C & Whiting A, *Cassese's International Criminal Law*, Third edition, Oxford University press (2013).
- Where a source is employed in a successive chapter, the full reference of such authority is replicated for easy availability in the study.

Summary

Access to justice for victims of sexual violence in refugee camps

Degree: Doctor of Laws

This study investigates the problem of access to justice for female victims of sexual violence (SV) in refugee camps, using South Africa, Tanzania and Uganda in a multiple case study. The main argument of this study is that female refugees in refugee camps, are not adequately protected by those responsible to safeguard them against sexual violence and the myriad of perpetrators of such sexual violations may never be apprehended, prosecuted, or convicted. Thus, refugees who are victims of sexual violence in refugee camps do not even have the opportunity to testify against their assailant.

On the other hand, the current UN Refugee Convention 1951 and its Protocol 1967 have no clauses that protect female refugees against sexual violations. Moreover, victims do not have access to justice in the host states, despite the provision of article 16 of the UN Refugee Convention 1951, which provides free access to courts in all contracting states. Article 16 of the UN Refugee Convention 1951 further proposes that refugees should be accorded the same treatment like the citizens of host states in this respect.

The study reveals that sexual violence perpetrated against citizens of contracting states are prosecuted in courts and victims have the opportunity in domestic courts to testify against the assailants. Whereas, refugees who are victims of SV in the states of study are not treated like the citizens who suffered the similar violation as prescribed by article 16 of UN convention of 1951. Since the cases of SV against refugees in the territory are hardly prosecuted, they do not have the opportunity to testify against their assailant.

Therefore, this study recommends that states should be compelled to address the offence of sexual violence against refugees in camps, as part of their international obligation as signatories to the refugee convention. Through, a thorough investigation and prosecution of SV cases perpetrated against these victims in their territories. So that victims of sexual violence in their

territories can also have the opportunity to testify against their assailants like citizens who suffer SV in the contracting states. However, if a State is not a party to the convention, that state should be held responsible through the invocation of complicity to crime and customary international law. This is because the general norm in domestic courts is that, states handle the prosecution of crime and the enforcement of the rights of their citizenry.

The study in addition, recommends an international legal framework in support of the current international refugee mechanism that offers victims of sexual violations in refugee camps, legal protection, and access to justice. The proposed international refugee instrument provides for the enforcement of the rights of refugees who are victims of sexual violence, and remedy and reparations that could mitigate the effects of such violence and encourage those charged with their care to give both physical and legal protection to refugees, in camps, in their territories. In addition, the study also suggests a one stop facility in refugee camps for handling the cases of sexual violence against these victims, thus facilitating access to justice.

In addition, the researcher also suggests that states should assume a victim - oriented approach in dealing with sexual violations in their territory. This is because, the current practice of the domestic laws of states, is that victims of crime are used as prosecution witnesses, since crime is against the State and a challenge of the rule of law. Consequently, victims do not have the needed *locus standi* to access the courts as an injured party to a suit.

This can be achieved through the inclusion of a *locus standi* clause in their various criminal procedure acts, so that victims will have the requisite access to court, become parties to the litigation, as co-prosecutor of their offenders. This can be done, as a paradigm shift from the current practice of the criminal proceedings, so that while the state prosecutor represents the interest of the public and that of the rule of law, the victim will represent themselves and will be given a fair hearing in order to assert their rights against their assailant. In this process, victims can also enjoy the services of legal aid as maintained by article 16 of the 1951 UN Refugee Convention.

Key words: Access to justice, refugees, victims, sexual violence, refugee camps

List of abbreviations and acronyms

AAHI	Action African help international
ACRWC	African Charter on the rights and welfare of the child
ADR	Alternative dispute resolution
AfriMAP	African governance monitoring and advocacy project
AIDS	Acquired immune deficiency syndrome
AU	African Union
BBC	British Broadcasting Corporation
CE	Council of Europe
CIA	Central Intelligence Agency
CRC	Convention on the rights of the child
CRPD	Convention on the rights of persons living with disability
CSO	Civil societies oversight
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GA	General Assembly
GAATW	Global alliance against traffic in women
GC	Geneva Convention
HIV	Human immunodeficiency virus
HR	Human Rights
HRW	Human Rights Watch
IA	Inter-America
IAWJ	International Association of Women Judges
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICLA	Information, Counselling and Legal Assistance Programme
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICVA	International Council of Voluntary Agencies
ILC	International Law Commission

ILO	International Labour Organization
IRO	International Refugee Organization
NHRC	National Human Rights Commissions
NHRIs	National Human Rights Institutions
NACOSA	Networking HIV & Aids community of Southern Africa
NGO	Non-governmental organisation
NPA	National prosecuting authority
NRC	Norwegian refugee council
OAU	Organisation of Africa Unity
OAS	Organisation of American States
OED	Oxford English dictionary
OUNHCR	Office of the United Nations High Commissioner for Refugee
PLD	Persons living with disability
PTSD	Post-traumatic stress disorder
RCT	Rational choice theory
RSA	Republic of South Africa
SAPS	South African Police Service
SERI	Socio-Economic Rights Institute
SGBV	Sexual and gender-based violence
SICJ	Statute of International Court of Justice
SOCA	Sexual Offences and Community Affairs Unit
STD	Sexually Transmitted Diseases
STI	Sexually Transmitted Infection
SV	Sexual violence
TEEC	Treaty Establishing the European Community
TFEU	Treaty on the Functioning of The European Union
TCCs	Thuthuzela Care Centres
TIJS	Traditional and Indigenous Justice Systems
UDHR	Universal Declaration of Human Rights
UHR	United for Human Rights
UK	United Kingdom
UN	United Nations
UNCHR	United Nations High Commissioner for Refugees

UNDP	United Nations development programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations Children Education Funds
UNRRA	United Nations Relief and Rehabilitation Administration
UNRWA	United Nations Relief and Works Agency
USA	United States of America
USSR	Union of Soviet Socialist Republics
VPRS	Victims Participation and Reparations Section
VSAC	Victoria Sexual Assault Centre
WHO	World Health Organisation

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Chapter 1: Introduction and problem statement

1 Introduction

Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with, but injustice makes us to pull things down. When only the rich can enjoy the law, as a doubtful luxury and the poor who need it most cannot have it, because its expense puts it beyond their reach, the threat to the existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in the benefit of impartiality and fairness.

(US Supreme Court, Judge Brennan. 1956).

The immediate cause of most refugees fleeing their countries because of armed conflict has been attributed to actual and anticipated human rights violations.¹ The mass movements of people are generated when the rights of these people are encroached upon by wars, intolerance or persecution.² The disintegration of social structures in their country of origin and the flight to safety makes them vulnerable to all manner of abuses, especially sexual violation.³

Sexual violence (SV) against refugees, especially female refugees, is a global problem and is a violation of human rights.⁴ It is a challenge to the rule of law and a display of the 'greatest

¹ C Apodaka, 'Human Abuses: Precursor to refugee flight' (1998) 11 (1) *Journal of Refugee Law* 80; United Nations High Commissioner for Refugees (UNHCR) 'Sexual and Gender-based violence (SGBV) situation in Nyarugusu refugee camp' (2016) <http://data.unhcr.org/burundi/documents.php?page=1&view=grid&Org%5B%5D=1> (accessed 29 November 2016); see also J Freedman, 'Sexual and gender - based violence against refugee women: a hidden aspect of the refugee "crisis"' (2016) 24 (47) *Reproductive Health Matters* 18.

² As above.

³ M Hynes & BL Cardozo, 'Sexual violence against refugee women' (2000) 9 (8) *Journal of Women's Health & Gender Based Medicine* 819.

⁴ UN High Commissioner for Refugees (UNHCR) 'Sexual violence against refugees: guidelines on prevention and response' 8 March 1995, 1.3 (b) (c) <http://www.unhcr.org/3b9cc26c4.html> (accessed 14 January 2017); see also F Vigaud - Walsm 'Women and girls failed: The Burundi refugee response in Tanzania' *refugee international*, (2015) 1, <http://www.refworld.org/docid/568cf1e64.html> (accessed 1 February 2017); see also I Keygnaert et al, 'Sexual and gender-based violence in the European asylum and reception sector: a perpetuum mobile?' (2014) 25 (1) *European Journal of Public Health* 90; see also Hynes and Cardozo (n 3 above) 819- 823; see also I Keygnaert et al 'Hidden violence is silent rape: sexual and gender-based violence in refugees, asylum seekers and undocumented migrants in Belgium and the Netherlands' (2012)14 *Cult Health Sex* 505-520; see also Ward and Vann, 'Gender-based violence in refugee settlements' (2002) *Lancet* 360: S13 - S14; see also J Leatherman 'Sexual violence and armed conflict: complex dynamics of re - victimization' (2007) 12(1) *International Journal of Peace Studies* 64;

breach of human security'.⁵ On occasion refugees have suffered sexual violence already in their home countries⁶ as a result of war,⁷ where sexual violence is simply used as a reward to the combatants⁸ as the spoils of war and as a means of achieving a military objective. That is, it is a weapon of war.⁹ Smith-Spark,¹⁰ quoting a report by Amnesty International,¹¹ states 'women bodies have become a part of the terrain for conflict'.¹²

Consequently, most refugees, especially women and girls, attempt to flee to other relatively more peaceful countries.¹³ Ironically, sexual violation is unabated.¹⁴ In the country of refuge,¹⁵

dynamics of re - victimization' (2007) 12(1) *International Journal of Peace Studies* 64; see also GA Johnson 'Frozen words: memory and sexual violence amongst Sudanese refugee women in Cairo' UNHCR, (2012) 1, <http://www.refworld.org/pdfid/5142e20e2.pdf> (accessed 6 March 2017); see also A Mkalama 'Somalia: violence against Somali refugee women' (2014) <https://mkalama.wordpress.com/2014/05/30/somalia-violence-against-somali-refugee-women/> (accessed 6 March 2017); see also T Hassan 'Female refugees face physical assault, exploitation and sexual harassment on their journey through Europe' Amnesty International (2016) <https://www.amnesty.org/en/latest/news/2016/01/femalerefugeesfacephysicalassaultexploitationandsexualharassmentontheirjourneythrougheur...> (accessed 17 February 2016); see also K Lister "'It was disgusting": Female refugees face trauma and sexual violence on the road' (2016) https://www.com/en_us/article/it-was-disgusting-female-refugees-face-trauma-and-sexual-violence-the-road (accessed 10 March 2017); see also J Freedman (n 1 above) 18.

⁵ TA Obaid 'Introduction' in M Couldrey & T Morris, *Sexual violence: weapon of war, impediment to peace* (2007) 27 *Forced Migration Review*, the Refugee Studies Centre in association with the United Nations Population Fund (UNFPA) <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/FMR27/full.pdf> (accessed 8 March 2017).

⁶ As above; see also Z Awad, 'Sexual violence against women during displacement' Middle East Centre (2017) <http://blogs.lse.ac.uk/mec/2017/12/22/sexual-violence-against-women-during-displacement/> (accessed 10 February 2018).

⁷ As discussed in chapter three of this thesis.

⁸ M Arakawa 'A new forum for comfort women: Fighting Japan in United States federal court' (2013) *Berkeley Women L J*, 174 - 200.

⁹ L Smith-Spark, 'How did rape become a weapon of War' (2004) BBC news, <http://news.bbc.co.uk/2/hi/4078677.stm> (accessed 05 June 2017).

¹⁰ As above.

¹¹ Smith - Spark (n 9 above).

¹² Smith - Spark (n 9 above).

¹³ Human Rights Watch (HRW) 'Forgotten children of war' Human Right Watch (1999), vol. 11, No. 5 (A) <https://www.hrw.org/reports/1999/guinea/guinea997.htm> (accessed 27 August 2017); see also Apodaka (n 1 above) 80; see also United Nations High Commissioner for Refugees (UNHCR) 'Sexual and Gender-based violence (SGBV) situation in Nyarugusu refugee camp' (2016) <http://data.unhcr.org/burundi/documents.php?page=1&view=grid&Org%5B%5D=1> (accessed 29 November 2016); see also Freedman (n1 above) 18.

¹⁴ UNHCR (1995) (n 4 above) para 1.3(b); see also U Krause 'A continuum of violence? linking sexual and gender - based violence during conflict, flight, and encampment' (2015) 34 *Refugee Survey Quarterly* 8-10; see also 'The New Arab, Europe: Female migrants, refugees 'face violence and sexual harassment' (2016) <https://www.alaraby.co.uk/english/society/2016/1/18/europe-female-migrants-refugees-face-violence-and-sexual-harassment> (accessed 10 March 2017); see also Freedman (n1 above) 18.

¹⁵ As above

as undocumented migrants, asylum seekers or refugees the assault continues.¹⁶ Female refugees' rights are violated in their shelters, repatriation or detention facilities,¹⁷ throughout repatriation operations and integration periods. The focus of this research is on access to justice (formal justice) for female refugees who suffer SV in refugee camps.¹⁸ Statistics reveal that of the fifty million refugees in the world, women and girls make up about half the number.¹⁹

Refugees are accommodated in camps,²⁰ settlement²¹ and reception, detention, and repatriation²² centres. Occasionally, they find sanctuary on the streets and in the open in some countries of refuge.²³ In addition, some are accommodated in 'hangars and tents, hotel room, small local reception initiatives in houses and large open-air accommodation.²⁴ Refugee camps breed lawlessness and violence, rape and forced prostitution are commonplace.²⁵ Sexual violence in the camps is perpetrated by a myriad of actors, including relatives, acquaintances, strangers, and

¹⁶ Keygnaert (2012) (n 4 above) 505.

¹⁷ TR Jones and TC Pratt 'The prevalence of sexual violence in prison: the state of the knowledge base and implications for evidence-based correctional policy making' (2008) 52 *International Journal of Offender Therapy and Comparative Criminology* 280 - 295; see also C Struckman - Johnson & D Struckman - Johnson 'A comparison of sexual coercion experiences reported by men and women in prison' (2006) 21 *Journal of Interpers Violence* 1591 - 615; see also Krause (n 14 above) 10.

¹⁸ All the facilities used for housing such refugees.

¹⁹ UNHCR 'UNHCR women: Particular challenges and risks' (2001 - 2015) <http://www.unhcr.org/pages/49c3646c1d9.html> (accessed 19 June 2015).

²⁰ UNICEF 'Findings of the participatory assessment with children in Marratane refugee camp in Mozambique' (2006) <https://www.unicef.org/violencestudy/pdf/Mozambique.pdf> (accessed 24 November 2017). The term denotes facilities used for housing refugees and 'victims' denotes 'refugees who have been sexually violated in refugee camps.

²¹ UNCHR, '2014 UNHCR country operations profile - Uganda' (2014) <http://www.unhcr.org/pages/49e483c06.html> (accessed 11 July 2014).

²² Human Rights Watch (HRW) 'Prohibited persons, abuse of undocumented migrants, asylum seekers and refugees in South Africa, (1998) 83 - 92; see also BBC 'Australia asylum: Detention "harms children and violates law"' (2015) <http://www.bbc.com/news/worldaustralia31432017> (accessed 22 June 2015); see also BBC 'Australia investigates detention center abuse reports' (2015) <http://www.bbc.com/news/worldaustralia31596727> (accessed 22 June 2015).

²³ Human Rights Watch (HRW) 'Sexual violence and its consequences among displaced persons in Darfur and Chad' (2005) 9, <https://www.hrw.org/legacy/backgrounder/africa/darfur0505/darfur0405.pdf> (accessed 28 February 2017).

²⁴ Keygnaert *et al* (2012) (n 4 above) 14.

²⁵ J Ramji - Nogales 'Questioning hierarchies of harm: Women forced migration and international criminal law' 2011 *Intentional Criminal Law Review*, Social Science Research Network Electronic Paper Collection: <http://ssrn.com/abstract=1753758> (accessed 22 June 2014); see also M Hynes *et al.*, 'A Determination of the prevalence of gender-based violence among conflict affected populations in East Timor' (2004) 28 *Disasters* 307 (noting that women displaced to a camp in West Timor were 2.7 times more likely to report sexual violence than women who had not been displaced to camps; results for both sets of women came from the same study, using the same methodology and standardized questionnaire).

fellow refugees, citizens of the countries of refuge, peacekeepers and aid workers.²⁶ These acts of sexual violence take place against female refugees in their overcrowded, unsecured shelters, latrines/toilets,²⁷ when going to school²⁸ or fetching water or firewood²⁹ or at bathing places.³⁰

Another cause of vulnerability to sexual violence is overcrowding.³¹ The physical structures of the camps,³² for instance, the shelters are unsecured and sometimes without proper doors, the latrines, bath places and places where firewood is found are at a distance. The housing of unrelated families in the same shelter³³ and refugee children in foster homes makes refugees soft targets of sexual violence.³⁴ Furthermore, dependence on the goodwill of the host states, on non-governmental and international organisations, on males and public or well-intentioned individuals for their everyday requirements and survival creates a platform for opportunistic rape.³⁵ Most of the time supplies are inadequate and thus often the exchange of sex for rations and money is rife.³⁶

The scarcity of resources, the poor living condition in camps in a foreign environment and the

²⁶ UNHCR (1995) (n 4 above) 1.3 (a) (b) (c); see also United Nation (UN) ‘Special measures for protection from sexual exploitation and sexual abuse’, Report of the Secretary-General, GA/70/729, 2016 2/41-2/43, (accessed 1 February 2017).

²⁷ UNICEF (n 20 above) 6; see also Vigaud - Walsm (n 4 above) 4.

²⁸ UNICEF (n 20 above) 6; see also Vigaud - Walsm (n 4 above) 7.

²⁹ UNICEF (n 20 above) 6; see also Vigaud - Walsm (n 4 above) 4.

³⁰ *Ramji - Nogales* (n 25 above) 4; see also Vigaud - Walsm (n 4 above) 7.

³¹ M Hersh ‘Syrian women and girls: No safe refuge’ Refugee international (2012) <http://www.refugeesinternational.org> (accessed on 9 March 2015).

³² *Ramji - Nogales* (n 25 above) 5; see also Vigaud - Walsm (n 4 above) 8-9.

³³ 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 79; see also UNHCR (1995) (n 4 above) para 1.2.

³⁴ As above.

³⁵ RB Murray ‘Sex for food in refugee economy: Human rights implications and accountability’ (1999-2000) 14 *Georgetown Immigration Law Journal* 987; see also *Ramji - Nogales* (n 25 above) 5; see also A Farmer ‘Refugee responses, State - like behaviour and accountability for human rights violations: A case study of sexual violence in Guinea’s refugee camps,’ (2006) 9 *Yale Human Rights & Development Law Journal* 44; see also Vigaud - Walsm (n 4 above) 5; see also J Cohen *et al* ‘Governance in refugee camps on the Thai / Burma border’ George Warren Brown School of social works, Washington University in St. Louis (2016) <https://gwbweb.wustl.edu/sites/devpractice/refugees%20group%20Project/Governance%20in%20Refugee%20Camps.pdf> (accessed 7 April 2017).

³⁶ As above; see also Human Rights Watch (HRW) ‘Forgotten children of war Sierra Leonean refugee children in Guinea’ July 1999, vol. 11, No. 5 (A) 4, 39, 40, 41.

general physical insecurity in the facilities that host them³⁷ also expose them to sexual exploitation where camp officials demand or victims offer sexual favours in exchange for food, blankets³⁸ and the basic necessities of life.³⁹ The risk of sexual violation of women and girls in the camps is increased by old age, infirmity, physical or mental disability⁴⁰ and if females and children are unaccompanied by men or male parents.⁴¹

The consequences of SV on the victims in refugee camps are many and diverse, physical, psychological and psycho-social. Sexual violence may lead to homicide, serious injury, unwanted or early pregnancies, sexually transmitted diseases/infections (STIs), infertility and infection by the human immunodeficiency virus and the development of acquired immune deficiency syndrome (HIV/AIDS) cervical cancer and venereal disease.⁴² Victims also suffer from psychological trauma, mental-health problems,⁴³ post-traumatic stress disorders (PTSD)⁴⁴ miscarriages if raped and pregnant, prolonged haemorrhage, vesicovaginal and rectovaginal fistulas, insomnia, nightmares, chest and back pains, painful menstruation, complications, even death, resulting from unsafe abortions and suicide.⁴⁵

Refugees who are victims of sexual violence in refugee camps are stigmatised, ostracised or even sanctioned by their families, which worsen their physical and psychological injuries.⁴⁶ Some of the consequences outlive the victims, for instance, children born from the act may be stigmatised, discriminated against and also suffer sexual assault.⁴⁷

Despite the above-listed impact of sexual violence on these victims, most perpetrators of these vile crimes are never apprehended or prosecuted.⁴⁸ Even if prosecution takes place the victims do not obtain justice. For example, in Tanzania, fifty refugee women were raped by Tanzanian

³⁷ R Mabuwa, 'Seeking protection: Addressing sexual and domestic violence in Tanzania's refugee camps, Human Right Watch (2000) 39.

³⁸ Ramji - Nogales (n 25 above) 2; see also Farmer (n 35 above) 46.

³⁹ Ramji - Nogales (n 25 above) 2; see also Farmer (n 35 above) 52.

⁴⁰ UNHCR (1995) (n 4 above) 1.2.

⁴¹ UNICEF (n 20 above) 9.

⁴² UNHCR (1995) (n 4 above) 1.5; see also OUNHCR (n 33 above) para 94.

⁴³ UNHCR (1995) (n 4 above) 1.5; see also Ramji - Nogalis, (n 25 above) 820.

⁴⁴ UNHCR (1995) (n 4 above); see also Ramji - Nogalis, (n 25 above) 821.

⁴⁵ Mabuwa (n 37 above) 39; see also Vigaud - Walsm (n 4 above).

⁴⁶ Mabuwa (n 37 above) 39; see also Vigaud - Walsm (n 4 above).

⁴⁷ Mabuwa (n 37 above) 39; see also Vigaud - Walsm (n 4 above).

⁴⁸ Mabuwa (n 37 above) 46; see also Vigaud - Walsm (n 4 above).

men. However, out of over 100 men who committed the violations only eleven (11) perpetrators were prosecuted.⁴⁹ Some cases were dismissed by the magistrate for tardiness on the part of the prosecutor.⁵⁰ Where convictions were secured and sentencing took place⁵¹ the matter was regarded as finalised and the victim received no further remedy for the harm suffered.

The United Nations High Commissioner for Refugees (UNHCR), in acknowledgment of the magnitude of sexual violence against female refugees, has developed guidelines for the protection of refugee women⁵² and for the prevention and effective response to sexual violence against women and girls.⁵³ The guidelines merely are administrative measures and cannot provide access to justice by victims of sexual violence in refugee camps.

These guidelines are inadequate, are not legally binding and exclude sexual violations that occur in family settings. There are no provisions for reparations that could ameliorate the plight of the victims and possibly curb the current culture of impunity. The guidelines were described⁵⁴ as representing little more than theory, with few if any effort made by UNHCR staff to ensure that they form a routine and an integral part of all UNHCR programmes at the very first stage of any refugee crisis.⁵⁵ This research is an analysis of the access to justice (formal justice) by victims of sexual violence in refugee camps, using South Africa, Tanzania and Uganda as case studies.

2 Problem statement

It is well known that female refugees are not adequately protected against SV in camps and if they are sexually violated they may not have access to a court or receive justice despite the

⁴⁹ Mabuwa (n 37 above) 46.

⁵⁰ Mabuwa (n 37 above) 39.

⁵¹ Mabuwa (n 37 above) 39.

⁵² UNHCR 'Guidelines on the protection of refugee women' (1991) <http://www.unhcr.org/3d4f915e4.html> (accessed 30 June 2015).

⁵³ UNHCR (1995) (n 4 above); see also UNHCR, 'Sexual and gender - based violence against refugees, returnees and internally displaced persons: guidelines for prevention and response' (2003) <https://www.unicef.org/emerg/files/glsbv03.pdf> (accessed 02 January 2018).

⁵⁴ Mabuwa (n 37 above) 39.

⁵⁵ Mabuwa (n 37 above) 39.

provisions of article 16 (1) (2) (3) of the UN Convention relating to the status of refugees⁵⁶ (UN Refugee Convention, 1951). Article 16 provides refugees with access to a court in the territory of all states and proposes that refugees should be given the same treatment as citizens of the host state in this regard.⁵⁷ This provision implies that the jurisdiction for dealing with legal issues relating to refugees is the domestic courts of the host states as will be discussed in chapters four and five of this thesis.

However, most of the time refugees who have been the subject of sexual violence experience that the perpetrators are not apprehended and are not prosecuted.⁵⁸ Victims of sexual violence may never have the opportunity to testify against their assailant in court as a prosecution witness and their voices are not heard. The immediate effect of this failure is the entrenchment and the promotion of a culture of impunity when refugees are excluded from criminal proceedings.

There are few examples of prosecution and if they do occur, for instance in Tanzania, the perpetrators either are acquitted because of poor investigation, inept prosecution⁵⁹ and lack of evidence⁶⁰ or the case is dismissed⁶¹ due to tardiness on the part of the prosecutor.⁶² This situation depicts a lack of procedural and substantive justice. On the rare occasion when a conviction is secured and sentences imposed which send the perpetrators to prison,⁶³ the victims continue to languish in refugee camps, living with the consequences of sexual violence without remedy and reparation for the harm they have suffered.

In addition, the current practice of criminal procedures in states is that crime is regarded as being against the state and is a challenge to the rule of law. Consequently, the state is the victim of crime, whereas the real victim who suffered the injury is used as a witness to advance the

⁵⁶ UN General Assembly, *Convention Relating to the Status of Refugees* (Refugee convention, 1951) 28 July 1951, United Nations, Treaty Series, vol. 189.

⁵⁷ As above.

⁵⁸ *Mabuwa* (n 37 above) 48; see also IOW 'Refugee sexual abuses' (1995 - 2005) www.iowatch.org/refugeesexualabusesI.pdf (accessed 11 March 2016).

⁵⁹ *Mabuwa* (n 37 above) 40.

⁶⁰ *Mabuwa* (n 37 above) 40, 46 - 47.

⁶¹ *Mabuwa* (n 37 above) 40.

⁶² *Mabuwa* (n 37 above) 40.

⁶³ *Mabuwa* (n 37 above) 50.

cause and the rights of the state in a criminal proceeding.⁶⁴ The real victims are left to suffer and live with the consequences of the criminal act of the offender. Victims of crimes are not allowed to institute criminal proceeding in their own right as an injured party. Thus, victims of sexual violence in refugee camps do not have free access to a court either as prosecution witnesses or as enforcer of their individual rights by instituting a law suit against their assailant.

Moreover, the UN Refugee Convention⁶⁵ does not protect against human rights abuses such as sexual violence against refugees in camps. Hence, there is lack of a coordinated and holistic international legal framework which specifically supports the legal protection of refugees against sexual violence in camps and seeks the enforcement of their rights when violated.

International law imposes the responsibility for the legal protection of refugees on the host state.⁶⁶ However, a lack of political will coupled to a defence of a lack of resources means that states abdicate their responsibility to other bodies.⁶⁷ This possibility suggests that there is a vacuum in the current legal framework that effectively protects refugees (female) against sexual violence and allows them to seek redress if sexually violated in the camps. As well there is no access to an effective justice system that can deter perpetrators and mitigate the consequences of sexual violence against refugees in camps.

In South Africa refugees generally are hosted in reception centres or detention facilities or other refugees shelter in churches, hostels and private accommodation. Refugees and undocumented migrants suffer sexual violence.⁶⁸ Those who report cases of sexual violence to the South African Police Service (SAPS) may find their account is not taken seriously, instead, they are ill-

⁶⁴ The State v Bradley Van Rooyen, Case No.: CC128 / 2010

⁶⁵ UN Refugee Convention 1951' (n 56 above) art 16.

⁶⁶ AL Purkey 'Whose right to what justice? Administration of justice in refugee camps' (2011) XVII *New England Journal of International and Comparative* 22.

⁶⁷ As above.

⁶⁸ ES Idemudia, WK John and GE Wyatt 'Migration Challenges among Zimbabwean refugees before, during and after arrival in South Africa' *Journal of Injury and Violence Research* (2013a) 5(1) 17-27; see also S Memela 'Vulnerabilities of African Female Refugees in South Africa: A Case Study of Albert Park Area' unpublished Master of Science in Environmental Science, Collage of Agriculture, Engineering and Science School of Agriculture, Earth and Environmental Sciences (2014) 141, https://researchspace.ukzn.ac.za/bitstream/handle/10413/12280/Memela_Sinenhlanhla_2014.pdf?sequence=1&isAllowed=y (accessed 27 March 2018) see also Human rights watch (HRW) 'No Healing Here: Violence, discrimination and barriers to Health for migrants in South Africa' Human Right Watch (2009) 27 <https://www.hrw.org/report/2009/12/07/no-healing-here/violence-discrimination-and-barriers-health-migrants-south-africa> (accessed 30 March 2018).

treated and discriminated against, which leads to their ‘secondary victimisation’.⁶⁹ As a result, cases of sexual violence against refugees in South Africa are not investigated and do not get to the stage of prosecution, as is discussed in chapter 5. In addition, many cases go unreported because of the ill-treatment and for fear of detention and repatriation.⁷⁰

Refugees in the various refugee camps in Tanzania have been reported as experiencing different forms of sexual violence.⁷¹ It is reported that among Burundian refugee women and girls in Nyarugusu camp⁷² from ‘May to September 2015, 224 of the 651 reported cases of gender-based violence (GBV) occurred in Tanzania, of which sexual violence accounted for 70 per cent’.⁷³ Of these cases 312 (48 percent) were rape cases and the highest incidence of reported cases of SV was from June to August 2015.⁷⁴ Refugees in this particular camp experienced these violations in and around the perimeter of the camp.⁷⁵ These violations occurred while they were fetching firewood, in the toilets/latrines or in their tent. Of the perpetrators 49% were strangers and 33 % were unknown to the victims.⁷⁶ In addition, in Nduta there were 16 cases

⁶⁹ Human Rights Council, ‘Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to South Africa’ Human Rights Council Thirty-second session, A/HRC/32/42/Add.2, para. 72, www.ohchr.org/EN/HRBodies/HRC/.../Session32/.../A_HRC_32_42_Add_2_en.docx (accessed 27 March 2018).

⁷⁰ Lawyers for Human rights (LHR) ‘Monitoring Immigration Detention in South Africa’ Lawyers for Human Rights (2012) 24; see also HRW (n 68 above) 36.

⁷¹ H McNeish, ‘Running from rape in Burundi: Women and men fleeing Burundi are reaching Tanzania with harrowing tales of sexual violence’ (2016) UNHCR Tracks | Running from rape in Burundi <http://tracks.unhcr.org/2016/05/running-from-rape-in-burundi/> (accessed 10 February 2018); see also Asylum Aid is part of Migrants Resource, ‘Gender-based violence in Tanzanian refugee camps’ (2017) Migrants Resource Centre, <https://www.asylumaid.org.uk/gender-based-violence-in-tanzanian-refugee-camps/> (accessed 10 February 2018); see also G Tapper, ‘Increasing perils at Tanzania’s Nyarugusu refugee camp: Sexual violence and environmental degradation threaten refugees seeking protection at Nyarugusu camp in Tanzania’ (2016) <http://www.aljazeera.com/indepth/inpictures/2016/05/increasing-perils-tanzania-nyarugusu-refugee-camp-160520115153710.html> (accessed 10 February 2018); see also M Gerrard, ‘Influx of refugees and limited firewood leads to spike in Gender-based violence’ Women Refugee Commission Inc. US (2016) <https://www.womensrefugeecommission.org/blog/2371-influx-of-refugees-and-limited-firewood-leads-to-spike-in-gender-based-violence> (accessed 10 February 2018).

⁷² Note that word camps, includes wherever refugee resides within the territory including urban refugees.

⁷³ F Vigaud - Walsh, Women and girls failed: The Burundian refugee response in Tanzania, Refugee International (2015) 5. www.refugeesinternational.org (accessed 10 February 2018). Note that the statistic quoted are for reported cases, a lot of the incidences go unreported.

⁷⁴ As above, 5.

⁷⁵ Vigaud - Walsh (n 73 above) 5.

⁷⁶ Vigaud - Walsh (n 73 above) 5.

and in Mtendeli 153 cases of sexual violence in refugee camps in Tanzania.⁷⁷ The problem of access to justice is as has been discussed in this introductory section above as well as in chapter five below.

With reference to the situation in Uganda, sexual violence against refugees has been found to be the most difficult problem facing the UNHCR.⁷⁸ The causes and risk factors for sexual violence include unemployment, limited access to education among children and youths, unsafe shelters with weak doors and no locks, insufficient lighting in the settlement, poor policing without female officers.⁷⁹ It is stated that cases of SV are grossly under reported, however, as at January 2016 over 2,867 females and 227 male cases of sexual gender-based violence (SGBV) were reported of which 20% were against children under 18 years of age in the Rwamwanja refugee settlement.⁸⁰

Refugees who are sexually violated have difficulty in accessing justice although there is a mobile court established to deal with cases of sexual violence, as is discussed in chapter five. However, prosecuted cases of SV against refugees are yet to be documented, as is revealed in chapter five of this thesis.

This research examines the failure of the current legal mechanisms adequately to protect female refugees against sexual violence in refugee camps and provide them with access to justice. It discusses the causes of vulnerability and suggests a legal framework for dealing with the prob-

⁷⁷ United Nations High Commissioner for Refugees (UNHCR) Sexual and gender based violence fact sheet - Tanzania, United Nations Tanzania (2016) <https://data2.unhcr.org/en/documents/download/52601> (accessed 12 February 2018); see also UNHCR, Factsheet sexual and gender based violence (SGBV) situation in Nyarugusu, Nduta and Mtendeli refugee camps, UNHCR Tanzania, (2016) October, https://reliefweb.int/sites/reliefweb.int/files/resources/Factsheet_SGBV_August2016.pdf, (accessed 12 February 2018); see also UNHCR, Factsheet sexual and gender based violence (SGBV) situation in Nyarugusu, Nduta and Mtendeli refugee camps, UNHCR Tanzania, (2016) August, https://reliefweb.int/sites/reliefweb.int/files/resources/Factsheet_SGBV_August2016.pdf, (accessed 12 February 2018).. Note that the statistics in this report have not been used because it lumped together the statistics of gender-based violence with those of sexual violence in order to avoid the citation of incorrect data.

⁷⁸ I Kasamani, 'Sexual and gender - based violence in the refugee context' Uganda solidarity summit on refugee, <http://solidaritysummit.gou.go.ug/content/sexual-and-gender-based-violence-refugee-context> (accessed 26 March 2016).

⁷⁹ As above

⁸⁰ Kasamani (n 78 above).

lem. The prosecution alone of perpetrators is insufficient; reparations, which are part of substantive justice, are essential in recognition of the lifelong impact of sexual violence on the victims.

3 Thesis statements

The main argument in this study is that female refugees in refugee camps are not adequately protected against sexual violence by those charged with the duty to protect them and where refugees have been violated the perpetrators of such sexual violations may never be apprehended,⁸¹ prosecuted or convicted.⁸² Generally, victims do not have access to justice in the host states in the light of the above, either to testify against their assailants in court or have them account for the crime committed against them. This thesis argues that states should be compelled to address the offence of sexual violence against refugees in camps through the creation of a congenial environment for reporting cases and by proper investigation and prosecution of cases as part of their international obligation under international treaty and by adopting a victim-oriented approach in dealing with sexual violence against refugees.

The study further argues for an international legal framework which offers victims of sexual violence in refugee camps legal protection and access to justice, especially the rights to remedy and reparations. These aforementioned rights could mitigate the effects of such violence and encourage those charged with their care to give both physical and legal protection to refugees in camps in their territories.

In addition, the thesis suggests that victims of sexual violence should be conferred with *locus standi*, so that victims have legal standing as co-prosecutor of their predators, representing a paradigm shift away from usual criminal proceedings.

⁸¹ Mabuwa (n 37 above) 48 - 49.

⁸² Mabuwa (n 37 above) 48 - 49.

4 Objective of the study

The overarching objective in this thesis is to canvass for the creation of an international legislative framework that will protect refugees against sexual violence in camps and will promote access to justice for the victims of sexual violence in refugee camps who generally are oppressed and denied justice.

Further objectives are to:

- Expose the situation that refugees in the camps are sexually violated by a myriad of perpetrators, in which the majority of these perpetrators are not held accountable for the crime and, consequently, refugees do not have access to justice.
- Examine the adequacy of the current legal mechanism for addressing sexual violence against refugee in camps under international law.
- Uncover the problem of jurisdiction over certain perpetrators such as aid workers and UN peacekeepers, who cannot be tried under the domestic laws of the host states and suggest ways to hold them accountable.
- Interrogate the accessibility of victims of sexual violence in refugee camps to procedural and substantive justice under the domestic laws of a host state and the capacity of the domestic law to deter and prosecute the different categories of perpetrators under their jurisdiction.
- Recommend an international legal framework that criminalises sexual violence against refugees, protects refugees against sexual violence and promotes access to procedural and substantive justice for victims of sexual violence in refugee camps.
- Promote accountability on the part of perpetrators, law enforcement agencies, the host state and relevant international bodies and deliver deterrence.

5 Research question(s)

In promoting access to justice for female victims of SV in refugee camps this study offers answers to a broad question: How can female victims of sexual violence in refugee camps have access to justice in a host state? In answering this question this study provides answers to the following sub-questions:

- Which theories underpin the thesis of this study?

- What are the typology, causes and effects of refugee problems and sexual violence in refugee camps against women?
- Who are the perpetrators and how can they be held accountable for the sexual violence committed against refugees in camps?
- Are there any legislative instruments that make access to justice available to the female victims of sexual violence in camps under International Law?
- What are the typical legislative mechanisms for addressing sexual violence against female refugees in a host state?
- How can victims of sexual violence in refugee camps be given access to justice?

6 Limitations

The research is constrained by a lack of scholarly materials due to limited literature pertaining to incidences of sexual violence. For this reason the investigation has relied on documentation from the UNHCR, NGOs, news media reports and a variety of internet sources. Furthermore, there is sparse documentation of incidences of SV because of a lack of reporting of cases.

In addition, there is difficulty in accessing courts records, such as Tanzanian magistrate courts records which have jurisdiction in prosecuting SV. In addition, most of the cases are not online. The researcher could access five straight years of reports with regard to South Africa and Uganda. The research relied on reports of prosecuted cases published by NGOs regarding to Tanzania.

7 Conceptualisation

For the sake of clarity some key concepts threaded throughout the investigation are defined as follows.

7.1 Access to justice

For a clearer understanding of the phrase ‘access to justice,’ it is defined first as separate words,

‘access’ and ‘justice’, and then the phrase ‘access to justice’.

Access

The word ‘access’ denotes an opportunity or ability to enter, approach, pass to and from, communicate with, for instance accessing the court.⁸³ In addition, ‘access’ has been 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.⁸⁴

Justice

The word ‘justice’ has been used variously but is believed to have its origin in the Latin ‘*jus*,’ meaning ‘right or law’.⁸⁵ In Greek literature the word ‘*dikaion*’ was used to describe a just person. From this use emerged the general concept of ‘*dikaiosune*’ or justice as a virtue.⁸⁶

The phrase ‘access to justice’⁸⁷ is used in different contexts.⁸⁸ Conventionally, the expression refers to the provision of access to the formal judicial systems and structures of the law to underprivileged groups in society.⁸⁹ This provision entails not only the removal of legal and financial barriers and intimidation when using the law and legal institutions,⁹⁰ but also the removal of social barriers such as language and lack of information about their legal rights.⁹¹ These are the typical characteristics of access to a justice system required for victims of sexual

⁸³ BA Garner ‘Court’ in *Black’s Law Dictionary*, 378

⁸⁴ Cambridge University Press, ‘Meaning of access’ in the English Dictionary, <http://dictionary.cambridge.org/dictionary/english/access> (accessed 3 April 2017).

⁸⁵ WP Pomerleau, ‘Justice’ in *Internet Encyclopaedia of Philosophy* (IEP), a Peer-review academic resource, Gonzaga University USA <http://www.iep.utm.edu/justwest/print> (accessed 17 November 2015).

⁸⁶ As above.

⁸⁷ Global Alliance against Traffic in Women (GAATW), ‘Access to justice: Increasing and broadening spaces within which trafficked persons and migrant workers can access their rights’ (2014) http://www.gaatw.org/atj/index.php?option=com_content&view=article&id=123:intro&catid=1:Lates%20News (accessed 14 January 2015).

⁸⁸ As above.

⁸⁹ GAATW (n 87 above).

⁹⁰ GAATW (n 87 above).

⁹¹ GAATW (n 87 above).

violence in refugee camps. In addition, ‘access to justice’ has been applied to include the question of the manner in which the courts administer cases, as well as to access to a mechanism that is devoid of injustices.⁹² Cappelletti and Garth⁹³ claim that access to justice functions either to justify the rights of the individual or to decide any disagreement between individuals by mechanisms created by states.⁹⁴ Furthermore, in order for this purpose to be achieved the system must be accessible to all on an equal basis and ‘must lead to results that are individually and socially just’.⁹⁵ Similarly, the UNDP defines access to justice as ‘the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards’.⁹⁶

Bedner and Vel, propose a definition of access to justice to include the provision of an effective complaint facility for people, notably the poor and vulnerable, to report injustices and grievances suffered.⁹⁷ The definition includes the reception of an appropriate response from both state and non-state institutions for those grievances, leading to a redress of those injustices in accordance with the rule of law or principles of state, religious or customary law.⁹⁸

There are two domains for access to justice: procedural access,⁹⁹ which entails obtaining a fair hearing before a tribunal; and substantive access, which involves the reception of a fair and just remedy for the violation of one’s rights¹⁰⁰ that will encompass reparations. The latter should also include civil and administrative processes such as immigration review or state compensation funds and international convention review.¹⁰¹ The protection of rights must continue

⁹² A Bedner & JAC Vel ‘An analytical framework for empirical research on access to justice’ (2010) 1 Law, Social Justice & Global Development Journal (LGD) 4 - 9.

⁹³ M Cappelletti, and B Garth, ‘Access to Justice: The worldwide movement to make rights effective: A general report,’ in M Cappelletti, and B Garth (eds.) *Access to Justice*, Vol. 1 (Milan: Dott A. Giuffrè Editore) (1978) 6.

⁹⁴ As above; see also Bedner & Vel (n 92 above) 4.

⁹⁵ Cappelletti, and Garth (n 93 above) 6; see also Bedner & Vel (n 93 above) 4.

⁹⁶ Bedner & Vel (n 92 above) 5.

⁹⁷ Bedner & Vel (n 92 above) 4 - 9.

⁹⁸ Bedner & Vel (n 92 above) 4 – 9.

⁹⁹ Bedner & Vel (n 92 above).

¹⁰⁰ Bedner & Vel (n 92 above).

¹⁰¹ Bedner & Vel (n 92 above).

throughout all phases of the legal process, from the time of reporting a crime to the police to the grant of a remedy and the enforcement of the court's decision.¹⁰²

7.2 Human Rights

Human rights (HR) have been defined in many ways. The term, used both abstractly and philosophically, presents a 'special type of moral claim' that can be invoked.¹⁰³ These entitlements are established by positive law and are a basis for holding governments accountable under the constitution.¹⁰⁴ Literally, human rights have been held to be the 'rights of human or man' associated with the basic nature of a human being, which they own correspondingly.¹⁰⁵ Human rights are based on nature, are universal and enjoyed similarly by all humans.¹⁰⁶ In addition, the Universal Declaration of Human Rights (UDHR) describes human rights as 'equal, inalienable rights and fundamental freedom that all human beings' possess from birth.¹⁰⁷

Furthermore, human rights have been referred to as the basic rights and freedoms to which all humans are considered to be entitled and include the rights to life, liberty, equality, a fair trial, freedom from slavery and torture and freedom of thought and expression.¹⁰⁸ Sociologically, it denotes the rights of individuals to liberty and justice,¹⁰⁹ as well as to fundamental rights such as the rights to speak, associate and work freely. These are rights which are believed to belong to an individual, in the exercise of which a government may not interfere.¹¹⁰ Sinha defined

¹⁰² Bedner & Vel (n 92 above).

¹⁰³ S Mechled - Garcia and B Cali 'Lost in Translation: The human rights ideal and international human rights law in S Mechled - Garcia and B Cali (eds), *The legitimization of human rights: Multi - disciplinary perspective on human rights and human rights law* (2006)11; see also F Viljeon *International Human Rights Law in Africa* (2012) 3.

¹⁰⁴ Viljeon, as above.

¹⁰⁵ Viljeon (n 103 above) 3.

¹⁰⁶ C Anyangwa, *Introduction to human rights and international humanitarian law* (2004)1; see also Viljeon, (n 103 above) 3.

¹⁰⁷ United Nations, *Universal Declaration of Human Rights*, UN Treaty series, adopted 10 December 1948, the General Assembly of the United Nations; see also Viljeon (n 103 above) 3.

¹⁰⁸ American Heritage Dictionary of the English Language, 'Human rights' (2011) 5th Ed.

¹⁰⁹ Collins English Dictionary Complete and Unabridged, 'Human rights' Harper Collins Publishers. (2003).

¹¹⁰ Random House Kernerman Webster's College Dictionary, 'Human rights' K Dictionaries Ltd by Random House, Inc. (2010).

human rights as the rudimentary ‘rights guaranteed to all people in all countries belonging to a different culture, simply because they are born as human beings’.¹¹¹

7.3 Sexual violence

Sexual violence is a portrayal of power and control but expressed in a sexual manner. It denotes an overarching term used to describe any violence, physical or psychosomatic, carried out through sexual means or by targeting sexuality.¹¹² It could be any ‘sexual act,¹¹³ an attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person’s sexuality using coercion, by any person, regardless of their relationship to the victim, in any setting, including but not limited to home and work’.¹¹⁴

Coercion can cover a spectrum of degrees of physical force, psychological intimidation, blackmail or the threat of physical harm, of being dismissed from an employment or of not obtaining a job that is sought.¹¹⁵ The target group of sexual violence is mostly women and girls, but men and boys are also victims.¹¹⁶ Bassiouni, defines ‘sexual violence as any violence, physical or psychological, carried out through sexual means or by targeting sexuality’.¹¹⁷

Also, it could ‘cover both physical and psychological attacks directed at a person’s sexual characteristics, such as forcing a person to strip naked in public, mutilating a person’s genitals, or

¹¹¹ MK Sinha ‘Business and human rights: An Indian perspective’ in Manoj Kumar Sinha, *Business and human rights* Vivek Mehre for SAGE Publication (2013) 52.

¹¹² Victoria Sexual Assault Centre (VSAC) ‘Sexualized violence is a community issue’ (2014) <http://vsac.ca/sexualized-violence/> (accessed 21 June 2014).

¹¹³ World Health Organisation (WHO) ‘Sexual violence’ World report on violence and health, (2002) 149, <http://whqlibdoc.who.int/hq/2002/9241545615.pdf> (accessed 21 June 2014); see also Inter - Agency Working Group on Reproductive Health in Crises (IAWGRHC) ‘Inter-agency field manual on reproductive health in humanitarian settings’ (2010) 162, <file:///D:/sv%20fieldmanualrhhumanitariansettings.pdf> (accessed 8 June 2017).

¹¹⁴ As above.

¹¹⁵ WHO (2002) (n 113 above) 149; see also IAWGRHC (n 113) above; see also ICC Elements of Crime ‘Crime against humanity of sexual violence’ International Criminal Court (2011) Article 7 (1) (g) - 6 (1) <http://www.icc.cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf> (accessed 31 July 2014).

¹¹⁶ S Sivakumaran ‘Sexual violence against man’ (2007) 18(2) *The European Journal of International Law* 253 - 276.

¹¹⁷ MC Bassiouni *et al*, ‘Sexual violence: An invisible weapon of war in the former Yugoslavia’, occasional paper no. 1, International Human Rights Law Institute, DePaul University College of Law (1996) 3.

slicing off a woman's breasts'.¹¹⁸ As well, it can cover 'situations in which two victims are forced to perform sexual acts on one another or to harm one another in a sexual manner'.¹¹⁹

Sexual violence can be rape or attempted rape,¹²⁰ which is the invasion of any part of the body of the victim by the perpetrator with a sexual organ or the invasion of the anal or genital opening of the victim with an object or the invasion of any other part of the body by force, threat of force, or coercion. Sexual violence occurs in a coercive environment against a person incapable of giving genuine consent.¹²¹ Other forms of assault involving a sexual organ include coerced contact between the mouth and penis, vulva or anus. Sexual slavery, enforced prostitution, sterilisation and forced pregnancy are also forms of sexual violence.¹²²

The International Criminal Court (ICC)¹²³ defines sexual violence to include 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.¹²⁴

The appeal chamber judgment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 2002 defines rape in *the Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Foca case)*¹²⁵ as:

The sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator;

¹¹⁸ Human Rights Watch, *Shattered lives: Sexual violence during Rwanda genocide and its aftermath* (1996) 62.

¹¹⁹ Sivakumaran (n 116 above) 263.

¹²⁰ ICC Elements of Crime (n 115 above) art 7 (1) (g) - 1.

¹²¹ ICC Elements of Crime (n 115 above) art 7 (1) (g) -1.

¹²² The Rome Statute of the International Criminal Court, United Nations, Treaty Series, vol. 2187 (17 July 1998) art 7(g).

¹²³ ICC Elements of Crime, (n 115 above) art 7 (1) (g)-1.

¹²⁴ ICC Elements of Crime, (n 115 above) art 7 (1) (g)-1.

¹²⁵ *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (foca case)* IT-96-23-T & IT-96-23-1/T, paras 127-133 (22 Feb. 2002).

where such sexual penetration occurs without the consent of the victim; (c) the sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed consent.¹²⁶

The United States (USA) Centre for Disease Control defines sexual violence to include:

a sexual act that is committed or attempted by another person without the freely given consent of the victim or against someone who is unable to consent or refuse. It includes: forced or alcohol/drug facilitated penetration of a victim; forced or alcohol/drug facilitated incidents in which the victim was made to penetrate a perpetrator or someone else; no physically pressured unwanted penetration; intentional sexual touching; or non-contact acts of a sexual nature. Sexual violence can also occur when a perpetrator forces or coerces a victim to engage in sexual acts with a third party¹²⁷

Sexual violence also occurs when the victim lacks the capacity to grant consent to the act, for example, while intoxicated, drugged, asleep or disabled.¹²⁸ In a refugee context, sexual violence has been defined to include ‘exploitation and abuse, it refers to every act, attempt or threat of a sexual nature that is resolved, or is likely to be resolved in a physical, psychological and emotional damage. It is a form of gender-based violence’.¹²⁹

7.4 Victims

The word ‘victims’ has been defined by the Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power¹³⁰ to include:

- i. persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through act or omission that are in violation of the criminal laws operative within the Member States, including those proscribing the criminal abuse of power; and

¹²⁶ As above.

¹²⁷ KC Basile et al, ‘Sexual violence surveillance: uniform definitions and recommended data elements’, version 2.0. atlanta (GA): National Centre for Injury Prevention and Control, Centres for Disease Control and Prevention (2014) 11, https://www.cdc.gov/violenceprevention/pdf/sv_surveillance_definitions-2009-a.pdf (accessed 8 March 2017).

¹²⁸ WHO (2002) (n 113 above) 149.

¹²⁹ UNHCR (2003) (n 53 above) 10.

¹³⁰ UN General Assembly, The Declaration of the Basic Principles of Justice and Victims of Crime and Abuse of Power (UNDBPJCAP) UN GA/RES/40/ 34, 29 November 1985, 98 plenary meeting, art 1 and 2; see also ICC, The Rules of Procedure and Evidence (ICC Rules of Procedure and Evidence) ICC-ASP/1/3, at 10, and Corr. 1 (2002) U.N. Doc. PCNICC/2000/1/Add.1 (2000) rule 85.

- ii. a person may be considered a victim under the declaration, regardless of whether the perpetrator is [found], apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim.¹³¹

The term ‘victim’ includes, where proper, the immediate family or dependant of the direct victim as well as persons who have suffered harm intervening to assist victims in distress or to prevent victimisation.¹³² This is a general definition, hence it applies as well to female refugees who are victims of sexual violence in refugee camps.

7.5 Refugee

The term ‘refugee’ has been defined¹³³ as ‘every person 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 nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country’.¹³⁴ It also applies to ‘a person who, not having a nationality and being outside the country of his former habitual residence because of such events, is unable or owing to such fear, is unwilling to return to it’.¹³⁵

The term ‘refugee’ applies to ‘every person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of usual habitation to seek refuge in another place outside his/her country of origin or nationality’.¹³⁶

7.6 Reparation

The Rome Statute¹³⁷ and the Basic Principles and Guidelines on the Right to a Remedy and

¹³¹ As above.

¹³² As above.

¹³³ Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention) 10 September 1969, 1001 U.N.T.S. 4 art 1.

¹³⁴ As above.

¹³⁵ The OAU Refugee Convention (n 133 above) art 1.

¹³⁶ The OAU Refugee Convention (n 133 above) art 1.

¹³⁷ The Rome Statute (n 122 above).

Reparation¹³⁸ institute the principles relating to reparations to or in respect of victims, and include: restitution which refers ‘to measures that could restore the victim to the original state before the violation’;¹³⁹ compensation which speaks to ‘the provision of economically accessible damage that is appropriate and proportional to the gravity of the violation and circumstances in each case’.¹⁴⁰

Reparation also encompasses, ‘rehabilitation’ which comprises ‘medical and psychological care as well as legal and social services’;¹⁴¹ ‘satisfaction’¹⁴² which embraces a ‘broad range of measures, from those aiming at the cessation of violations to truth seeking, the search for the disappeared, the recovery and the reburial of the remains, public apologies, judicial and administrative sanctions, commemoration and human rights training’;¹⁴³ and ‘guarantees of non-repetition’¹⁴⁴ which are ‘measures to be put in place to prevent a repeat or further violation’.¹⁴⁵ These comprise a broad compass of structural measures of a policy nature, such as institutional reforms aiming at civilian control over military and security forces, strengthening judicial independence, protecting human rights defenders and promoting human rights standards in public service, law enforcement, the media, industry and psychological and social services.¹⁴⁶

8 Research method

This thesis embraces a synthesis of a literature review of relevant documents pertaining to the rights and protection of female refugees against sexual violence in refugee camps, their rights

¹³⁸ United Nations, ‘Basic Principles and Guideline on the Right to a Remedy and Reparation, for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’ UN GA/RES/60/147, GAOR 60th session Supp 49 (2005) vol 1.

¹³⁹ As above, principle 19.

¹⁴⁰ The Basic Principles (n 138 above) principle 20.

¹⁴¹ The Basic Principles (n 138 above) principle 21.

¹⁴² The Basic Principles (n 138 above) principle 22.

¹⁴³ The Basic Principles (n 138 above) principle 22.

¹⁴⁴ The Basic Principles (n 138 above) principle 23.

¹⁴⁵ The Basic Principles (n 138 above) principle 23.

¹⁴⁶ The Basic Principles (n 138 above) principle 23.

and their need for reparations. It examines the current existing legal framework for the protection of refugees against sexual violence, access to justice when they are violated and the need for reparation.

The review encompasses a historical perspective of a brief, global history of refugee production and the problem of sexual violence against female refugees in camps. This is followed by an exploratory and comparative analysis of the current legal framework for the protection of female refugees against sexual violence in camps. It includes mechanisms under international, regional and domestic instruments of host nations for responding to and seeking redress for refugees when they are sexually violated. Finally, it explores the possibility of reparations for female victims of sexual violence in refugee camps.

9 Significance of study

This investigation is an undertaking to promote access to justice for female victims of sexual violence in refugee camps and will argue in support of a victim-oriented criminal justice system whereby victims are involved not only as witnesses but are treated as human beings who have suffered harm because of sexual violence. These victims deserve to receive a remedy and reparations that will ameliorate the harm and serve as deterrence.

The study is novel in that previous research has not addressed this aspect of the refugee problem at this level. The literature that is available incorporates those critics that report the occurrence of sexual violence against female refugees in camps, those that expose the lack of accountability on the part of officials and perpetrators, inept prosecution, lack of access to justice to victims of sexual violence in refugee camps, administrative mechanisms and a lack of effective legal mechanisms for dealing with the problem.

First, this study argues that victims of sexual violence should have an opportunity to present their case in court as prosecution witnesses as is the current practice in the prosecution of their assailants by states. Secondly, the study argues that victims should be conferred with *locus standi*. To do so would constitute a paradigm shift for the current criminal justice system which permits victims as witnesses only, for them to have access to courts as co-prosecutor of their perpetrators. In other words, the state public prosecutor represents the state and protects the

rule of law, and the victim as the second prosecutor will protect their own interest and rights and argue for a remedy and reparation that befits the harm they suffered.

In order to achieve this goal, the researcher argues that a special unit be created under the attorney-general's office, which is charged with a duty to approve the granting of a fiat to victims who wants to prosecute their assailant in their own right in collaboration with the state prosecutor. The researcher suggests that the criminal procedures in states and international criminal courts be amended to reflect the victim as a second prosecutor in the criminal proceeding against their assailant.

Additionally, the study canvasses support for an international legal framework for the protection of refugees against sexual violence and the promotion of access to justice for the female victims of sexual violence in refugee camps. This framework is in the form of a draft 'Additional Protocol to the Convention relating to the Status of Refugees 28 July 1951: 'Protection of refugees against sexual violence and access to justice for victims of sexual violations in refugee camps'.¹⁴⁷

The draft is holistic in content and includes provisions that compel a state to fulfil its obligations under international law protecting refugees against sexual violence in camps, facilitating access to justice for the victims, ensuring that the perpetrators are legally accountable and guaranteeing that victims have access to both procedural and substantive justice, including reparations, as is provided for the victims of crime under international criminal law (ICL).

The draft incorporates clauses that create individual and state responsibility for crimes of sexual violence against refugees in camps and for the award of remedy and reparations in accord with the norms of International Human Rights and International Humanitarian Law. The draft presents a model in the form of the establishment of a 'one-stop' facility in refugee camps for dealing with SV against refugees, which will include health facilities, facilities for reporting sexual violations, a police station, a court conferred with jurisdiction over the perpetrators irrespective of their status as UN peacekeepers, aid workers or locals of the host states. It is

¹⁴⁷ See Appendix A below.

hoped that its institution will promote accountability amongst perpetrators, law enforcement agencies and refugee staff and eradicate the current culture of impunity.

The draft has a provision for the invocation of customary international law to bind a state hosting refugees without its assent to or ratification of this convention or that is not a member of the United Nations. It encompasses clauses for the awarding of remedy and reparations to victims of sexual violence in refugee camps. The thesis can serve as a reference resource to other researchers.

10 Overview of chapters

This study on the access to justice for female victims of sexual violence in refugee camps, in general and by using South Africa, Tanzania, and Uganda as case studies, is structured in seven chapters.

Chapter 1 introduces the title of the study, provides background and states the problems relating to sexual violence and access to justice for female refugees who are victims of SV using South Africa, Tanzania and Uganda as case studies. It exposes the current gaps in access to justice for female victims of sexual violence in refugee camps. It specifies the research question(s) and the limitation of the study, defines all the concepts that are employed in the study which include ‘access to justice’. Chapter one defines ‘human rights’, ‘sexual violence’, ‘victim’, ‘refugee’ and ‘reparation’. In addition, the chapter describes the research method, the significance of the study and an overview of the chapters.

Chapter 2 defines various theories, gives justification for the choice of theories and analyses the function of theories, among which are critical and heuristic functions in the creation of a legal order that brings about the establishment of an institution that facilitates change. In addition, it discusses the relevant theories underpinning access to justice. The concept of ‘access’, which includes ‘ability’ and ‘power’ required by victims of sexual violence if they are to obtain justice, is explained.

The chapter examines the theories of sexual violence including a feminist theory of sexual coercion, theories of crime causation which include situational crime theories, environmental

criminology and routine activity theory. These theories are put forward to explain the perpetration of the crime of SV against female residents in refugee camps and their need for access to justice. Utilitarian theory underscores the element of happiness and is the basis for an explanation that crimes are committed because the pleasure the perpetrators derive is a gain greater than the possible losses, particularly if they are never apprehended.

Rational choice theory (RCT) exposes the fact that perpetrators of crime (SV) are rational human beings who deliberately commit the act knowing that they will derive pleasure and in the belief they will not feel the pain of being caught and punished. The theory of the ‘rule of law’, which has its basic principle that ‘no one is above the law’, is the foundation that holds accountable all categories of perpetrators no matter their status. As well, it is analysed as the foundation upon which victims of sexual violence assert their rights against their violators. The researcher investigated the theories of rights, which include the wills theory, claim theory, interest theory and theories of natural and human rights as a fundamental basis for enforcing the right of access to justice.

The chapter discusses theories of justice, which include retributive justice as the foundation for the punishment of offenders and reparative justice, a victim-oriented criminal justice system that ameliorates the consequences of sexual violence on victims. The chapter concludes with a discussion of the theory of deterrence as the best form of justice.

Chapter 3 puts the plight of the female refugee problem in a historical perspective. The chapter defines a ‘refugee’ and an ‘internally displaced person’. In addition, it traces the evolution of the term ‘refugee’ from before the Second World War to the present day and the causes of the refugee problem. Furthermore, a brief history of sexual violence is narrated, followed by a discussion of the dynamics of sexual violence and jurisprudence of sexual violence cases under the law of international tribunals. This narration reveals the horror that is the cause of refugees and describes how the international community manages the problem.

The chapter explores the typology of sexual violence experienced by refugees, names the perpetrators of the crime of sexual violence against refugees in camps and describes the impact of SV on refugees and the problem of accessing justice in refugee camps.

Chapter 4 conducts a critical analysis of the legal framework for access to justice for female victims of sexual violence in refugee camps and the protection of refugees under international refugee law and the various international instruments. The assessment begins with an analysis of the general protection of refugees and females under international laws and specifically in the African Union (AU), the European Union (EU) and under the Organisation of American States (OAS). Next the chapter enquires into whether female refugees are protected against sexual violations under the international and regional legislations of the AU, EU and OAS.

The chapter also investigates whether there is provision for accessing justice by refugees who are victims of SV in refugee camps under the international and regional legislations of the AU, EU and OAS. Furthermore, it analyses the extent of victim's participation in criminal proceeding in international criminal courts and draws conclusions.

Chapter 5 focuses on an examination of the manner in which the contracting states to the convention have dealt with the issue of SV against their citizens and whether such treatment extends to refugees who are victims of SV on their territories as is provided for under article 16 of the UN Refugee Convention, 1951. South Africa, Tanzania, and Uganda are used as case studies. First, the chapter examines the status of international conventions in the domestic legal systems of the three states. It advances a brief demographic history of these countries. The investigation includes the various constitutional foundations for the protection refugees and for access to justice, as well as the refugee acts of these territories. The analysis encompasses the criminal law and procedures for the prosecution of sexual violence and laws protecting females against sexual violence in these states.

In addition, the chapter examines the legal aid systems of these states and whether refugees enjoy equal access to a court as provided for under article 16 of the UN Refugee Convention, 1951 as is applicable to the citizens of these countries. Chapter 5 examines the extent of victim participation in criminal proceedings in domestic courts. It compares and contrasts how sexual violence is handled in relation to citizens of the contracting states of South Africa, Tanzania, and Uganda with the treatment of refugees in relation to access to courts for victims of sexual violence.

Chapter 6 addresses the subject of access to justice, jurisdictional issues relating to sexual violence against refugees and factors militating against access to justice for victims. It makes a case for substantive justice which includes a provision for remedy and reparation as a way of

mitigating the effects of the sexual violence on the victims and encourages physical and legal protection of refugees by the host states. The chapter contains a discussion of the issue of state responsibility, of complicity and the use of customary international law as tool in holding all perpetrators accountable. Finally, it discusses the issue of *locus standi* as means of assessing the quality of the justice provided victims of sexual violence in refugee camps and draws conclusions from the various analyses in the chapter.

Chapter 7 summarises the findings of the research, draws conclusions and makes recommendations.

Chapter 2: Theoretical underpinnings

1 Introduction

The goal in this chapter is to lay the foundation of the study and to flesh out the theme by exploring the question raised in the theories that underpin it. This study assumes that refugees are not adequately protected against sexual violence (SV) in refugee camps, and, consequently, when they are sexually violated the perpetrators seldom are apprehended, prosecuted, convicted and sentenced.¹ If they are prosecuted, the perpetrators either are acquitted as a result of poor investigation, inept prosecution,² or lack of evidence³ or the case may be dismissed⁴ due to tardiness on the part of the prosecutor.⁵ In other words, victims do not have access to justice that can ameliorate their plight. This chapter examines the concept of access as a right and a capacity, it defines theories with reference to their importance for the purposes of this research and provides reasons for the choice of theories which are discussed below in terms of their offering an underpinning to the discussion of the notion of access to justice. A conclusion is provided.

2 Concept of access

The word ‘access’ has not been fully theorised.⁶ It is used by property analysts and other social theorists.⁷ Also, it is used with diverse meanings and with different connotations contingent on the context in which it is employed. The most common contexts are in relation to access to

¹ R Mabuwa, Seeking Protection: Addressing sexual and domestic violence in Tanzania's refugee camps, Human Right Watch (2000) 48; see also IOW ‘Refugee sexual abuses’ (1995 - 2005) <http://www.iowatch.org/refugeesexualabusesI.pdf> (accessed 11 March 2016); see also CW Mwangi, ‘Women refugees and sexual violence in Kakuma Camp, Kenya; Invisible rights, justice, protracted protection and human insecurity’ International Institute of social studies, The Hague, The Netherlands, Unpublished, (2012) 7, 21, 39, file:///C:/Users/oluremi/Downloads/Clare%20Waihera%20Mwangi_CLAIRE%20WAITHIRA%20MWANGI%20RESEARCH%20PAPER_1683.pdf (accessed 17 February 2016).

² Mabuwa (n1 above) 40.

³ Mabuwa (n1 above) 40, 46 - 47.

⁴ Mabuwa (n1 above) 40.

⁵ Mabuwa (n 1 above) 40.

⁶ JC Ribot, and NL Peluso, ‘A Theory of Access’ (2003) 68 (2) *Rural Sociology*, 153-156.

⁷ A De Janvry, *et al* ‘Access to Land and Policy Reforms.’ in J-P Platteau *et al* (eds.) *Access to land, rural poverty and public action* (2001) 1-27.

information, as well as the literal meaning of entry by a gate or to a house, or access to a person. Ribot and Peluso⁸ define ‘access’ as ‘a right, means and ability to derive benefits from things’.⁹

This research examines ‘access’ from the perspective of ‘ability’ and ‘right’ (property rights, but not in reference to real estate) and in relation to access to justice. ‘Access’ as an ability has been defined as ‘the ability to benefit from things, including material objects, persons, institutions, and symbol’.¹⁰ ‘Ability’ is a property analogous to power (or a bundle of powers), and is defined as the capacity of some actors to affect the practices and ideas of others.¹¹ ‘Power’ is viewed as being emergent from though not always attached to people.¹² ‘Power’ has been assumed to be inherent in certain kinds of relationships and can emerge from or flow through the intended and unintended consequences or effects of social relationships.¹³

The relationship between female refugees who are victims of SV in refugee camps and a host state should confer upon victims of SV the ability to report such cases and demand that state authority make their assailants account for their action, thus, to assert their right of access to justice against their violators. Without the ability (power) drawn from this relationship there cannot be access to justice. The host state has the duty to protect victims, to issue documents for their legal stay, provide facilities for them to access the justice system and provide disciplinary institutions, mechanisms and practices that cause people (refugees in camps) to act in certain ways without apparent coercion.¹⁴ These are the requirements in refugee camps for the protection of female refugees and the prevention of SV.

MacPherson refers to rights-based access as the ability to benefit from something and which derives from rights attributed to law, custom or convention.¹⁵ Contemporary theorists title

⁸ Ribot and Peluso (n 6 above) 156.

⁹ Ribot and Peluso (n 6 above) 156.

¹⁰ Ribot and Peluso (n 6 above) 156.

¹¹ M Weber (ed.) *Economy and Society* (1978) 53; S Lukes, *Power* (1986) 3.

¹² Ribot and Peluso (n 6 above) 156.

¹³ Ribot and Peluso (n 6 above) 156.

¹⁴ M Foucault, ‘On Governmentality, Lecture at the College de France’ in G Burchell et al (eds.) *The Foucault Effect: Studies in Governmentality*, (1978a) 87-104; see also CB Macpherson ‘The meaning of property’ in CB Macpherson, (ed.) *Property: Mainstream and Critical Positions*. (1978a) 2.

¹⁵ As above 2.

rights-based access ‘property’,¹⁶ on the basis that access as a right has to do with claims,¹⁷ and define ‘property’ as ‘a right in the sense of an enforceable claim to some use or advantage of something’.¹⁸ An ‘enforceable claim’ is one that is acknowledged and supported by society through law, custom, or convention. It is asserted that victims of SV should be accorded access to justice as an enforceable claim. Moreover, this assertion canvasses support for access to justice both as an ability, as was previously defined, and as a right for female victims of SV. The intention is to inspire the mapping of dynamic processes which establish relationships of access to resources and to locate property rights as a set of access relationships among others that facilitate access to justice for female refugees who are victims of SV.

3 The concept of legal theory

Legal theory (LT) is a branch of an ‘inquiry’ that simplifies and investigates legal structures, processes, relations and products.¹⁹ It is an ‘abstract statement that explains why certain incidences occur or do not happen’ and describes situations and why they ensue.²⁰ LT is a system whose fundamental ideas are interdependent, consistent with propositions that can be perceived, justified, necessary, clear, and accurate, without a limitation in their application to legal distinctiveness.²¹ The objective of LT is to provide understanding and the interpretation of perplexities of phenomena, as well as ‘the solving of practical problems and the realisation of humane justice’.²² LT is referred to as a scheme whose fundamental ideas are unlimited in their application to a legal phenomenon.²³

Siegel adds that for a theory to be valid it must have the ability to predict further occurrences or observations of the phenomena in question and validate or test the theory through experiment

¹⁶ Macpherson (n 14 above) 2.

¹⁷ Macpherson (n 14 above) 2.

¹⁸ Macpherson (n 14 above) 2.

¹⁹ LJ Siegel and BC Welsh, *Juvenile delinquencies: theory, practice and law*, 11th ed. (2012) 78; see also LJ Siegel, *Criminology: Theories, patterns, and typologies*, 12th ed. (2016) 93.

²⁰ As above.

²¹ Siegel and Welsh (n 19 above) 78; see also Siegel (n 19 above) 93.

²² H Cairns ‘Legal Theory’ (1954-1955) 9 *Rutgers Law Review* 388.

²³ As above.

or some other forms of empirical observation.²⁴

Seidman and Seidman assert that research requires a guide, that is, ‘a theory that will thread the intricate webs of reality’.²⁵ Friedman²⁶ avows that a lawyer in any field consciously or unconsciously ‘is guided by the principles of legal theory formulated in the professional form, from the precepts of philosophy and political theory’.²⁷ This research is guided by the theory of the rule of law and the right of access to justice.²⁸ It focuses on theories of justice which include theories of retributive justice and reparative justice, as well as theories of rights which include human rights and on utilitarian theory, rational theory, a feminist theory of sexual coercion and theories of deterrence.

4 Justification for the choice of theories

The selection of these theories is based on their functions as discussed by Seidman and Seidman who argue that theories are employed by scholars and practitioners in the following three different styles: as a metaphor, critique or heuristic.²⁹ This thesis relies on the critique and heuristic functions of theories. The metaphoric function is the use and identification of a theory as being like an unrelated life situation for rhetorical effect, highlighting the similarity between the theory and the life situation.³⁰

5 Functions of theory

5.1 The critical function of theory (critique)

The critical function of theory is the use of theory to criticise a social practice. According to

²⁴ Siegel (n 19 above) 93.

²⁵ A Seidman & RB Seidman, *The State and Law in the development process: Problem solving and Institutional Change in the Third World*. (1994) 57.

²⁶ Friedmann, *Legal Theory* (1967) 3 - 4.

²⁷ As above.

²⁸ Although there are no specific theories of access to justice.

²⁹ Seidman and Seidman (n 25 above) 59 - 62.

³⁰ Seidman and Seidman (n 25 above) 59 - 60.

Rubin the critical theorist approach is ‘pragmatic rather than descriptive or normative’.³¹ The approach is designed to shed light on the values ‘implicit in ... social practices and then to advance those values incrementally by a process of self - reflection’.³² Critical theorists view issues against the usual opinion of the world and questions how that opinion came about.³³ A critique uses an ideal-type model that consciously distorts reality to emphasise what the author believes is important.³⁴ It is a method which serves to deepen insights about theory³⁵ and ‘leads towards the construction of a larger picture of the whole... and seeks to understand the process of change in which both parts and whole are involved’.³⁶

This research pragmatically examines the laws (including conventions) relating to the protection of female refugees against sexual violence in refugee camps and the provision of access to justice for victims with the goal of exposing gaps within the law and ultimately proposing a legal framework which will fill these gaps.

5.2 Heuristic function of theory

The heuristic function of theory³⁷ consists of the use of theory as a guide to researchers leading to categories of data which were relevant in the past and have proven helpful in explaining and solving similar problems so as to exclude irrelevant data.³⁸ They provide criteria for deciding the facts to consider and those to ignore. It is described as constituting a net for catching data; ‘its mesh helps determine which data could be filtered from the deep’.³⁹ As heuristic the theory acts as a ‘rule of thumb’ through the provision of specific rules which simplify a task that may

³¹ E Rubin ‘Law and legislation in the administrative state’ (1989) 89 *Columbia Law Review*, 371; see also, Seidman and Seidman (n 25 above) 61.

³² As above.

³³ R Cox ‘Social forces, states and world order beyond international relation theory’ in Keohane (ed.) *Neorealism and its Critics* (1986) 208; see also Seidman and Seidman (n 25 above) 61.

³⁴ M Weber, *Max Weber on the Methodology of Social Science* trans. by Shils and Finch (Eds.) (1949) 43; see also, Seidman and Seidman (n 25 above) 61.

³⁵ Seidman and Seidman (n 25 above) 61.

³⁶ Cox (n 32 above) 208; see also Seidman and Seidman (n 10 above) 61.

³⁷ Seidman and Seidman, (n 25 above) 60.

³⁸ Seidman and Seidman, (n 25 above) 62.

³⁹ G Allison, *Essence of decision; explaining the Cuban missile crises* (1971) 67 - 83.

be overwhelming in its complexity and fulfils the demand for information required by researchers.⁴⁰

5.3 Other functions of theory

Some scholars have argued that improvement requires the instrumental use of a legal order to create institutions that serve the body of a population,⁴¹ such as refugee camps that lack legal institutions for addressing sexual violence in camps.⁴² Seidman and Seidman emphasise that the law of reproduction of institution teaches that no matter how technically competent or morally inspired the governors are, unless they use the law to change the inherited institutions, their policies are not likely to expedite improvement.⁴³

In order to facilitate access to justice for female victims of sexual violence in refugee camps, there is a need for a specific law reforming the existing refugee convention, which potentially can establish institutions and/or mechanisms that can serve to produce attitudinal change on the part of the perpetrators of SV and facilitate access to justice for the victims.

Seidman and Seidman further opine that to realise the desired change there is the need for research, which requires a theory that links the complex maze of the reality of this study.⁴⁴ Furthermore, theories have been employed to explain why female refugees are sexually violated in refugee camps, they account for their inability to have access to justice⁴⁵ and offer a rationale for access to justice.

This chapter draws on the principles of LT to elucidate why victims of SV in refugee camps

⁴⁰ DA Chalmers, 'Corporatism and comparative Politics' in LJ Cantori and AH Ziegler (Eds.) *Comparative Politics in the Post-Behavioural Era*, Boulder CO: Lynne Rienner, (1988) 144, 137; see also Seidman and Seidman (n10 above) 62.

⁴¹ Seidman and Seidman (n 25 above) 57.

⁴² Mabuwa (n1 above) 48.

⁴³ Seidman and Seidman (n 25 above) 57.

⁴⁴ Seidman and Seidman (n 25 above) 57.

⁴⁵ Siegel (n 19 above) 93.

suffer violation. It employs the principle of LT as an investigative tool in exposing the predisposing factors, causes and occurrences of SV against female refugees. The principle of LT is used to uncover the perpetrators and provide an explanation for the dynamic of the commission of SV against refugees and why the perpetrators must be brought to account for the crime as a means of promoting justice. In addition, the doctrine of LT is used to critique the current legal mechanism for addressing SV against refugees in camps, to expose the gaps and to proffer a practical solution to problem of SV. LT is considered as providing a means of creating institutions and mechanisms that facilitate access to justice for victims of SV in camps.

6 Underpinning theories

Grounded on the above justification of theory this research advocates the incorporation of the principles of the following theories as the pillars for dealing with the problem of access to justice for victims. An analysis of the feminist theory of sexual coercion is put forward as an explanation for the crime of sexual violence against female residents in refugee camps and the need for access to justice. Utilitarian theory underscores the principle of happiness and explains the fact that crimes are committed because the pleasure derived by perpetrators as a gain is greater than the losses, which is because they may never be caught, apprehended, convicted and punished.⁴⁶ The principles of Utilitarian theory are employed in determining the proportionality of the crime against the sentence.

Rational choice theory (RCT) exposes the fact that perpetrators of the crime of SV are rational human beings who deliberately commit the act knowing that they will derive pleasure without the pain of being caught.⁴⁷ The theory of the ‘rule of law’ has the basic principle that ‘no one is above the law’ and is the basis for holding all categories of perpetrators accountable whatever their status, for instance perpetrators who possess immunity from prosecution in a local jurisdiction such as peacekeepers.⁴⁸ The theory of the rule of law serves as the foundation upon

⁴⁶ Mabuwa (n1above) 48.

⁴⁷ Mabuwa (n1above) 48.

⁴⁸ United Nations General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, section 22.

which victims of SV can assert their rights against their violators. Routine activity theory is a theory of crime causation.

The research also investigates the theories of rights, which include wills theory, claim theory, interest theory, the theories of natural and human rights as a fundamental basis for enforcing their rights of accessing justice. The theories of justice, which include retributive justice as the foundation for the punishment of offenders, and reparative justice as a victim-oriented criminal justice system that is needed to ameliorate the consequences of sexual violence on the victims, are discussed. The chapter concludes by considering the theory of deterrence as delivering the best form of justice.

6.1 Theories of sexual violence (SV)

The first part of the foundation of this research states that female refugees are not well protected against sexual violence.⁴⁹ Koss *et al* reveal that one out of four women will be a victim of a forced sexual act in her lifetime,⁵⁰ a statistic which supports the emphasis on rape in the feminist movement.⁵¹ Sexual violence is a concern in a number of theories: for example theories of sexual coercion⁵² which include evolutionary theory, a feminist theory of sexual coercion and a synthesised (biosocial) theory of rape.⁵³ For the purposes of this research the central argument hinges on the feminist theory of sexual coercion.

Feminist theory of sexual coercion

The feminist theory of sexual coercion holds that all men use rape as a process of intimidation

⁴⁹ Note that chapter one captioned the definition of sexual violence.

⁵⁰ M Koss *et al* 'The scope of rape: Incidence and prevalence of sexual aggression and victimisation in a national sample of education student' (1987) 55 *Journal of Consulting and Clinical Psychology* 162-170.

⁵¹ N Malamuth, 'The confidence of sexual aggression: feminist and evolutionary perspective' in D Buss and N Malamuth (ed.) *Sex power and conflict: evolutionary and feminists perspective* (1996) 270; see also S Brownmiller *Against our will* (1975) 16.

⁵² L Shannon 'Theories of sexual coercion: Evolutionary, feminist and biosocial perspective' (2004) 2 <http://www.pandys.org/theoriescoercion.pdf> (accessed 21 April 2016).

⁵³ As above.

by which all women are kept in a state of fear, and sex is an entitlement which men have a right.⁵⁴ The theory suggests that perpetrators of SV feel that ‘sexual access’ is a source of pride and is an exercise of power.⁵⁵ It proposes that rape and sexual coercion are hindrances in a woman’s right to choose with whom to share her sexual life.⁵⁶ Feminist theorists assert that sexual coercion is motivated by the urge to exert control over women and is not an expression of lust;⁵⁷ rape is not a sexual act, but an act of violence⁵⁸ and that violence asserts power and dominance.⁵⁹

Some feminists believe that a woman is raped if she engages in a sexual act and feels violated, whether she initiated it or not or whether it was due to economic, social and personal pressures.⁶⁰ Accepting the victim’s point of view, feminist theorists affirm that rape is a pseudo-sexual act that is violent.⁶¹ They declare that any adult female at any age can be a victim of rape, regardless of her appearance and status.⁶² They argue that the male attackers are always taller and heavier than the woman and have both physical and psychological advantages over their victims.⁶³

The feminist theory of sexual coercion reveals that the crime of SV against refugees in camps is about violence. The victims do not engage voluntarily in the act but are under duress or undue influence or they are forced into it either by their assailants or by the difficulty they face as refugees living in refugee camps. For their part the offenders feel they are entitled to have sexual intercourse against the will of the victims in a display of manliness, the exercise of power and domination.

⁵⁴ MP Koss, CA Gidycz, and N Wisniewski, ‘The scope of rape: Incidence and prevalence of sexual aggression and victimization in a national sample of education student’ (1987) 55 *Journal of Consulting and Clinical Psychology*, 162 - 170; S Brownmiller, *Against our will* (1975) 391.

⁵⁵ Brownmiller, as above, 392.

⁵⁶ Brownmiller (n 54 above) 27,392.

⁵⁷ Brownmiller (n 54 above) 391.

⁵⁸ Brownmiller (n 54 above) 391.

⁵⁹ Brownmiller (n 54 above) 391.

⁶⁰ Brownmiller n 54 above; see also L Shannon, ‘Theories of sexual coercion: Evolutionary, feminist and biosocial perspective’ 2004. www.pandys.org/theoriescoercion.pdf (accessed 4 November 2015).

⁶¹ Brownmiller (n 54 above) 174.

⁶² Brownmiller (n 54 above) 172.

⁶³ Brownmiller (n 54 above) 127; Shannon (n 60 above).

Against this backdrop the inclusion of the criminalisation of SV in the proposed protocol compels contracting states to fulfil their obligations to refugees by establishing mechanisms which deter and provide access to justice for the victims. It empowers victims of SV to report cases of violation and to demand the enforcements of their rights.

6.2 Theories of crime causation

The legal theory of crime causation aims to shed light, for example, on why female victims of SV in refugee camps are violated and why the perpetrator commits the crime. In so doing it buttresses the need for access to justice. Thus, situational crime theory, the theory of environmental criminology, as well as utilitarian, rational choice and routine activity theories are analysed.

Situational crime theories

Situational crime theories emphasise the situations in which crimes are committed. Three theoretical models are referred to as ‘opportunity theories’ because they evaluate the various situations that create an opportunity for the commission of a crime;⁶⁴ they are ‘environmental criminology’, ‘the rational choice perspective’ and ‘the routine activity approach’.⁶⁵ The role of opportunity in crime causation expresses the following ideas: it contributes to the commission of all crimes; is extremely precise and focused in particular time and space; depends on everyday movements and that one crime creates an opportunity for another crime to be committed.⁶⁶

Some types of personal property are more alluring in a crime of opportunity than others. It is argued that ‘societal and technological’ vagaries generate crime opportunities. The reduction in crimes of opportunity typically does not dislocate crime, however the reduction of crimes of opportunity can result in a decline in the crime rate.⁶⁷

⁶⁴ F Adler *et al*, *Criminology* (2013) 207.

⁶⁵ As above.

⁶⁶ Adler *et al* (n 64 above) 207.

⁶⁷ Adler *et al* (n 64 above) 207.

The discussion on situational crime theory reveals that the precarious situation of refugees in camps creates the opportunity for crime and that the crime of SV is more pleasurable to perpetrators who see vulnerable female refugees as an easy target. It is in this setting that the criminalisation of SV in the protocol creates state responsibility for creating accountability for the crime.

Environmental criminology

Environmental criminologists assume that certain individuals are ‘criminally motivated’ and that the causes of crime are linked inextricably to the nature of the physical environment.⁶⁸ The implication is that the very nature of localities, edifices and substances can have an impact on the crimes directed at them and around them.⁶⁹ This idea leads to the investigation of how ‘location in time and space’ interrelates with the perpetrator, the victim and the law that prohibits the act.⁷⁰

Environmental criminology examines crime patterns and links them to the target, the offenders and the location of routine activity. This theory supports the fact that sexual violations of female refugees in camps occur because refugee camps create an environment for crime; the camps are insecure with the result that victims are violated in schools, while fetching water or searching for firewood.

It is hoped that the incorporation of specific clauses to protect refugees against SV in camps and the establishment of mechanisms that promote safety in camps in the proposed protocol will place an obligation on contracting states to protect refugees against SV in camps. Therefore, the emphasis is that to deter crime as the best form of justice.

⁶⁸ Adler *et al* (n 64 above) 207.

⁶⁹ R Randa, Environmental criminology in B Gerben and D Weisburd (Eds.) *The Encyclopaedia of criminology and criminal justice* (2014); Adler *et al* (n 64 above) 207.

⁷⁰ Adler *et al* (n 64 above) 207.

Utilitarian theory

Access to justice is desirable where an individual has suffered a wrong or a violation of a right or she has been a victim of an act by an offender. This section focuses on the justification offered for why people commit acts that need a remedy. Utilitarianism is a theory in normative ethics that places the locus of right and wrong on the outcomes (consequences) of choosing some action/policy over other actions/policies.⁷¹ It is an attempt to provide an answer to the practical question: ‘what ought a man do?’ The answer the theory offers is that ‘he ought to act to produce the best consequences possible’.⁷² The theory holds that the best moral action is the one that maximises utility.⁷³ This theory takes cognisance not only of the interests of an individual but also those of others. Classically, utility has been defined by Bentham as the aggregate of pleasure after deducting the suffering of all involved in any action.⁷⁴

The first systematic account of the utilitarian theory was developed by Bentham (1748 - 1832),⁷⁵ but the inkling that morally appropriate behaviour will not harm others but will increase happiness or utility occurred much earlier before Bentham.⁷⁶ Some of the precursors of classical utilitarian theory were the British moralists, Cumberland, Shaftesbury, Hutcheson, Gay and Hume.⁷⁷ Richard Cumberland (1637 - 1718) and John Gay (1699 - 1745) were theological utilitarians and believed that promoting human happiness is incumbent on us since it is approved by God.⁷⁸

Anthony Ashley Cooper, the Earl of Shaftesbury (1671 - 1713) is thought to be one of the earliest moral sense theorists. He held that man has an inner eye that is innate in that it allows him to discriminate between right and wrong or moral beauty and deformity.⁷⁹ The correctness

⁷¹ R Cavalier, ‘Utilitarian theories’ online guide to ethics and moral philosophy (2002) <http://case.phil.cmu.edu/Cavalier/80130/part2/sect9.html> (accessed 20 April 2016).

⁷² HR West, ‘Utilitarianism’ Encyclopaedia Britannica (2015) <http://0-global.britannica.com/innopac.up.ac.za/topic/utilitarianism-philosophy> (accessed 20 April 2016).

⁷³ Cavalier (n 71 above).

⁷⁴ J Bentham, *The principles of morals and legislation* (1948) 3; see also PJ Ross ‘Utility, subjectivism and moral ontology’ (1994) 11(2) *Journal of Applied Philosophy* 189.

⁷⁵ J Driver, ‘The history of utilitarianism’ (2014) <http://0-plato.stanford.edu/innopac.up.ac.za/entries/utilitarianism-history/> (accessed 20 April 2016).

⁷⁶ As above.

⁷⁷ Driver (n 75 above).

⁷⁸ Driver (n 75 above).

⁷⁹ Driver (n 75 above).

of this doctrine was acknowledged by Francis Hutcheson and David Hume (1711 - 1776).⁸⁰ For the purpose of this research the classical approach to Utilitarian theory is focused upon.

Bentham opines that:

‘Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do’.⁸¹ On the other hand, the standard of right and wrong, on the other chain of causes and effect, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it. In words a man may pretend to abjure their empire: in reality, he will remain subject to it all the while.⁸² But⁸³ the principle of utility is that principle, which approves or disapproves of every action whatsoever, according to the tendency appears to have to argue or diminish the happiness of the party whose interest is in question: or what is the same thing, in other words, to promote or to oppose that happiness. I say of every action whatsoever and therefore not only of every action of a private individual but of every government.⁸⁴

Bentham’s principle of utility recognises the fundamental role of pain and pleasure in human life; that actions are approved or disapproved because of the amount of pain or pleasure that is a consequence of an action and equates good with pleasure and evil with pain. Bentham asserts that pleasure or pain are capable of qualification and hence can be measured.⁸⁵ In measuring pleasure and pain, Bentham⁸⁶ introduces the following criteria, namely intensity, duration, certainty or uncertainty, proximity, fairness, its ability to produce the desired result, its purity, i.e. if pleasure will not be followed by pain or vice versa, and the extent to which it can affect other people.⁸⁷

Mill adopted the more hedonistic tendencies in Bentham’s idea by stressing the fact that it is not the quantity of pleasure but the quality of happiness that is central to utilitarianism.⁸⁸ Mill was of the view that the calculus is unreasonable because its qualities cannot be measured

⁸⁰ Driver (n 75 above).

⁸¹ Bentham (1948) (n 74 above) 1.

⁸² Bentham (1948) (n 74 above) 1.

⁸³ J Bentham, *An introduction to the principles of morals and legislation* (2009) 1.

⁸⁴ As above.

⁸⁵ Cavalier (n 71 above).

⁸⁶ Bentham (1948) (n 74 above) 29 - 30.

⁸⁷ Cavalier (n 71 above).

⁸⁸ Cavalier (n 71 above).

(there is a distinction between ‘higher’ and ‘lower’ pleasures). Further, utilitarianism refers to ‘the greatest happiness principle’, thus its essence is to promote the capability of achieving happiness or higher pleasures for the majority of people.⁸⁹

This theory is distinguished by its impartiality and agent neutrality. It promotes the happiness of everyone, that the good of an individual is not more important than that of anyone else, that the reason for the promotion of the overall good is not peculiar to an individual but is general to everyone.⁹⁰ The perpetrators of sexual violation usually derive pleasure from the act but clearly it does not promote the happiness of the woman who is sexually violated. Accordingly, to promote the happiness of a female refugee there is a need for a life free from sexual violation by making SV less attractive to its perpetrators. In deliberating on utilitarian theory with its many facets, this work focuses on rational choice theory (RCT).

Rational choice theory

Rational choice theory has its roots in classical criminology as developed by Cesare Beccaria.⁹¹ It adopts the utilitarian belief that people reflect on their actions; this means that prior to acting they deliberate on the means, ends, cost and benefits, prior to making a rational choice.⁹² Cornish and Clarke, are of the opinion that RCT assumes that crime is a purposive behaviour designed to meet the offenders’ commonplace needs for things such as money, status, sex and excitement and that meeting this need involves the making of (sometimes quite rudimentary) decisions and choices⁹³ constrained by limits of time and the availability of relevant information.⁹⁴ The crime of sexual violence is not an involuntary crime, but an act calculated to derive pleasure from the harm to the victim.

⁸⁹ Cavalier (n 71 above).

⁹⁰ Driver (n 75 above).

⁹¹ FE Devine ‘Cesare Beccaria and the theoretical foundation of modern penal jurisprudence’ (1982) *New England Journal of Prison Law* 7, 8; see also Siegel (n 19 above) 96.

⁹² RVG Clarke (ed.) *Situational crime prevention: successful case study* (1997) 9 - 10.

⁹³ As above.

⁹⁴ Clarke (ed.) (n 92 above).

This theory is based on several assumptions. First, human beings see themselves as individuals⁹⁵ who want to maximise their goals and self-interest.⁹⁶ Offenders are self-centred and think only of how to achieve their goals⁹⁷ without taking cognisance of the harm or losses suffered by their victim. Keel recognises the central point of RCT in stating that humans ‘are rational actors’, the reasonableness encompasses an ‘end/means calculation’.⁹⁸ In addition, human beings have a choice in their actions, whether they are conforming or aberrant, which is grounded on a lucid scheming against a backdrop of cost-benefit scrutiny of pleasure versus pain or self-indulgent intention.⁹⁹

Keel highlights that choice in a convivial state of affairs is usually coordinated towards the amplification of selfish gratification and typically is directed by insight and thoughtfulness with regard to the prospective pain or retribution that will accompany the violation of a law, right or collective agreement.¹⁰⁰ Keel adds that the obligation of the state to preserve law and order as part of the social contract must display the features of ‘swiftness, severity, and certainty of punishment’ in regulating human conduct.¹⁰¹

RCT has received much criticism. Some critics¹⁰² of RCT argued that people are psychologically different from what the theory assumes.¹⁰³ The assumption that criminals make a rational decision to commit a crime is not absolute. On the other hand, RCT has been criticised from the notion of bounded rationality that relates to two aspects, one part arises from cognitive limitations and the other from extremes in emotional arousal.¹⁰⁴ It is believed that sometimes

⁹⁵ SK Gul ‘An evaluation of rational choice theory in criminology and, sociology and applied science’ (2009) 4(8) *GAU Journal of Social and Applied Sciences*, 36-44.

⁹⁶ As above.

⁹⁷ Gul (n 95 above).

⁹⁸ R Keel ‘Rational choice and deterrence theory: The evolution of classical theory: rational choice, deterrence, incapacitation and just desert’ (2005) <http://www.umsl.edu/~keelr/200/ratchoc.html> (accessed 15 October 2015); see also Gul (n 95 above).

⁹⁹ As above.

¹⁰⁰ Keel (n 98 above).

¹⁰¹ Keel (n 98 above).

¹⁰² GW Cox, ‘Lies, damned lies and rational choice analysis’ in I Sapiro *et al* (ed.) *Problems and methods in the study of politics* (2004) 171.

¹⁰³ As above.

¹⁰⁴ B Kaufman ‘Emotional arousal as a source of bounded rationality’ (1998) 38 *Journal of Economic Behaviour and Organization* 136.

emotional arousal at the moment of a crime can be acute, therefore prospective offenders find themselves acting out of control, thus rational considerations are far less salient.¹⁰⁵

This research is not in agreement and argues in support of self control even in a state of emotional arousal. Most perpetrators of rape view women as prey. In addition, sex is not an involuntary or impulsive act, for instance, as is the spontaneous infliction of a blow on the face of a person instantaneously in retaliation for a blow from an assailant considered as provocative. Rape is not the same form of involuntary act, he meditates on it, decides, stalks her, waits for congenial time and place; events usually unknown to the victim. Then the assailant takes advantage of her defencelessness and uses his strength and perhaps a weapon of intimidation. Additionally, the issue of provocation does not arise.

This research pitches its argument on the basis of RCT and on the tenets of utilitarian theory. It insists that crime is calculated and deliberate, which means that all criminals, especially those who perpetrate the crime of SV against female refugees in camps are rational human beings who weigh the pleasure they will gain as greater than the losses they may suffer¹⁰⁶ since they may never be apprehended, prosecuted, convicted or sentenced.¹⁰⁷ If offenders are aware that they will be caught swiftly and will receive severe punishment with certainty, they will have to weigh the pleasure against the pain and decide whether or not to commit the crime.

Rational choice theory in conjunction with utilitarian theory promotes access to justice for the female victims of sexual violence in refugee camps because the theory encourages impartiality,¹⁰⁸ agent neutrality, the happiness and the good of the victims and the good of the society in general and it is productive of deterrence and will be a curb on the culture of impunity.

It is argued that poor policing, inadequate protection¹⁰⁹ and the absence of legal mechanisms for addressing SV against refugees in camps are the causes of the violations against refugees.

¹⁰⁵ As above.

¹⁰⁶ Cox (2004) (n 102 above) 171.

¹⁰⁷ Mabuwa (n1 above) 46.

¹⁰⁸ Mabuwa (n1 above) 46.

¹⁰⁹ I Kasamani, 'Sexual and gender - based violence in the refugee context' Uganda solidarity summit on refugee, <http://solidaritysummit.gou.go.ug/content/sexual-and-gender-based-violence-refugee-context> (accessed 26 March 2016).

Therefore, it is advocated that the inclusion of a clause requiring contracting states to protect refugees against human rights violations in camps through an increase in law enforcement agencies in camps in the protocol will create fear in the hearts of those who proposed to commit crime.

An increase in the apprehension of perpetrators and in the prosecution of cases will promote access to justice for victims. Therefore, it is argued that the governments of host countries and their agents take into account the principles of RCT in dealing with perpetrators and in managing the problem of SV against refugees.

Routine activity theory

This theory states that crime is likely to occur where there is a willing criminal who has located a suitable victim in the absence of a ‘capable protector’ and with no person to control the activity of the likely perpetrator.¹¹⁰ The implication is that where an unprotected suitable victim comes in contact with a potential perpetrator at a particular time and space without the presence of a law enforcement agent there is a likelihood of a crime being committed.¹¹¹ This theory vividly demonstrates the plight of female refugees who are victims of sexual violence in refugee camps in Africa as has been discussed in the introduction.

The researcher argues that poor policing, inadequate protection¹¹² and the absence of legal mechanisms for addressing SV against refugees in camps are the causes of the violations carried out against refugees. It is argued that the inclusion of a clause requiring contracting states to protect refugees against human rights violations in camps through the increase of law enforcement agencies in camps in the protocol will inhibit the commission of crime. In addition, an increase in the apprehension of perpetrators and in the prosecution of cases will promote access to justice for victims.

¹¹⁰ LE Cohen & M Felson ‘Social change and crime rate trends: a routine activity approach’ (1979) 44 *American Sociology Review* 588-608; see also Adler et al, (n 64 above) 208.

¹¹¹ Adler et al (n 64 above) 209.

¹¹² Kasamani (n 109 above).

6.3 Theory of rule of law

The rule of law is the legal principle that law should govern a nation as opposed to it being governed by the arbitrary decisions of individual government officials. Primarily, the principle refers to the influence and authority of law within society, particularly as a constraint upon behaviour, including the behavior of government officials,¹¹³ and expresses the basic principle that ‘no person is above the law’.¹¹⁴

The Secretary General of the United Nations has pronounced¹¹⁵ that ‘the rule of law symbolises a principle of governance that holds accountable individuals, organizations, bodies, community, and private institutions, including the state itself, through legislation that are applied in the same way and autonomously decided in accordance with ‘international human rights norms and standards’.¹¹⁶ The doctrine entails processes that safeguard the observance of the values 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’.¹¹⁷

Dicey describes the rule of law as¹¹⁸ the ‘absolute supremacy or predominance of the regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority’ by the government.¹¹⁹ Dicey explains that the rule of law signifies, ‘equality before the law, or the equal subjection of all classes to the law of the land administered by the ordinary courts’.¹²⁰ The implication is that there is no

¹¹³ Oxford University Press, ‘Rule of law’ in The Oxford English Dictionary (2016) <http://0-www.oxford.oup.com/innopac.up.ac.za/view/Entry/277614?redirectedFrom=rule+of+law&> (accessed 20 April 2016).

¹¹⁴ C Fleck ‘The rule of law’ LexisNexis, <http://www.lexisnexis.co.za/ruleoflaw/rule-of-law.aspx#citizensreeaccess> (accessed 11 January 2016).

¹¹⁵ Secretary-General, United Nations ‘The rule of law and transitional justice in conflict and post-conflict societies’, report of the Secretary-General (2004) S/2004/616, <http://daccess-dds-ny.un.org/doc/UN-DOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement> (accessed 11 January 2016).

¹¹⁶ As above.

¹¹⁷ Secretary-General, UN (n 115 above).

¹¹⁸ AV Dicey, *Introduction to the Study of the Law of the Constitution* (1961) 202; see also ML Principe ‘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.

¹¹⁹ As above.

¹²⁰ Dicey (n 118 above); see also Principe (n 118 above).

immunity against prosecution of any individual or state or corporate body who is in contravention of an extant law. It is submitted that all offenders of SV against refugees, which includes peace keepers and aids workers who possess immunity and should have their immunity waived, be subject to prosecution.

Dworkin¹²¹ professes that the rule of law is a communal concept of individual rights which assumes that citizens possess ethical rights and duties with respect to their fellow humans along with political rights against the state.¹²² Dworkin insists that these moral and political rights must be documented in positive law to guarantee their enforcement when individuals petition the courts or other judicial institutions.¹²³ This suggests that individuals who are violated can hold states accountable for not creating the platform for them to hold individuals accountable for the harm they have suffered.¹²⁴

For Allan¹²⁵ the rule of law basically is made up of a body of basic ideologies and standards which provide strength and lucidity for a legitimate imperative and has universal suffrage as its dominant component.¹²⁶ It is a fusion of standards, prospects, and objectives which embrace philosophies on an individual's liberty and natural justice with the benchmarks of 'justice and fairness in the dealings amid governments and the people'.¹²⁷ This doctrine denotes there should be equal opportunity in justice and fairness, which includes the same significance be given the opinion of all citizens in a parliamentary procedure,¹²⁸ and have substantive and procedural fairness in court based on respect for the dignity of the individual person.¹²⁹ It is also the foundation for the creation of institutions for holding lawbreakers accountable.

From the doctrine stated above it is trite to argue that one of the causes of sexual violence against female refugees in refugee camps is the absence of the rule of law. In addition, without

¹²¹ R Dworkin 'Political judges and the rule of law' (1978) *64 Proceedings of the British Academy* 259, 262.

¹²² As above.

¹²³ Dworkin (n 121 above) 262.

¹²⁴ Dworkin (n 121 above) 262.

¹²⁵ TRS Allan, *Law, liberty, and justice: The legal foundations of British constitutionalism* (1993) 21 - 22.

¹²⁶ As above.

¹²⁷ Allan (n 125 above) 22.

¹²⁸ Allan (n 125 above) 22.

¹²⁹ Allan (n 125 above) 22.

the rule of law there cannot be access to justice, 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 of the rule of law emphasise 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.

The principles of the rule of law serve as a foundation on which the female refugees who are victims of sexual violence have access to justice through the recommendation of a mechanism for the achievement of such access. The rule of law promotes equal protection before the law. This implies that refugees should be accorded the same protection against sexual violations as is accorded citizens in host states.

The researcher argues that peacekeepers and caregivers should be considered automatically to have waived their immunity when they commit acts of SV against female refugees and must be punished under the domestic law of the host state. The principles of rule of law emphasise 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 extinguished.

6.4 Theories of right

The basis for not violating another person and for accessing justice hinges on rights. ‘Rights’ is a moral concept which pertains to that which a person is free to do.¹³⁰ Wenar, describes rights as ‘entitlements not to perform certain actions, or not to be in certain states; or entitlements that others not perform certain actions or not to be in certain state’.¹³¹ Hohfield opines that the

¹³⁰ C Biddle ‘Ayn Rand’s Theory of rights: The moral foundation of a free society’, (2011) 6(4) *The Objective Standard* 13.

¹³¹ L Wenar ‘Rights,’ in EN Zalta (ed.) *The Stanford Encyclopaedia of Philosophy* (Fall 2015 Edition) (2015) <http://plato.stanford.edu/archives/fall2015/entries/rights/> (accessed 10 December 2015).

theory of rights includes claim rights and will (choice) or interest theory.¹³²

Theory of claim right

The theory of claim right refers to a duty that is owed to a right holder by some other person(s). This explanation indicates that the person's right is dependent on the performance of a duty by another.¹³³ Claim right involves both a negative and positive duty, either to refrain from acts that are in breach of the rights of the holder of claim rights or to prevent others from doing so, or to a positive obligation that will enhance the rights of the holder.¹³⁴

This theory involves the right to assistance as well as a right to negative freedom.¹³⁵ Claim right has been classified into right *in personam* and right *in rem*. 'Claim right' *in personam* is a correlative duty peculiarly incumbent on an assignable person, for example, the relationship between rights and duties arising from a contract, whereas rights *in rem* are correlative to duties in principle incumbent on everyone.¹³⁶

It implies that a holder of claim right owes a duty to perform or to omit a specific action that is owed to others.¹³⁷ For instance, a promisor owes a duty to fulfil his promises to a *promisee*,¹³⁸ and, as a corollary, the government of a host state owes a duty to protect female refugees against sexual violations which corresponds with the female refugees' rights to be free of sexual abuse by those charged with the duty to protect them. It implies the right to hold the host state accountable if they do not fulfil their obligation in bringing the perpetrators to account for the crime.

It is submitted that contracting states are required to tighten camp security as a means of protecting refugees against violations, to create mechanisms that encourages the reporting of

¹³² WN Hohfield, 'Fundamental legal conceptions as applied in judicial reasoning' (1991) 26 *Yale Law Journal* 710; see also J Waldron (Ed.) *Theories of Rights* (1984) 6.

¹³³ Hohfield, as above 710.

¹³⁴ Hohfield (n 132 above) 710.

¹³⁵ Waldron (Ed.) (n 132 above) 6.

¹³⁶ Waldron (Ed.) (n 132 above) 6.

¹³⁷ L Wenar, 'The nature of Claim-Rights' (2013)123 *Ethics*, 207.

¹³⁸ As above.

SV by refugees and to ensure that their rights against their assailants are enforced.

The will (choice) theory

This theory asserts that the function of rights is to give the right-holders a choice.¹³⁹ It creates a right because duties are owed to those who have choices to waive or demand the performance of the promissory duty,¹⁴⁰ or to enforce the duty.¹⁴¹ Hart's will theory asserts that the term 'rights' offers the holder the power to exercise legal rights.¹⁴² This doctrine supports the claim that refugees in camps have rights and thus should be given an opportunity to assert the right of choice through the provision of a sympathetic/appropriate facility that encourages the reporting of the violation and to seek redress.¹⁴³ In addition, victims of sexual violence should be given an opportunity to state their case and defend their rights.

Interest theory

The interest theory holds that rights promote the rights-holder's interests,¹⁴⁴ and in addition asserts that duties are owed to those with an interest in the creation of duties or performance.¹⁴⁵ For example, interest theory opines that property is a right because ownership improves the life of the interest rights holder.¹⁴⁶ The interest rights of female refugees are embedded in the duty of the host states to protect them against sexual violation in camps and to punish offenders.

The choice theory (or will) and the interest theory (or benefit),¹⁴⁷ are theories that dominate human rights discussions.¹⁴⁸ Interest theory asserts that the primary function of a human right

¹³⁹ Wenar (2013) (n 137 above) 202.

¹⁴⁰ Wenar (2013) (n 137 above) 202.

¹⁴¹ Wenar (2013) (n 137 above) 208.

¹⁴² Wenar (2013) (n 137 above) 208.

¹⁴³ UNCHR '2014 UNHCR country operations profile - Uganda' (2014) <http://www.unhcr.org/pages/49e483c06.html> (accessed 11 May 2014).

¹⁴⁴ Wenar (2013) (n 137 above) 202.

¹⁴⁵ Wenar (2013) (n 137 above) 208.

¹⁴⁶ Wenar (2013) (n 137 above) 202.

¹⁴⁷ A Harel, 'Theories of Rights,' (2003) downloaded from Social Science Research Network Electronic paper, [Http://: ssrn.com/abstract=459960](http://ssrn.com/abstract=459960) (accessed 27 June 2018).

¹⁴⁸ As above.

is to protect and promote certain human interests which points to the fact that female refugees have an interest to be protected against violation of their bodily autonomy and dignity. However, if there is failure in the protection of these interests, then their rights against the perpetrators must be promoted or enforced through legal means. Will theory attempts to establish the validity of human rights based on the unique human capacity for freedom.¹⁴⁹ It advocates that contracting states should protect refugees against SV.

Natural rights theory

The doctrine of natural rights has been understood as an aspect or feature of the modern doctrine of natural law.¹⁵⁰ Natural law expresses ethical laws specifying what a person should be free to do and these laws come from God. There are political laws as well which are created by governments and moral laws which are inherent to human nature.¹⁵¹ Natural rights are based on the political theory that every person has basic rights that the government cannot deny.¹⁵² These rights are also inherent to female refugees in refugee camps, namely that they must not be violated.

Natural rights are the ‘rights that all men¹⁵³ possess, which may obligate them to act, or to refrain from acting in certain ways’.¹⁵⁴ According to Hobbes and Locke, there are many natural rights, but all are inferences from one original right, the right that each man has to self - preservation.¹⁵⁵ The doctrine of natural rights teaches primarily that all obligations derive from the right which every man has to preserve his own life. Conversely, it teaches that no man can be bound to regard as a duty whatever he regards as destructive to the security of his life.¹⁵⁶

¹⁴⁹ A Fagan, ‘Human rights’ Internet Encyclopaedia of Philosophy (2010) [http://www.iep.utm.edu/hum-
rts/](http://www.iep.utm.edu/hum-
rts/) (accessed 27 June 2018).

¹⁵⁰ HV Jaffa, ‘Natural Rights’ (2016) http://www.encyclopedia.com/topic/natural_rights.aspx (accessed 16 January 2016).

¹⁵¹ Waldron (n 132 above) 6.

¹⁵² Waldron (n 132 above) 6.

¹⁵³ Including women.

¹⁵⁴ Jaffa (n 150 above).

¹⁵⁵ Jaffa (n 150 above).

¹⁵⁶ Jaffa (n 150 above).

According to Paine, natural rights are rights that are associated with an individual by his existence.¹⁵⁷ These rights include ‘intellectual rights or rights of the mind’, and all other rights that individuals can exercise for their own well-being and pleasure without infringing other people’s natural rights.¹⁵⁸ By implication, if there is a natural right to engage in sexual activity in order to derive pleasure it does not include the right to sexually violate. On the other hand, it is correct to assert that female refugees have a right to live in comfort and happiness and free of sexual violence.

The researcher asserts that the lack of protection of refugees against SV is a violation of their interest rights. It is submitted that states should incorporate the principles of natural rights as enunciated in the preceding paragraphs for the protection of refugees against violence and promote a life free of SV and access to justice for the victims.

Theories of human rights

Human rights (HR) have been conceptualised as the basic rights and freedom to which all humans are entitled, and include the rights to life, liberty, equality and a fair trial, as well as freedom from slavery and torture and freedom of thought and expression.¹⁵⁹ Sociologically, HR denotes the rights of individuals to liberty and justice.¹⁶⁰ Fundamental rights are especially those rights which are believed to belong to an individual and in the exercise of which a government may not interfere, such as the rights to freedom of speech and association and the right to work.¹⁶¹

In addition, Nickel declares human rights as the;

¹⁵⁷ T Paine, *Rights of Man* (1984) 68.

¹⁵⁸ As above.

¹⁵⁹ American Heritage Dictionary of the English Language, ‘Human rights’ Houghton Mifflin Harcourt publishing company (2011) 5th Ed.

¹⁶⁰ C Harper Collins Publishers ‘Human rights’ Collins English Dictionary Complete and Unabridged (2003), <https://www.thefreedictionary.com/human+rights> (accessed 26 May 2018).

¹⁶¹ Random House Kernerman, ‘Human rights’ in Webster's College Dictionary, K Dictionaries Ltd by Random House, Inc. (2010).

basic moral guarantees that people in all countries and cultures allegedly have simply because they are people. Calling these guarantees “rights” suggests that they attach to particular individuals who can invoke them, that they are of high priority, and that compliance with them is mandatory rather than discretionary. Human rights are frequently held to be universal in the sense that all people have and should enjoy them, and to be independent in the sense that they exist and are available as standards of justification and criticism whether or not they are recognized and implemented by the legal system or officials of a country.¹⁶²

Human rights have been adjudged as being ‘universal rights held to belong to individuals by them being human, encompassing civil, political, economic, social, and cultural rights and freedoms, and based on the notion of personal human dignity and worth’.¹⁶³ ‘Dignity’ has been defined as the importance and value that a person has, that brings out self-respect and commands respect from other people.¹⁶⁴ It is the key term for the discussion on human rights and the Universal Declaration of Human Rights appeals to human dignity as its basis.¹⁶⁵

UDHR declares that ‘all human beings are born free and equal and with dignity’.¹⁶⁶ This declaration implies that dignity is inherent to all human beings, whether they are refugees or citizens of a nation.¹⁶⁷ In addition, article 3 of UDHR provides for the security of a person, and article 5 prohibits ‘torture, cruel, inhuman, degrading treatment or punishment, against all human beings’.¹⁶⁸ Article 12 provides that there should be no arbitrary interference with privacy or the family and outlaws ‘attacks on honour and reputation of a person’.¹⁶⁹ Article 12 states further: ‘Everyone has the right to the protection of the law against such interference or attacks’.¹⁷⁰

¹⁶² JW Nickel, *Making sense of human rights: philosophical reflections on the Universal Declaration of Human Rights* (1987) a561 - 562; See also A Fagan, ‘Human rights’ *Internet Encyclopaedia of Philosophy Human*, (2015) <http://www.iep.utm.edu/hum-rts/> (accessed 11 December 2015).

¹⁶³ Columbia University Press ‘Natural rights theory’ in *The Columbia Electronic Encyclopaedia*, (2013) <http://encyclopedia2.thefreedictionary.com/Natural+Rights+theory> (accessed 9 December 2015).

¹⁶⁴ Cambridge University Press ‘Dignity’ *Cambridge Dictionaries Online* (2016), <http://dictionary.cambridge.org/dictionary/english/> (accessed 18 April 2016).

¹⁶⁵ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

¹⁶⁶ As above art 1.

¹⁶⁷ UDHR (n 165 above).

¹⁶⁸ UDHR (n165 above).

¹⁶⁹ UDHR (n 165 above).

¹⁷⁰ UDHR (n 165 above).

With respect to gaining access to justice, the UDHR emphasises equality before the law and the equal protection of the law without discrimination.¹⁷¹ Refugees in a host state therefore should not be discriminated against in issues relating to protection under the law. Article 8 provides for the ‘right to effective remedy’ for harms suffered because of any violations in accordance with the law or constitution of nations.¹⁷² Article 10 provides for a fair and public hearing for those facing criminal charges.¹⁷³

It is an aspect of a woman’s dignity that she has the right to choose with whom she shares her sexuality. If it is taken forcefully or against her will, as is the case in sexual violence, she is dehumanised and is robbed of her dignity by the perpetrator. This means that female refugees in camps have rights that they can invoke when their personal dignity and worth are violated.

The natural rights theory of human rights underscores contemporary human rights doctrines.¹⁷⁴ The term ‘human rights’ generally is taken to denote what Locke and his successors meant by natural rights, namely rights or entitlements held simply by virtue of being a human being.¹⁷⁵ This notion has been criticised by Beitz¹⁷⁶ who argues that it is wrong to base human rights on natural rights¹⁷⁷ because the ‘philosophical insecurity surrounding the subject of human rights results from construing them on the natural rights model’.¹⁷⁸ Beitz suggests an alternative theory of human rights, which he calls the social justice model, in which he states that human rights are prerogatives in the gratification of various human benefits that are definite and affiliate to a cluster of ideas in the ideology of social justice.¹⁷⁹

The philosophies of justice express the circumstances under which communal establishments may be legitimised, such as the mode of distribution of the assets and liabilities of societal

¹⁷¹ UDHR (n 165 above) art 7.

¹⁷² UDHR (n 165 above).

¹⁷³ UDHR (n 165 above).

¹⁷⁴ J Donnelly ‘Human rights as natural rights’ (1982) 4(3) *Human Rights Quarterly* 391.

¹⁷⁵ As above.

¹⁷⁶ CR Bietz, ‘Human rights and social justice’ in Brown and MacLean (Ed.) *Human rights and U.S. foreign policy*, Lexington, Massachusetts: Lexington Books, (1979) 45-63; see also Donnelly (n 241 above) 392.

¹⁷⁷ As above 48.

¹⁷⁸ Bietz (n 176 above) 55.

¹⁷⁹ Bietz (n 176 above) 55.

collaboration.¹⁸⁰ In sum, Beitz asserts that social justice is the source of human rights theories. Whether social justice or natural justice, human rights are inherent to all human beings, which includes female refugees, whose rights must be enforced by those charged with their care.

The analysis of human rights theory reveals that all humans are entitled to the preservation of their dignity and where it is violated they are entitled to enforce their rights against their assailants. It is argued that the principles of human rights be incorporated in the management of refugee and the protocol to the refugee convention for dealing with SV compels states to fulfil their obligations under international law to refugees in their territories. This analysis denotes that female refugees have the right to be free from sexual violence as part of the preservation of their dignity as humans. If they suffer sexual violation, they have the right to hold the assailant accountable

6.5 Theories of justice

The word ‘justice’, also referred to as ‘fairness’,¹⁸¹ is the main goal in this research. ‘Justice’ is a term used in many languages but with different meanings. In English it is said to mean, ‘fairness in the way people are dealt with’.¹⁸² It is also referred to as law or the system of laws in a country that judges and punishes people.¹⁸³ In legal parlance justice means protecting rights and punishing wrongs, using fairness in the prosecution of cases.¹⁸⁴

There are many schools of thought in the doctrine of justice.¹⁸⁵ Plato opines that justice is a

¹⁸⁰ Bietz (n 176 above) 55.

¹⁸¹ Cambridge University Press ‘Justice’ in Cambridge Dictionaries online (2016) <http://dictionary.cambridge.org/dictionary/english/justice> (accessed 15 April 2016).

¹⁸² As above.

¹⁸³ Cambridge University Press (n 183 above).

¹⁸⁴ BA Garner ed. Black's Law Dictionary Free 8th Ed. (2004) 881.

¹⁸⁵ For Augustine, the cardinal virtue of justice requires that we try to give all people their due. For Kant, it is a virtue whereby we respect others’ freedom, autonomy, and dignity by not interfering with their voluntary actions, so long as those do not violate others’ rights; Mill argued that justice is a collective name for the most important social utilities, which are conducive to fostering and protecting human liberty. Rawls analysed justice in terms of maximum equal liberty regarding basic rights and duties for all members of society, with socio-economic inequalities requiring moral justification in terms of equal opportunity and beneficial results for all. Various post-Rawlsian philosophers develop alternative conceptions, in Pomerleau ‘Western Theories of Justice,’ Internet Encyclopaedia of Philosophy, A Peer-Reviewed Academic Resource, (2013) <http://www.iep.ut.m.edu/justwest/> (accessed 30 December 2015).

virtue establishing rational order, with each part performing its appropriate role and not interfering with the proper functioning of other parts.¹⁸⁶ Aristotle declares that justice consists of what is lawful and fair, and fairness involves an equitable distribution and the correction of what is inequitable¹⁸⁷ and that ‘justice is considered as the greatest virtue and neither evening nor morning star is as wonderful’.¹⁸⁸

Aristotle posits that ‘universal justice’ is what is lawful, while ‘particular justice’ is that which is equal and fair.¹⁸⁹ Aristotle added that justice is a charisma that propels people to aspire, seek to do and act justly,¹⁹⁰ whereas injustice is the innate personality which makes an individual to seek what is unjust and act unjustly.¹⁹¹ Aristotle elaborates and clarifies the topic stating that an unjust man is lawless while the unfair man is grasping, and, as a corollary, the just man is lawful and just.¹⁹² Aristotle gives an example of injustice as a man who commits adultery for financial gain as gasping and the one who commits the same act as self-indulgence as wickedness.¹⁹³ This research aims to assist in correcting the unjust and unlawful act of SV suffered by female refugees in camps in a just, lawful and equitable manner.

Thus, the researcher argues that the meanings and principles enunciated by various scholars in relation to the word ‘justice’ should be incorporated into the administration of refugee camps, and address the unjust and unlawful acts of SV suffered by female refugees by perceiving them as persons who deserve justice in an equal, just, lawful and equitable manner. There are different theories of justice, but the focus is on theories of retributive justice and reparative justice.

The theory of retributive justice

Retributive justice theory¹⁹⁴ can be traced back to the laws of Moses as documented in Exodus

¹⁸⁶ As above.

¹⁸⁷ Aristotle, *Nicomachean Ethics*, translated by David Ross and revised by Ackrill and Urmson (1894) 106.

¹⁸⁸ As above 108.

¹⁸⁹ Aristotle (1894) (n 187 above) 108.

¹⁹⁰ Aristotle (1894) (n 187 above) 108.

¹⁹¹ Aristotle (1894) (n 187 above) 108.

¹⁹² Aristotle (1894) (n 187 above) 107.

¹⁹³ Aristotle (1894) (n 187 above) 109.

¹⁹⁴ Also referred to as, retributive theory of punishment.

21:12-35 (1400 BC),¹⁹⁵ where a different penalty and punishment for various crimes are created. Scripture describes the various acts that attract capital punishment to include the murder of a person;¹⁹⁶ ‘if an assailant attacks a fellow citizen with impunity for the purpose of causing death in a devious manner and thereafter escapes to the altar,¹⁹⁷ he will be taken from the altar and executed’.¹⁹⁸ It also prescribes the death penalty for a child that beats his parents and children who disrespect, insult and curse their parents.¹⁹⁹ Also attracting retribution is the crime of human trafficking, which also is punishable by death.²⁰⁰

The book of Exodus declares that if there is a fight between two persons and one hits another with a stone or with a blow causing grievous harm, and the victim does not expire but fully recovers from the injury, the perpetrator will be declared not guilty but will be asked to pay compensation for the loss of time.²⁰¹ If a man fights with a pregnant woman leading to a threatened abortion, the offender shall be punished as prescribed by the husband of the woman and pay compensation in accordance with the court’s judgment.²⁰² However, if there is grievous harm, then the punishment will be ‘life for life’, ‘eye for eye’, ‘tooth for tooth’, ‘hand for hand’, ‘foot for foot’, ‘burning for burning’, ‘wound for wound’, and ‘stripe for stripe’.²⁰³

In a master and servant relationship it was declared that if a master assaults his servant or maid with a bar, resulting in the death of that retainer, he will be punished but the type of punishment is not prescribed.²⁰⁴ If the master attacks the servant or maid and he or she loses an eye, or if the master punches the male or female servants in the mouth leading to the loss of a tooth, the

¹⁹⁵ FC Thompson, King James Version Bible, The Thompson Chain Reference Bible, fourth improved edition updated, B.B Kirk Bible Company Inc, (1982) 76-77.

¹⁹⁶ As above, Exodus 21:12, 76.

¹⁹⁷ The practice in those days was that if an individual commits an offence and runs into the place of worship and holds the horn of the altar, the offender will no longer be held responsible for the crime or be punished.

¹⁹⁸ Thompson (n 195 above) Exodus 21 verse 14, 77.

¹⁹⁹ Thompson (n 195 above) Exodus 21:15, 17, 77.

²⁰⁰ Thompson (n 195 above) Exodus 21:16, 77.

²⁰¹ Thompson (n 195 above) Exodus 21: 18-19, 77.

²⁰² Thompson (n 195 above) Exodus 21:22-23, 77.

²⁰³ Thompson (n 195 above) Exodus 21: 24-25. 77.

²⁰⁴ Thompson (n 195 above) Exodus 21: 20, 77

master is compelled to release that servant because of the loss of the eye or the tooth as punishment.²⁰⁵

In the case of death or injury inflicted by pets or animals it is provided that if an ox slays a human being that ox will be stoned to death and shall not be eaten, but the owner will not be held liable.²⁰⁶ However, if the ox has been aggressive and has attacked people with his horn, ‘and it was reported to the owner who did not tame the ox, and the ox killed a human being, both the ox and the owner will be slaughtered’.²⁰⁷ But, if a fine is placed on him, ‘he shall pay whatsoever price that has been charged to his account as a redemption for his life’.²⁰⁸ It is inconsequential whether the ox injured a boy or a girl, the owner of the animal must comply with the judgement and its punishment.²⁰⁹ In the event that the injury is inflicted by the ox on a female or male servant, then compensation amounting to ‘thirty shekels of silver’ shall be paid to the master of the servant and the ox will be killed.²¹⁰

Deuteronomy 19:17-21 provides for judges to adjudicate in disputes between parties through ‘diligent inquisition’.²¹¹ If the allegations are proven to be false, then the principles of retribution, which include responsibility, proportionality (eye for an eye, tooth for tooth, hand for hand, foot for foot, life for life) and just requital, will be employed in the sentencing and in awarding punishment to the offender.²¹²

Retributive justice theory considers punishment, if proportionate, to be the best response to crime. It promotes liability and eligibility for the punishment of an offender who is²¹³ guilty of a crime.²¹⁴ Retribution is not revenge, it deals with what is wrong and has its limits; it is not personal and does not take delight in the suffering of the offender but employs procedural

²⁰⁵ Thompson (n 195 above) Exodus 21: 26-27, 77.

²⁰⁶ Thompson (n 195 above) Exodus 21: 28, 77.

²⁰⁷ Thompson (n 195 above) Exodus 21: 29, 77.

²⁰⁸ Thompson (n 195 above) Exodus 21: 30, 77.

²⁰⁹ Thompson (n 195 above) Exodus 21: 31, 77.

²¹⁰ Thompson (n 195 above) Exodus 21: 32, 77.

²¹¹ Thompson (n 195 above) 202.

²¹² Thompson (n 195 above) 202.

²¹³ M Cavadino and J Diggan, *The penal system: An introduction*, London: Sage, 2nd Ed (1997) 39.

²¹⁴ HA Bedau, ‘Retribution and theory of punishment’ (1978) 75(1) *Journal of Philosophy, Inc.* 603.

standards.²¹⁵ Retribution, retrospectively, is justified by the crime that has been committed and is applied to atone for the damage already done.²¹⁶

Hart states that the retributive theory of punishment²¹⁷ is composed of three tenets: first, that punishment should be meted to a person who deliberately commits a crime, secondly, that the punishment must be proportionate to the crime and finally that the justification for punishing persons is that the return of suffering, instead of a voluntary evil committed, is in itself just and morally good.²¹⁸ Bedau, refers to these tenets as the principles of responsibility (R1), the principle of proportionality (R2) and the principle of just requital (R3).²¹⁹

The principle of responsibility means that a perpetrator of the transgression must be held liable for his act. It is followed by the principle of proportionality, which denotes that the punishment meted to the offender must be proportionate to the severity of the crime. Lastly, the principle of just requital entails that people should be rewarded or punished, in accordance with that which is due to their conduct or motives.²²⁰ In addition, the principle involves the idea of someone paying back something to someone else²²¹ that has suffered harm from the act of the offender. This principle is a basis for the notion of remedy and reparation.

Female victims of sexual violence in refugee camps face the possibility that perpetrators may never be apprehended, prosecuted, convicted or sentenced and where prosecution occurs the case may be dismissed for want of evidence or a lack of diligent prosecution.²²² Hence a culture of impunity is perpetuated. It is argued that the introduction and the implementation of retributive justice will help to bring justice to the female victims of sexual violence in refugee camps.

²¹⁵ R Nozick, *Philosophical explanation*, Cambridge MA: Harvard University Press, (1981) 366; see also Duff, 'Legal punishment' (Positive retribution and the meaning of desert) in *Stanford Encyclopaedia of Philosophy* (2013) <http://plato.stanford.edu/entries/legal-punishment/> (accessed 24 November 2015).

²¹⁶ Cavadino and Dignan (n 215 above) 39.

²¹⁷ HLA Hart, *Punishment and responsibility* (1968) 4; Hart defined punishment to include pain, unpleasant consequence and must be for an offense against a legal rule; see also HLA Hart, 'Prolegomenon on to the principle of punishment' (1959 - 1960) 60 *Proceedings of the Aristotelian Society*, New series 1-26.

²¹⁸ As above.

²¹⁹ Bedau (n 214 above) 603, Note that a detail analysis of these principles is out of the purview of this research.

²²⁰ Bedau (n 214 above) 603.

²²¹ Bedua (n 214 above) 604.

²²² Mabuwa (n1 above) 46.

Kant believes punishment, which is a part of retribution, is justice that must be implemented by the state through the law and argues that if the guilty are not punished then there is no law.²²³ The crime of SV is a deliberate act as this thesis discusses in terms of the feminist theory of sexual coercion and the theory of rational choice and this research promotes the introduction and the implementation of the principles of RJ. The punishment of offenders is to be included in addressing the issue of SV in refugee camps to end the culture of impunity and to bring justice to female victims of SV.

This research argues that retribution mechanisms are absent in refugee camps and their absence accounts for the lawless situation.²²⁴ Based on the principle of just requit that is a part of retributive justice the researcher will now consider theories of reparative justice

Theories of reparative justice

Reparations were generally a civil remedy that was intended to redress the harm resulting from an unlawful act that violates the right of a person.²²⁵ In most domestic laws reparations are typically awarded by courts.²²⁶ The concept of ‘reparations’ revolves around the idea of justice;²²⁷ it serves as a critical strategy for achieving the central aims of transitional justice.²²⁸ It is retrospective in making right the past.²²⁹ Reparative justice can be traced to ancient times, where it often is termed ‘corrective justice’.²³⁰ It is a principle of civil remedies that has its roots in classical legal theory.²³¹ Plato argues that when a person has ‘done wrong... he must make the damage good to boot’, and the law ‘must be exact in determining the magnitude of the correction imposed on the particular offence, and... the amount of compensation to be paid’.²³²

²²³ J Rachel, *The elements of moral philosophy* (2007) 201.

²²⁴ Mwangi (n1 above).

²²⁵ LJ Laplante ‘The plural justice aims of reparations’ in S Buckley-Zistel *et al* (Ed.) *Transitional justice theories* (2014) 70.

²²⁶ As above 66.

²²⁷ Laplante (n 225 above) 65.

²²⁸ Laplante (n 225 above) 67. Note that discussions of transitional justice are out of the scope of this research.

²²⁹ Laplante (n 225 above) 67.

²³⁰ Laplante (n 225 above) 66.

²³¹ D Wood, *Retributive and corrective justice, criminal and private law* (1957) 557.

²³² MA Pauley ‘The jurisprudence of crime and punishment from plato to hegel’ (1994) 39 (1) *American Journal of Jurisprudence*, 97-152.

In discussing the notion of ‘rectificatory’ or ‘corrective justice’²³³ Aristotle, a proponent of the theory of corrective justice, in chapter four of *Nicomachean Ethics*²³⁴ argues that it is irrelevant whether the offense was perpetrated by a respectable individual,²³⁵ what matters is that the law considers the character of the harm suffered and addresses the parties’ alike, one as the offender who inflicted the injury and the other as the victim who suffered the injury.²³⁶ The implication is that justice means the law does not discriminate, but rather treats everyone as equal. In the context of female victims of SV in refugee camps the law should apply to the perpetrators whether of high or low status.

With regards to the issue of remedies, Aristotle reiterated that,²³⁷

the judge tries to equalize things by means of the penalty, taking away from the gain of the assailant. For the term “gain” (*kerdos*) is applied generally to such cases, even if it be not a term appropriate to certain cases, e.g. to the person who inflicts a wound and “loss” (*zemia*) to the sufferer; at all events, when the suffering has been estimated, the one is called loss and the other gain . . . Therefore, the just . . . consists in having an equal amount before and after the transaction.²³⁸

Aristotle signifies that justice entails a victim recovering what has been lost before and after the painful act and for there to be equality, the losses, i.e. the harm suffered by the victim must be weighed against the gain of the perpetrator. The pleasure derived from the sexual violation should be matched with an award of a remedy and reparation to a victim to balance the resultant

²³³ Diorthotikos, literally ‘making straight,’ in Pauley as above.

²³⁴ Aristotle, *Nicomachean Ethics*, Trans. M Ostwald (1962) 120-123; see also Aristotle, *Nicomachean ethics*, trans. R. Crisp (2000); see also Aristotle (1894) (n 187 above) 114 -115; see also RA Posner ‘The concept of corrective justice in recent theories of tort law’ (1981) 10(1) *The Journal of Legal Studies* 189.

²³⁵ Aristotle (1962) (n234 above); see also Aristotle (2000) (n234 above); see also Aristotle (1894) (n 187 above).

²³⁶ Aristotle (n 234 above) and Posner (n 234 above). Note that, the Greek (transliterated) is *ouden gar diapherei*, ei epieikis phaulon apesteresen e phaulos epieiki, ou d’ ei emoicheusen epiekis phaulos; alla pros tou blabous ten diaphoran monon blepei ho nomos, kai chretai h6s isois, ei ho men adikei ho d’ adikeitai, kai ei eblapsen ho de beblaptai. Rendered more or less literally, this means: ‘for it makes no difference whether a fair (moderate, upper class, good, reasonable) man robs (bereaves, defrauds) a man of low (bad, inferior) station or a man of low station robs a fair man, or whether a fair man commits adultery (against a man of low station) or a man of low station (commits adultery against a fair man); the law looks to the distinction alone of the injury, and treats as equals, if one acts unjustly and the other is wronged, and if one injures and the other is injured’.

²³⁷ Aristotle *The Nicomachean Ethics* (1980) 111-112, 115,117; see also Posner (n 234 above) 189.

²³⁸ As above.

inequality arising from the wrongful act. In the case of victims of sexual violation, even though the act is irreversible, reparation which is a form of remedy can ameliorate the plight of the victim.

Aristotle used ‘the metaphor of an arithmetic balance’ to demonstrate that one person who causes harm must compensate another for the resulting injury or damage to even out the ‘equation’.²³⁹ The theory of reparative justice is based on the theory of corrective justice, which is a response to an injustice by ‘righting a wrong’.²⁴⁰ It focuses on harms and losses that arise from the infringement.²⁴¹

The principle of reparative justice has been adopted by international human rights tribunals in instances where they generated jurisprudence on remedies through a focus on individualised cases of measurable damages where restitution is not possible or is impracticable.²⁴² In taking the approach of restitution *in integrum* the tribunal adopts modalities for ‘making a victim whole’ and restoring the ‘*status quo ante*’ with the understanding of the impossibility of true restitution for the immeasurable harm arising from the various violations suffered by victims.²⁴³ These modalities include restitution, compensation, rehabilitation, satisfaction and a guarantee of non-repetition.²⁴⁴

Although it is not completely possible to remedy the crime of SV against female refugees in camps, there are reparative measures such as rehabilitation, satisfaction, restitution, guarantees of non-repetition and compensation that can ameliorate their plight. The researcher asserts that the principles of reparative justice theory should be incorporated alongside RJ as a heavier burden and a stricter measure against the perpetrators of crime against female refugees. Additionally, the scholar advocates the incorporation of the principles enunciated in the theory of

²³⁹ Aristotle (1962) (n 234 above) 123; see also Aristotle (2000) (n 234 above) 115.

²⁴⁰ JL Coleman, ‘The practice of corrective justice’ in DG Owen (ed.) *Philosophical foundation of tort law* (1995) 53.

²⁴¹ Laplante (n 225 above) 70.

²⁴² Laplante (n 225 above) 70; see also N Roht-Ariaza ‘Punishment redress and pardon: Theoretical and psychological approach’ in N Roht-Ariaza (ed.) *Immunity and human rights in international law* (2004a) 57 - 58.

²⁴³ As above.

²⁴⁴ United Nations, ‘Basic principles and guideline on the right to a remedy and reparation, for victims of gross violations of international human rights law and serious violations of international humanitarian law’ UN GA/RES/60/147, GAOR 60th session Supp (2005) 49 vol 1.

reparation and those of jurisprudence from various international tribunals as a paradigm for the award of reparations to the victims of sexual violence in refugee camps.

6.6 The theory of deterrence

Prevention has been known to be better than cure. Hence, preventing SV against female refugees in camps is the best form of justice that is available. The thesis discusses deterrence as a solution to the problem of SV in refugee camps. A goal in this study is to end the culture of impunity, and in order to achieve this goal the author submits that the theory of ‘deterrence’ supports this objective. Deterrence demonstrates the effectiveness of penal sanctions and is as old as criminal law itself and has been described as the ‘primary and essential postulate’ of almost all criminal legal systems.²⁴⁵

The word ‘deterrence’ has its origin in the Latin word, ‘*de-terrēre*’²⁴⁶ which means to frighten from or away. In legal parlance it is defined as an ‘act or the process of discouraging certain behavior, particularly by fear, especially as a goal of the criminal law, in the prevention of a criminal behavior for fear of punishment’.²⁴⁷ Deterrence can be a weapon in curtailing sexual violence against refugees in camps. It is also a method of retrospective interference, by holding out threats that whenever a wrong has been committed the wrongdoer shall incur punishment.²⁴⁸

‘General deterrence’ is the discouragement of potential offenders from committing a crime because of a specific conviction and sentence passed on a criminal.²⁴⁹ ‘Specific deterrence’ has ‘the goal of dissuading offenders from committing crimes in the future, as a result of a specific conviction and sentence they have received’.²⁵⁰ Deterrence means something that impedes,

²⁴⁵ FE Zimring & GJ Hawkins, *Deterrence: The legal threat in crime control* (1973)1.

²⁴⁶ Lewis and Short, *A Latin Dictionary*, founded on Andrews edition of Freund’s *Latin Dictionary*, revised, enlarged and in great part rewritten Oxford University press, 1st ed. (1933, 1976) 562.

²⁴⁷ Garner (n184 above) 481.

²⁴⁸ Garner (n 184 above) 481.

²⁴⁹ JP Gibbs, *Crime, punishment, and deterrence* (1975) 34.

²⁵⁰ As above.

prevents or inhibits²⁵¹ a crime, and can be referred to as ‘determent’ which is an act or fact of deterring.²⁵²

Deterrence by punishment is defined as a method of retrospective interference, holding out the threat of punishment.²⁵³ Kenny opines that punishment affects the prevention of crime in three ways²⁵⁴ First, the incarceration or death of the offender can either temporarily or perpetually deprive him of the opportunity or power to repeat the crime.²⁵⁵ In addition, that punishment influences the reasoning of the offender, thereby bringing about a behavioural change from a deviant attitude to a law-abiding citizen, because it is believed that the dread of punishment instigates a sense of responsibility, accountability and a feeling of guilt or reward for the crime.²⁵⁶ Similarly, the principle objective of punishment has also been thought to instill fear in potential offenders, thereby deterring them from committing a crime.²⁵⁷

In the Bible the first attempt at deterrence is when God²⁵⁸ commands Adam that of ‘every tree of the garden thou may freely eat: But of the tree of knowledge of good and evil, thou shalt not eat of it: for in the day that you eat thereof thou shall surely die’.²⁵⁹ Clerics use the threat of heaven and hell to deter believers from sin. The Roman motto *Si vis pacem, para bellum* (if you wish for peace, prepare for war) reflects a belief that the demonstration of military might deters adversaries.²⁶⁰

Deterrence theory can be traced back to the work of early utilitarians such as Cesare Beccaria

²⁵¹ Garner (n 184 above) 481.

²⁵² Garner (n 184 above) 481.

²⁵³ JW C Turner, *Kenny outlines of criminal law* (1947) 31; see also Zimring and Hawkins (n 253 above) 1.

²⁵⁴ Turner, as above 33.

²⁵⁵ Turner (n 253 above) 33.

²⁵⁶ Turner (n 253 above) 33.

²⁵⁷ Turner (n 253 above) 33. To show that fear of punishment can deter, the examples of the fall in the offences against Education Act when the fine was raised from 5s. to 20s and the reduction in the trafficking of cocaine when the Dangerous Drug Act of 1923 raised the length of incarceration from six months’ imprisonment to ten years penal servitude.

²⁵⁸ Thompson (n 195 above) Genesis 2: 16-17 King James Version; see also Turner (n 253 above) 33.

²⁵⁹ Thompson (n 195 above) Genesis 2: 16-17 King James Version; see also Turner (n 253 above) 33.

²⁶⁰ Thompson (n 195 above) Genesis 2: 16-17 King James Version; see also Turner (n 253 above) 33.

and Jeremy Bentham.²⁶¹ The underlying principle is that people will commit crimes to the extent they are more pleasurable than painful. Certain, severe, and swift legal punishments increase the pain and can deter people from committing crime.²⁶²

Neither Beccaria nor Bentham systematically defines deterrence. However, Gibbs conventionally defines deterrence as the omission or curtailment of a crime through fear of legal punishment.²⁶³ The terms ‘omission’ and ‘curtailment’ identify two possibilities: ‘(1) people may refrain entirely from committing a crime from fear of legal punishment, or (2) they may only curtail or restrict their commission of it (e.g., a motorist may speed only occasionally in the belief that repetitive speeding eventually will result in a fine)’.²⁶⁴

It has been argued that deterrence, as an efficacious method of a penal sanction, is as old as criminal law itself and has been described as the primary and essential principle of almost all criminal legal systems.²⁶⁵ This principle was applied in the case of *S v M*,²⁶⁶ a 21-year-old Bantu male teacher was convicted and imprisoned by a South-Eastern Cape Local Division Court for the rape of a 17 year-old Bantu female student. The appellate court later dismissed an appeal and affirmed the court’s decision which held that ‘it is important for the crime of rape committed by a teacher upon one of the pupils entrusted to his care to be severe, as a deterrent and warning to other persons similarly placed in the positions of trust *vis- a-vis* young girls’.²⁶⁷

Freedman opines that ‘influencing another’s conduct through bullying is a normal phenomenon’.²⁶⁸ The strongest survive by coaxing would-be predators that they are too fast to be caught,

²⁶¹ EH Johnson, *Crime, Corrections and Society*, (1974) 177; see also Johnson & Wolfe, *History of criminal justice* Anderson, Cincinnati, (2003).

²⁶² M Stafford and G Deibert ‘Deterrence theory’ in Ritzer (Ed) *Blackwell Encyclopaedia of Sociology* (2007) 1065.

²⁶³ Gibbs (n 249 above) 34.

²⁶⁴ As above.

²⁶⁵ Turner (n 253 above) 31.

²⁶⁶ *S v M* [1975 (1)] SA 424 (A).

²⁶⁷ As above

²⁶⁸ L Freedman, *Deterrence*, (2004) 6, see also J Renaker, *DR Strangelove and the Hideous Epoch: Deterrence in the Nuclear Age* (2000) 145; MH Mather and BD Roitberg. ‘A Sheep in Wolf’s Clothing: Tephritid Flies Mimic Spider Predators’ (1987) 236 (4799) *Science, New Series*, 308 - 31; E Greene, LJ Orsak & Douglas W. Whitman, ‘A Tephritid Fly Mimics the territorial displays of its jumping Spider predators’ (1987) 236 (4799) *Science, New Series*, 310 - 312.

that they will fight back when necessary and that even if they are overwhelmed they are inedible.²⁶⁹

The above principles support the concept of the use of threats and the infliction of pain to deter others from committing a crime. It is submitted that the principles of deterrence be employed in a deliberate attempt to persuade potential perpetrators of sexual violence against female refugees in camps to change their attitude, because without the fear of legal punishment the perpetrators of crime will not be deterred.

This research borrows from these principles in encouraging an end to the culture of impunity surrounding sexual violence in refugee camps. It advocates the inclusion of a legal mechanism in refugee camps so that the threat of punishment held out deters sexual violence.

7 Conclusion

This chapter lays a foundation for this thesis through the theoretical discourse that underpins this study. The chapter started with the definition and the importance of theory to research. It provided reasons for the choice of the theories discussed and explained the critical and the heuristic use of theory in this research. It expressed the use of theory as a guide and analysed the theories of the rule of law, the concept of access, the theories of justice, which include retributive and reparative justice, rights, sexual coercion, utilitarian theory, rational choice theory and deterrence theories and how they relate to the core thesis of this research.

The theories have assisted in explaining why refugees are violated in camps and the researcher lays a foundation for solving the problem of gaining access to justice through the analysis of

²⁶⁹ As above; see also FE Zimring and GJ Hawkins, *Deterrence: The legal threat in crime control*, (1973)1; see also Renaker, (n 268 above) 145; ‘Some of these forms of natural deterrence can be quite subtle and even rely on confusing opponents. The owl eyes on the wings of the Caligo butterfly serve to encourage birds to keep their distance’. (Zimring & Hawkins as above 1; see also Renaker (n 268 above) 145); ‘Then again, Monarch butterflies must produce a poisonous constituent that will make blue jays ill to sustain the deterrence’ (Zimring & Hawkins (n 269 above) 6; Renaker (n 268 above) 145); ‘When one jumping spider approaches another, leg waving behaviour is used to mark a territory. There is a fly that has acquired wing markings that resemble the legs of a jumping spider, and this ability to create the impression of leg-waving is sufficient to persuade a potential predatory spider that it is in the presence of another so that it backs away (Freedman (n 268 above) 6; Zimring and Hawkins (n 269 above) 1; Renaker (n 268 above) 145).

the principles that can be adapted to fit the recommendation of the creation of legal mechanisms for giving access to justice for victims of sexual violence and their families.

Chapter 3: The problem of female refugees from a historical perspective

1 Introduction

The preceding chapter laid the foundation for this study through the analysis of the relevant theories that underpin the assumptions of this research. It covered the framework to illuminate the theories relevant to the rights of victims of SV in refugee camps.

The questions this chapter seeks to answer are: What are the typology, causes and effects of refugee problems and sexual violence (SV) in ‘refugee camps’ against women? And, who are the perpetrators and how can they be held accountable for the sexual violence committed against female refugees in camps?

In offering answers to these questions this chapter presents a brief history of the global problem of refugee production in order to understand the sequence and connections of events and the reasons for these events. This overview exposes how people acted in the past so as to learn from it and to appreciate how the problem was created which has led women to suffer sexual violation as refugees. In addition, the idea is to lay a foundation for shaping the future of the problem of female refugees. The causes of the refugee problem will be discussed.

This chapter narrates a brief history of sexual violence, generally and during armed conflicts, the dynamics of sexual violations, in order to demonstrate that the act is deliberate and is designed to punish and torture the victims or their family or their ethnicity. It discusses the impact of refugee production on females and places the problem of female refugees who are victims of sexual violence in refugee camps in a historical perspective with a view to capturing the unjustified situation of female refugees in camps.

The section gives a description of the characteristics of a refugee camp, where refugees live as dependents of humanitarian aid, which form a part of the predisposing factors contributing to the vulnerability of female refugees to sexual violence in camps. In addition, the research explores the typology of sexual violence, the incidences and the consequences of sexual violence on female refugees and names the perpetrators of the crime of sexual violence against refugees

in camps in order to exemplify the problem of gaining access to justice. This chapter is grounded on the feminist theory of sexual coercion, the theory of the rule of law and the theory of crime causation.

Sexual violence has been defined as ‘any act of a sexual nature committed against one or more persons or caused by such person or persons to engage in an act of a sexual nature by force, or by a 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 incapacity to give genuine consent’.¹ SV includes exploitation and abuse, the attempt or threat of a sexual nature that results or is likely to result in physical, psychological and emotional harm, and a form of gender-based violence.²

2 Who are refugees?

The word ‘refugee’ has its origin in the 1680s and is taken from the French word ‘*refugié*,’ a noun used as a past participle of *refuge*, meaning ‘to take shelter or protect’.³ It was developed from the old French word ‘*refuge*’ meaning a ‘hiding place’ a ‘shelter or protection from danger or distress’ or ‘to flee’.⁴ In English the word ‘refuge’ means a shelter from danger or trouble. It denotes protection or ‘to seek shelter or protection in a place’.⁵ ‘A refugee is person who is driven from his or her home to seek refuge, especially in a foreign country, from war, religious persecution, political troubles, natural disaster, for example the French Huguenots who migrated to England after the revocation of the Edict of Nantes in 1685’.⁶

¹ International Criminal Court (ICC) Elements of crimes (2011) Art 7 (1) (g)-6, <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> (accessed 22 May 2016).

² United Nations High Commissioner for Refugee (UNCHR), Sexual and Gender-Based violence against refugees, returnees and internally displaced: Guidelines for prevention and response persons, (2003) 10.

³ D Harper, ‘Refugee’ (2001-2016) <http://www.etymonline.com/index.php?allowedinframe=0&search=refuge> (accessed 30 May 2015).

⁴ As above.

⁵ L Brown ‘Refuge’ in *The new shorter Oxford English Dictionary: On historical principles* (1993) 2524, see also Garner (ed.) ‘Refuge’ in *Black law dictionary*, Thompson West, (2004) 8th ed. 135.

⁶ Brown (n 5 above) 2524.

In legal phraseology ‘refugee’ refers to a person who flees or is expelled from a country, especially because of oppression and seeks shelter in another country.⁷ The word ‘asylum’ has various meanings depending on the context in which it is used. It can denote a sanctuary, place of refuge and safety for criminals.⁸ ‘Asylum’ has also been referred to as a place for protection and as an institution for the shelter and support of handicapped and or indigent people.⁹ ‘Asylum’ is also defined as the protection of political refugees from arrest by a foreign jurisdiction, a nation or embassy that affords such protection.¹⁰ A person who is seeking to be recognised as a refugee is referred to as an asylum seeker, this definition is what is applicable in this context.¹¹

There was a need to identify the status of forced migrants in the European countries so an inter-governmental conference was held in 1926 at which a Russian refugee was defined as ‘any person of Russian origin who do not enjoy or no longer enjoys the protection of the Government of the U.S.S.R. and has not acquired another nationality’.¹² In Germany, a refugee was defined by the Convention of 1938 held in Geneva¹³ as ‘persons possessing or having possessed German nationality and not possessing any other nationality, who have demonstrated that they do not currently enjoy the protection of the German government in law or in fact’ or ‘stateless persons that are not governed by previous conventions or agreements, who have left German territory after being established therein, and who have established not to enjoy in law, or in fact, the protection of the German government’.¹⁴

As the problem of refugees became wide spread, the United Nations (UN) in 1951 defined refugees¹⁵ as persons who became refugees during the measures of 12 May 1926, 30 June 1928

⁷ Garner (ed.) (2004) (n5 above) 1307.

⁸ Brown (n 5 above) 136.

⁹ Brown (n 5 above) 136.

¹⁰ Brown (n 5 above) 136.

¹¹ UNHCR, ‘Protecting refugees and the role of UNHCR’ (2014) file:///D:/unhcr%20509a836e9.pdf (accessed 31 May 2016).

¹² JH Simpson, ‘The Problem of refugees’ *International Affairs* (Royal Institute of International Affairs 1931-939), (1938) 608.

¹³ League of Nations (LN) Convention Concerning the Status of Refugees coming from Germany Geneva, League of Nations Treaty Series, (1938) Vol. CXCII, No.4461, at 59, art 1(1)(a)(b); see also Simpson (n 11 above) 608 - 609.

¹⁴ Simpson (1938) (n 12 above) 608.

¹⁵ Convention Relating to the Status of Refugees (adopted 28th July 1951, entered into force 22nd April

or under the Conventions of 28 October 1933 and 10 February 1938.¹⁶ There were refugees who were under the Protocol of 14 September 1939 or the Constitution of the International Refugee Organisation.¹⁷ In addition, people who were denied the status of refugee by reason of disqualification by the International Refugee Organisation would have been conferred with the status once they satisfied paragraph 2 the UN Refugee Convention of 1951.

Refugees include people who were displaced because of the conflicts that befell their country before 1 January 1951 due to a substantiated fear of the possibility of unfair treatment because of ‘race, religious conviction, ethnic group, involvement in a specific public set or dogmatic belief.’¹⁸ Refugees are persons who have fled to a foreign country because of the fear of human rights violations, who are reluctant to benefit from the protection of the country they fled from or people who are stateless and have fled their country of citizenship because of a crisis and it is unwise for them to return coupled with the reluctance on their part to return to their country of residence.¹⁹ With regard to individuals with several citizenships, the term ‘the country of his nationality’ signifies all the nations of which he is a citizen, and he may not be regarded as without the protection of any of those countries if there is no actual threat of any kind to him that will warrant seeking asylum from another country.²⁰

To avoid ambiguity the convention counted the events occurring before 1 January 1951’ in article 1, section A, to be understood as either ‘events occurring in Europe before 1 January 1951’ or ‘events occurring in Europe or elsewhere before 1 January 1951’.²¹ This subsection admonishes contracting states to make a ‘declaration at the time of signature, ratification or accession, specifying which of these connotations applies to its obligations under this convention’.²²

The convention further clarified that any contracting state that adopts the option ‘events

1954) 189 UNTS 137 (UN Refugee Convention 1951) art 1. A (1) (2), B (1) (a) (b), (2).

¹⁶ As above art A (1).

¹⁷ UN Refugee Convention 1951 (n 15 above) art1 A (1).

¹⁸ UN Refugee Convention 1951 (n 15 above) art1 A (2).

¹⁹ UN Refugee Convention 1951 (n 15 above) art 1 A (2).

²⁰ UN Refugee Convention 1951 (n 15 above) art 1 A (2).

²¹ UN Refugee Convention 1951 (n 15 above) art 1 B (1) (a) (b).

²² UN Refugee Convention 1951 (n 15 above) art 1 B (1) (b).

occurring in Europe before 1 January 1951' may have to spread their commitment, by acceptance of the alternate option through a 'notification addressed to the Secretary-General of the United Nations'.²³ Consequent to the restricted nature of the UN definition, since it applies only to people who became refugees before 1951, a Protocol extending the same protection enjoyed by the pre-1951 refugees to those after 1951 was adopted in 1967.²⁴

The African Union (AU) in recognition of the refugee problem in Africa and the need to address the peculiar nature of the problem in Africa, defined refugees to meet the need of the region through the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.²⁵ Refugees have been denoted in article 1²⁶ to include all people who have escaped from his heritage to another country for safety, because they are frightened that they will be victimised for their 'racial identity, religious conviction, ethnic group, belonging to a communal set or radical ideology'.²⁷ As a result of this justifiable fear, they cannot go back to that country for safety reasons.

Also included is anybody who is stateless and has absconded from their country of residence because of fear of maltreatment.²⁸ In addition, refugees are referred to as individuals who have flown their country of ancestry to ask for protection in another country because of an attack from other countries, the takeover, control of his country by an alien power or any crisis upsetting civic command in either part or the whole of his state of citizenship or ethnic group to search for a sanctuary in another country.²⁹

In the case of individuals with multi citizenship the expression 'a country of which he is a national' symbolises 'any of the states' where they are citizens and, alternatively, these individuals cannot be called refugees if they have no justifiable fear of persecution and refuse to

²³ As above.

²⁴ UN General Assembly, Protocol relating to the Status of Refugees (The Protocol 1967) 31st January 1967, United Nations, Treaty Series, vol. 606, 267.

²⁵ Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention) adopted on 10 September 1969 by the Assembly of Heads of State and Government. CAB/LEG/24.3. It entered into force on 20 June 1974 (1969/1974) art 1(1) (2) (3).

²⁶ As above.

²⁷ OAU Refugee Convention (n 25 above, art, 1(1).

²⁸ OAU Refugee Convention (n 25 above) art. 1(1).

²⁹ OAU Refugee Convention (n 25 above) art. 1(2).

benefit from the protection of one of the countries of their citizenship.³⁰ This definition is more encompassing because it includes reasons why people flee their home country in article 1 (2). This clause, however, is absent in the UN Convention on refugees, 1951, although not exhaustive.

3 Internally displaced persons

Other forced migrants who are not refugees are ‘Internally Displaced Persons’ (IDP) who are defined as follows:

persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human made disasters, and who have not crossed an internationally recognized State border.³¹

These groups of persons are outside the scope of this research.

4 Historical perspective to a global refugee problem

The global refugee problem has been labeled the phenomenon of our time.³² In 1988, Holborn asserted that the problem of refugees was not only created by two World Wars but by other factors such as repressive governments.³³ The general awareness of the need of the common people to fight for their rights, complicated by the closure of national boundaries has contributed to forced migrants becoming refugees, a situation which was striking in the twentieth century as discussed below.³⁴

³⁰ OAU Refugee Convention (n 25 above) art. 1(3).

³¹ UN High Commissioner for Refugees (UNHCR), UN Guiding Principles on Internal Displacement (UN principle displacement) E/CN.4/1998/53/Add.1, 11th February 1998. New York: United Nations.

³² LW Holborn, ‘Refugees: World problems’ in *International Encyclopaedia of the Social Sciences* (1988) Encyclopedia.com, <http://www.encyclopedia.com/topic/refugee.aspx>, (accessed 1 June 2016).

³³ As above.

³⁴ Holborn (1988) (n 32 above).

The purpose of reviewing the global history of refugee production is to lay a foundation for the study. It provides an understanding of the characteristics and peculiarity of the population of study and serves to tell the truth about who refugees are and to construct a vivid picture of their problems.³⁵

In addition, the history of global refugee problems is meant to shed light on the production of refugees in the past, why refugees are in their current precarious situation and why they are in camps in foreign countries. Furthermore, history recounts mistakes made in the past, helps to understand the present and grants an opportunity to deal wisely, to reshape, prevent and find a solution to the problem in the future. It helps in understanding how the world treated refugees in the past, to judge wisely and understand the changes that have occurred. The history of refugees serves as an inspiration to adopt the best practices in resolving the current problem.

The history of refugees assists in comprehending the fact that anybody can become a refugee at any time, and that the problem is not peculiar to only one race, continent or sex³⁶ and, as a result, it helps in reconsidering how they are treated. For the sake of precision, the discussion on the historical evolution of the refugee problem will be classified into the following periods; refugees pre-World War I, World War I and World War II and thereafter.

4.1 Pre-World War I

The concept of a refugee can be traced back to the ancient Greeks and Egyptians who believed that a person who escapes into a holy place could not be hurt without inviting divine retribution.³⁷ This belief also applied to Jews in the land of Canaan where God told Moses to appoint six cities of refuge where a man who commits manslaughter can flee to for safety until he

³⁵ P N Stearns 'Why study history?' American Historical Association (2017) [https://www.historians.org/about-aha-and-membership/aha-history-and-archives/historical-archives/why-study-history-\(1998\)](https://www.historians.org/about-aha-and-membership/aha-history-and-archives/historical-archives/why-study-history-(1998)) (accessed 30 September 2017).

³⁶ RB Standler, 'What is history and why is history important (1998)' (2013) 2 of 5, www.rbs0.com/wh.pdf (accessed 30 September 2017).

³⁷ E Chelule, 'Refugee crisis in Africa' Journal of International Academic Research for Multidisciplinary (2014) 83.

stands before the congregation in judgment.³⁸

Simpson, in narrating the problem of refugees, states that there were many refugee movements such as the expulsion of the Jews by Isabella of Spain,³⁹ the expulsion of Huguenots after the Edict of Nantes, the Pilgrim Fathers and the United Empire Loyalists.⁴⁰ Simpson adds that before World War I he travelled to many countries without a passport because the frontiers were open and as a result of the open borders the problem of refugees was avoided.⁴¹ Simpson reiterates that twenty years prior to World War I millions of people from eastern Europe, who would have become refugees, escaped to the new land across the ocean, where labour was required for its development.⁴²

At that time the political, economic and racial nationalism that exists today was of a different form.⁴³ Simpson asserts that after World War I the frontiers were closed and there were restrictions across borders of nations so not only did you require a passport but a valid visa to travel to another country.⁴⁴ Consequently, the free movement of people across nations was regulated⁴⁵ and it can be assumed that this has contributed to and created the problem of refugees.

In '600 AD King Ethelbert of Kent codified into law the right to seek asylum in church, a holy place or in a city of refuge'.⁴⁶ This codification gained recognition and was implemented in Europe.⁴⁷ In 740 BC the rulers of Assyria conquered ancient Israel and ten of the twelve tribes of Israel were displaced from their lands⁴⁸ If in the past people could migrate from one part of the world to another without restriction, the Peace of Westphalia in 1648 acknowledged the

³⁸ FC Thompson, King James Version Bible, The Thompson Chain Reference Bible, fourth improved edition updated, B.B Kirk Bible Company Inc, (1982) Numbers 35:9-34, 179-180.

³⁹ Simpson (1938) (n12 above) 607.

⁴⁰ Simpson (1938) (n12 above) 607.

⁴¹ Simpson (1938) (n12 above) 607.

⁴² Simpson (1938) (n12 above) 607.

⁴³ Simpson (1938) (n12 above) 607.

⁴⁴ Simpson (1938) (n12 above) 607.

⁴⁵ Simpson (1938) (n12 above) 607.

⁴⁶ Chelule (n 37 above) 83.

⁴⁷ Chelule (n 37 above) 83.

⁴⁸ Chalabi, 'What happened to histories of refugees' (2013), theguardian.com, <http://www.theguardian.com/news/datablog/interactive/2013/jul/25/whathappenedhistoryrefugees#WorldII> (accessed 1 June 2016).

autonomy of states. The idea of a ‘country nationality’ developed in the 18th Century⁴⁹ and brought about restriction on free migration; persons migrating outside the confines of one state to another were required to identify their nationality.⁵⁰

In the wake of Louis XIV of France issuing the Edict of Fontainebleau in 1685 which forbade Protestantism in France gave rise to the flight of about 200 000 Huguenots to England, Switzerland, South Africa, Germany, Netherland, Scandinavia, Russia and Prussia to seek refuge over a 20 year period, with no money but with various lucrative commercial skills.⁵¹ The American Revolution, 1770 - 1779, gave rise to the escape of refugees to Ontario in Canada’.⁵² At the beginning of the 20th century several Quaker refugee settlements were founded in western Canada.⁵³

Between 1783 - 1785 African Americans, ‘Black Loyalists’, in their thousands united with the tens of thousands of refugees who had embraced the British cause throughout the American Revolution.⁵⁴ These black loyalists, approximately 3 000, migrated to Nova Scotia and settled near Shelburne, Digby, Chedabucto and Halifax.⁵⁵ About 50% of them at the outset moved to Shelburne for the need of freedom to own property unrestrictedly.⁵⁶

By 1783 the Ottoman Empire, over a period of 150 years, received 5-7 million Muslims, of which 750 000 were Bulgarians escaping the Russo - Turkish War, from other countries.⁵⁷ In the 1820s Quakers from England and Ireland went to British North America. European Jews fled to Canada, because of persecution.⁵⁸ In the 19th century over 800 000 people, including the ‘Muhacir’, became refugees in Turkey from the Balkans, the Caucasus, Crimea and Crete. This process continued due to Balkan Wars of 1912 and 1913 and up to the onset of the First World

⁴⁹ Chelule (n 37 above) 83.

⁵⁰ Chelule (n 37 above) 83.

⁵¹ Chelule (n 36 above) 83; see also Chalabi (n 48 above).

⁵² Government of Canada, ‘Canada: A history of refuge’ (2012) <http://www.cic.gc.ca/english/games/teacherscorner/refugee/refuge.asp> (accessed 2 June 2016).

⁵³ Government of Canada (n 52 above).

⁵⁴ As above.

⁵⁵ Government of Canada (n 52 above).

⁵⁶ Government of Canada (n 52 above).

⁵⁷ Chalabi (n 48 above).

⁵⁸ Government of Canada (n 52 above).

War.⁵⁹ The Balkan Wars displaced thousands of people and inflicted great suffering and turmoil in their lives.⁶⁰

The earliest forced migration of Jewish refugees originated from Germany because of the unsuccessful revolts of 1848. Because of social and political upheaval around 1881 they fled from the Pale of Settlement⁶¹ after the murder of Tsar Alexander II brought about an increase in cruel anti - Jewish sentiment in Russia. The situation was aggravated by a weak economy coupled with⁶² a reckless media which sold the belief to the public that the Jews were their enemies. This situation created insurrection and attacks against Jewish homes were rife for a period of three years.⁶³ Twenty years later Jews became the focus of violence which left thousands dead.⁶⁴ Consequently, there was a mass flight of approximately 2 million Jews to the UK, US and other places in Europe.⁶⁵ There was a series of similar conflicts between 1881 and 1920, coupled with the continual waves of massacres of Jews which swept across Eastern Europe propelling mass exodus of over 2 million Russian Jews from Eastern Europe⁶⁶ and other Jews to foreign countries to seek refuge.⁶⁷

4.2 World War I

Hiskey claims that the Austria - Hungarian Empire needed an occasion to declare a pre - emptive war against Serbia in order to end Serbian agitation in the empire's Balkan provinces.⁶⁸ In order to attain this goal it required the support of Germany,⁶⁹ which they could not secure until the assassination of 'Archduke Franz Ferdinand of Austria and his wife Sophie in June 28th,

⁵⁹ Chelule (n 37 above).

⁶⁰ Chelule (n 37 above).

⁶¹ Government of Canada (n 52 above).

⁶² Chalabi (n 48 above).

⁶³ Chalabi (n 48 above).

⁶⁴ Chalabi (n 48 above).

⁶⁵ Chalabi (n 48 above).

⁶⁶ Chelule (n 37 above) 83.

⁶⁷ Chelule (n 37 above) 84.

⁶⁸ D Hiskey, "What Started World War I", today I found out' (2010) <http://www.todayifoundout.com/index.php/2010/12/whatstartedworldwari/> (accessed 6 June 2016).

⁶⁹ As above.

1914 in the city of Sarajevo, by Gavrilo Princip',⁷⁰ a member of a Serbian nationalist secret society known as the 'Black Hand'.⁷¹ An Austrian newspaper reported that the assassination was both a tragedy and was for the best.⁷² This incident created the opportunity for Austria-Hungary to declare war against Serbia. Peradventure, Russia could elect to join the combat due to their treaty with Serbia.⁷³

With Germany's reserved support on 6th July 1914 Austria-Hungary⁷⁴ issued an ultimatum to Serbia in which they demanded that the assassins should be brought to justice, hoping to crush any Serbian nationalist movement,⁷⁵ and imposed 'severe terms' that Serbia would reject⁷⁶ and offer Austria-Hungary justification to start hostilities.⁷⁷ Interestingly, Serbia consented to most of the demands,⁷⁸ dissatisfied with Serbia's response Austria-Hungary declared war on 28th July 1914.⁷⁹ What had commenced as a circumscribed war between Austria-Hungary and Serbia, pursuant to various treaties that existed between the belligerent countries and their allies, deteriorated into World War I, which left more than 15 million people dead.⁸⁰

Gatrell, examines the resulting mayhem through which millions of European civilians degenerated into becoming refugees, 'either by enemy occupation or by the state's compulsory deportation during World War One'.⁸¹ The war uprooted millions of European civilians whose situation overwhelmed aid workers who were trying to assist.⁸² Gatrell recounts that among

⁷⁰ D Deans, "World War One: How did it start?" Who started it? When did it start? (2014) <http://www.walesonline.co.uk/news/wales-news/world-war-one-how-start-7557931> (accessed 6 June 2016).

⁷¹ Hiskey (n 68 above).

⁷² Hiskey (n 68 above).

⁷³ Hiskey (n 68 above).

⁷⁴ M Duffy, 'Feature articles - the July crisis' (2009) firstworldwar.com, <http://firstworldwar.com/origins/julycrisis.htm> (accessed 6 June 2016).

⁷⁵ As above.

⁷⁶ Duffy (n 74 above).

⁷⁷ Hiskey (n 68 above).

⁷⁸ Duffy (n 74 above).

⁷⁹ Hiskey (n 68 above); see also Duffy (n 70 above).

⁸⁰ Hiskey (n 68 above); see also J Godl 'The Planning of the War' (2009) <http://firstworldwar.com/features/plan.s.htm>, (accessed 13 June 2016).

⁸¹ P Gatrell, 'Europe on the move: refugees and World War One' The British Library (2014) <http://www.bl.uk/worldwarone/articles/refugeeseuropeonthemove>, (accessed 6 June 2016).

⁸² As above.

civilian populations who fled from the Russian troops were Germans and Austrians.⁸³ Similarly, civilians and ‘tsarist officials who abandoned their posts in Poland, on the side of Russia, also escaped from the counter attack by the German troops between 1914 and 1915’.⁸⁴

Galician Jews fled to Vienna and other towns and cities for safety.⁸⁵ The 1914 war brought about an escalation in anti-Semitism, and Jews were confronted with increasing restrictions, on freedom of movement, their civil rights and economic autonomy.⁸⁶ European Jews fled to Canada in their thousands seeking political, religious and social refuge,⁸⁷ and reached a peak in 1914 ‘when 18 000 refugees, mostly artisans, small merchants and unskilled workers, arrived in Canada’.⁸⁸

Greek, Armenian and Russian settlers fled to the ‘Kars plateau for the safety of Erevan or Tiflis’, with the aim of returning when the Turkish army pulled out of the territory.⁸⁹ The conflict between Habsburg troops and Italians generated refugees.⁹⁰ In Western Europe the occupation of Belgium and northern France provoked the migration of civilians. People fled fear of being compulsorily recruited into the German army, especially men between the ages of twenty-eight and fifty. By the end of 1914 about 1.5 million Belgians had become refugees.⁹¹ In France civilians fled for fear of their residences being raided in search of ‘franc-tireurs by the German troops’.⁹² Civilians living close to the military operations regions such as the residents of Longwy, Verdun, Epinal, and Belfort were evacuated.⁹³

⁸³ P Gatrell ‘Resettlement’ in: 1914-1918, online. International Encyclopaedia of the first World War, issued by Freie Universität Berlin, (2014) <http://encyclopedia.1914-1918-online.net/pdf/1914-1918-Online-resettlement-2014-10-08.pdf>, (accessed 6 June 2016).

⁸⁴ As above.

⁸⁵ M Von Hagen, War in a European borderland. occupations and occupation plans in Galicia and Ukraine, 1914-1918 (2007) 20-21; see also Gatrell ‘Resettlement’ (n83 above).

⁸⁶ Government of Canada (n 52 above).

⁸⁷ Government of Canada (n 52 above).

⁸⁸ Government of Canada (n 52 above).

⁸⁹ MP Price War and Revolution in Asiatic Russia (1918) 184-185; see also Gatrell Resettlement (n83 above).

⁹⁰ Gatrell Resettlement (n 83 above).

⁹¹ P Gatrell, ‘Refugees, in: 1914-1918’ online, International Encyclopaedia of the First World War, (2014) by Freie Universität Berlin, <http://encyclopedia.19141918online.net/article/refugees>, (accessed 6 February 2016); see also Gatrell ‘Resettlement’ (n 83 above).

⁹² JN Horne and A Kramer, *German atrocities. A history of denial*, (2001) 184.

⁹³ As above.

In August 1914 East Prussia was invaded by the Russian army,⁹⁴ which led to a forced migration of between 500 000 - 1 000 000 citizens to Germany.⁹⁵ In the Ottoman Empire Turkish troops displaced Armenians because they had been tagged as spies.⁹⁶ 1914 - 1915 saw a mass exodus of Belgian refugees to France and the Netherlands.⁹⁷ About 160 000 refugees were accommodated in the UK, with close monitoring by the government.⁹⁸ From the inception they were portrayed as destitute and in dire need of help and as victims of German violence, consequently they had humanitarian support from over 2 500 committees in Britain. The refugees were disinclined to repatriate voluntarily to their home country and there was rivalry between the host communities and them. Host populations accused refugees of placing outrageous demands on them and tagged the refugees as ingrates who expect too much, for example the Farningham War Refugee Committee.⁹⁹ The committee in Crediton, Devon, protested that refugees felt that England owed them a duty to provide for them since prior to their flight they had assisted England. These complaints were coupled with criticism in the press.¹⁰⁰

The aftermath of Serbia's defeat by Austrian forces brought about a mass exodus of about one-third of the prewar population of both soldiers and civilians to Albania, Corfu, Corsica, and Tunisia¹⁰¹ Some were detained in Austrian camps and forced to serve their foe.¹⁰² Refugees in the UK were sheltered in orphanages and received assistance from non-governmental organisations.¹⁰³

The Russian refugees were branded by the Russian press as a 'state tragedy' and as a 'social catastrophe'.¹⁰⁴ Metaphors were used to illustrate the reports, such as 'images of river banks being broken', a 'human torrent, wave, and stream of people were flowing through'.¹⁰⁵ Other

⁹⁴ Horne and Kramer (n 92 above)184.

⁹⁵ Horne and Kramer (n 92 above) 184; see also VG Liulevičius, *War land on the eastern front. culture, national identity, and German occupation in World War I* (2001) 38-39; see also VG Liulevičius, 'Precursors and precedents. Forced Migration in North-eastern Europe during the first World War' (2005) 32-52.

⁹⁶ Gatrell, Europe on the move (n 81 above).

⁹⁷ Gatrell, Europe on the move (n 81 above).

⁹⁸ Gatrell,8 Europe on the move (n 81 above).

⁹⁹ Gatrell, Europe on the move (n 81 above).

¹⁰⁰ Gatrell, Europe on the move (n 81 above).

¹⁰¹ Gatrell, Europe on the move (n 81 above).

¹⁰² Gatrell, Europe on the move (n 81 above).

¹⁰³ Gatrell, Europe on the move (n 81 above).

¹⁰⁴ P Gatrell, *A Whole Empire walking: Refugees in Russia during World War 1* (1999) 200.

¹⁰⁵ As above.

reporters used images of disasters, such as ‘avalanche, volcanic eruptions, lava, and of fertile land being laid waste by hordes of locusts’, to describe the scale of the Russian refugee problem.¹⁰⁶ The estimated number of Russian Empire wartime refugees is about six million and the refugee disaster distorted many of Russia’s towns and cities.¹⁰⁷ Refugees were sheltered in ‘railway stations, schools, empty factories, breweries, hotels, bathhouses, army barracks, monasteries, synagogues, theaters, cinemas, cafes, and even prisons’.¹⁰⁸ The struggling local authorities evacuated refugees to other parts of the empire, in time the preliminary ‘sympathy and hospitality began to dwindle, because it became apparent that most refugees had no money to pay for accommodation or food’.¹⁰⁹

Armenian refugees who survived the annihilations perpetrated by Turkish troops were dispersed throughout the Middle East and Russia.¹¹⁰ Other Armenians, who were already in the Russian Empire and elsewhere, provided them with food and medicine, took care of orphans and provided an opportunity for basic schooling.¹¹¹ Organisations such as Near East Relief, which funded American missionaries and nurses in Syria, Palestine, and Turkey itself, also provided support for the Armenian refugees because they sympathised with them and saw them as innocent Christian victims.¹¹² The majority of Armenians migrated to Western Europe or to North America.¹¹³

The western boundary between Poland and Russia’s was wracked by war. The Russian situation was compounded by a civil war which generated additional flight of its inhabitants, comprising the mass departure of Russians who rebelled against the ‘Bolshevik regime’.¹¹⁴ The war between Soviet Russia and Poland which terminated in 1921 inflicted additional anguish and displacement.¹¹⁵ The Communist regime caused further unrest and upheaval during the Russian Revolution of 1917 and the civil war which took place between 1917-1921. These two conflicts

¹⁰⁶ Gatrell A Whole Empire Walking (n 104 above).

¹⁰⁷ Gatrell Europe on the move (n 81 above).

¹⁰⁸ Gatrell Europe on the move (n 81 above).

¹⁰⁹ Gatrell Europe on the move (n 81 above).

¹¹⁰ Gatrell A Whole Empire Walking (n 104 above) 156.

¹¹¹ Gatrell A Whole Empire Walking (n 104 above) 156.

¹¹² Gatrell A Whole Empire Walking (n 104 above) 156.

¹¹³ Gatrell A Whole Empire Walking (n 104 above) 156.

¹¹⁴ Gatrell A Whole Empire Walking (n 104 above) 156.

¹¹⁵ Gatrell A Whole Empire Walking (n 104 above) 156.

led to the expulsion of entire communities from their homes, who sought refuge in adjoining countries, and produced over 1.5 million refugees.¹¹⁶

Keegan states ‘after four years of brutal trench warfare regarded as the Napoleonic era strategy of massive frontal attacks’¹¹⁷ that triggered a colossal death toll, the ‘war finally ended on November 11, 1918’¹¹⁸ with the signing of the treaty of Versailles.¹¹⁹ A treaty that was meant to produce peace and stability in Europe became a stepping stone for another war because the terms of the armistice were punitive¹²⁰ and the ‘Carthaginian peace dictated by the allies at Versailles sowed the seeds that brought about the Second World War two decades later’.¹²¹

After World War I there was agitation for freedom in the Ukraine from 1919 - 1939.¹²² The Soviet invasion, occupation and subsequent establishment of the Ukrainian Soviet Socialist Republic in 1919 created social and economic turmoil in the region, which led to the flight of thousands of Ukrainians to Canada seeking refuge from religious and political oppression and to escape the effects of the Russian civil war.¹²³

Holborn adds that the twentieth century marked a massively forced voyage of refugees in Europe caused by ‘war, the breakup of empires, the impact of violent nationalism, and the arbitrary actions of dictatorial regimes’.¹²⁴ Earlier in the century political turbulence in the Balkans and Asia Minor forced ‘hundreds of thousands of people’, specifically Greeks, Bulgars, Serbs,

¹¹⁶ Chelule (n 37 above) 84.

¹¹⁷ The Learning Network, ‘Nov. 11, 1918 World War I Ends, the New York Times, 11 (2011) http://learning.blogs.nytimes.com/2011/11/11/nov-11-1918-world-war-i-end-s/?_r=0 (accessed 12 December 2016); see also Eye Witness to History, ‘Armistice - The End of World War I, 1918’ Eye witness to history (2004) <http://www.eyewitnesstohistory.com> (accessed 12 December 2016); see also J Keegan, *The First World War*, 49 London: Hutchinson (1999) 175-180,182; see also MC Bassiouni, ‘World War I: The War to end all wars and the birth of a handicapped international criminal justice system’ (2002) *Denver Journal of International Law and Policy*, 246.

¹¹⁸ As above.

¹¹⁹ Americanization Department ‘America - great crises in our history told by its makers’ Veterans of Foreign Wars of the United States (1925) 158-165; see also Bassiouni (n 117above) 247; see also D Irving *Hitler’s War* (1990) 295.

¹²⁰ CP Vincent, *The politics of hunger: The allied blockade of Germany, 1915-1919* (1985) 162-165, see also Bassiouni (n 114 above) 247.

¹²¹ L Degrelle, *Hitler: born at Versailles*, Institute for Historical Review, (1987) 532; see also Bassiouni (n 117 above) 247; see also Vincent (n 120 above) 162-165; see also Keegan (n117) 3; see also Irving (n 119 above) 234 -235.

¹²² Government of Canada (n 52 above).

¹²³ Government of Canada (n 52 above).

¹²⁴ Holborn (1988) (n 36 above).

Armenians, and Turks to migrate from one country to another, climaxing in ‘large exchanges of populations’.¹²⁵

30 000 Assyrians hostile to the Turks fled to the Caucasus, Greece, Iraq and Syria after the ruin of the Russian Empire in 1917.¹²⁶ Armenians in Asia Minor escaped torture and carnage after the defeat of ‘the Ottoman Empire and the rise of Turkish nationalism’.¹²⁷ Other groups of Armenian refugees escaped to the Middle East, the Balkans and European countries; in 1923 were approximately 320 000 Armenian refugees.¹²⁸

In Russia an estimated 1.5 million citizens were recorded to have been ‘dispersed and left stranded in north, central, and southern Europe and in the Far East’ because of the Bolshevik Revolution of November 1917, the flight of the anti-Bolshevik armies in European Russia in 1919 - 1920, the famine of 1921 and the collapse of White Russian resistance in Siberian Russia in 1922.¹²⁹

In 1932 a ‘massive and devastating famine in Eastern Europe, called the ‘Holodomor’, forced, even more, Ukrainians to seek the safety and prosperity of the Canadian Prairies’.¹³⁰ The movement of refugees was escalated by those escaping tyranny in Spain, Germany, and Italy.¹³¹ Spanish refugees who sought refuge in France numbered about 140 000 between 1937 and 1939, where they remained until the cessation of the Spanish civil war. Another group, majorly children, were evacuated to Great Britain, Belgium, Mexico and the Soviet Union; between 40 000 and 50 000 fled to North Africa.¹³²

The years between 1933 and the beginning of World War II witnessed a flight of over a million refugees, the majority of whom were Jews, from Germany, to Western Europe and over seas.¹³³

¹²⁵ Holborn (1988) (n 36 above) see also JH Simpson, *The refugee problem: report of a survey* (1939a) 11- 63.

¹²⁶ Simpson (1939a) (n 125 above) 13.

¹²⁷ Simpson (1939a) (n 125 above) 13.

¹²⁸ Simpson (1939a) (n 125 above) 13.

¹²⁹ Simpson (1939a) (n 125 above) 62 - 125; see also EM Kulischer, *The displacement of population in Europe*, studies and reports, series O, No. 8. Montreal: International Labour Office (1943) 39.

¹³⁰ Government of Canada (n 52 above).

¹³¹ Holborn (1988) (n 36 above).

¹³² JH Simpson, *Refugees: A review of the situation since September 1938* (1939b) 58 - 63.

¹³³ As above 58 - 63.

Nonetheless, close to 700 000 waited in territories consequently occupied by Germany and its allies.¹³⁴ The majority of those who escaped from Italian autocracy, numbering 65 000 - 70 000 in 1938, mostly migrated to North Africa.¹³⁵

4.3 World War II

According to Vincent this conflict was conceived when the armistice to end the First World War was signed and the Treaty of Versailles¹³⁶ was dictated to Germany.¹³⁷ 'The Treaty of Versailles forced upon Germany, draconian reparation measures which they were forced to deliver'.¹³⁸ The Germans concluded that the peace agreement was meant to loot and disarticulate Germany and take away all their means of livelihood.¹³⁹ Thus in 1939 Germany declared war.¹⁴⁰ Hitler had brought about World War II and all its related tragedies; 'the most awful disaster was the Jewish Holocaust'.¹⁴¹

The Second World War that ensued from September 1st, 1939-September 2nd, 1945¹⁴² involved virtually every part of the world'.¹⁴³ The frontline countries engaged in the war were the 'Axis Powers', namely 'Germany, Italy and Japan and the Allies, France, Great Britain, the United States, the Soviet Union and, to a lesser extent, China'.¹⁴⁴

¹³⁴ Holborn (1988) (n 36 above).

¹³⁵ Simpson (1939a) (n 125 above) 117 - 125.

¹³⁶ Treaty of Peace with Germany (Treaty of Versailles) Reparation, part VIII sections I and II, Paris Peace Conference, XIII) 55, 740, 743; Senate document 51, 66th Congress, 1st session (1920).

¹³⁷ Vincent (n 117 above) 162 - 165; see also Bassiouni (n 114 above) 247.

¹³⁸ Bassiouni (n 114 above) 247, 248; see also Degrelle (n121 above) 509, 511- 512, 528; see also US Department of State and Myers, *The Treaty of Versailles and after: Annotations of the text of the Treaty* (1944) 433, 490 - 499, 508 - 515.

¹³⁹ Bassiouni (n 114 above) 248; see also Degrelle (n 121 above) 528.

¹⁴⁰ Irving (119 above) 234 - 235, see also A Hitler, *Mein Kampf*, translated into English by James Murphy, Mckays of Chatham PL (1939) 347 - 348; see also A Hitler, *Mein Kampf*, Translated into English by Ralph Manheim, Mckays of Chatham PL (1969) 576 - 577.

¹⁴¹ Bassiouni (n 114 above) 248; see also H Kelsen 'The legal status of Germany according to the declaration of Berlin' (1945) 39 *American Journal of International Law* 518, 520; see also MC Bassiouni, 'International law and the holocaust' (1979) 9 *California Western International Law Journal* 202; see also Bassiouni (n114) 248.

¹⁴² JG Royde - Smith, *World War II 1939 to 1935*, Encyclopaedia Britannica (2016) <http://0-global.britannica.com.innopac.up.ac.za/event/World-War-II>, (accessed 2 June 2016).

¹⁴³ As above.

¹⁴⁴ Royde-Smith (n 142 above).

Holborn describes the Second World War displacement as ‘the most formidable displacement of the population ever experienced’.¹⁴⁵ Initially, the Germans moved within ‘Greater Germany’ in large numbers, then ethnic Germans were relocated into Germany, primarily from Eastern Europe.¹⁴⁶ The next displacement was of non-Germans, who were banished from the conquered nations. This relocation was based on ‘agreements or treaties for the transfer and exchange of populations’.¹⁴⁷ Those dispatched to ‘Greater Germany’ as prisoners of war or forced labourers’ were mostly Jews, who were expelled from the conquered countries and sent to concentration camps.¹⁴⁸ The people displaced in Europe by May 1945 comprised forced labourers and the Germans who fled before the advancing Soviet armies, but not counting non-Germans, numbered about 40.5 million.¹⁴⁹

Throughout World War II, Eastern European countries had a displacement of approximately 1.6 million people from 1939 - 1945 who declined repatriation after World War II.¹⁵⁰ The earliest main post-war migration of refugees from eastern Europe was because of the communist coup in Czechoslovakia in February 1948 when 60 000 Czech refugees ran away to the western zones in Germany and Austria.¹⁵¹ When the Hungarian revolution commenced in October 1956, more than 200 000 Hungarian refugees were documented to have fled to Austria (180 000) and Yugoslavia (20 000).¹⁵² The flight westward from the communist countries of Eastern Europe continued in trickles, the approximate number of those in this sense is between 12 000 and 15 000 per year by the end of 1964.¹⁵³

As recorded by the ‘U.S. Escapee Program’ as of 1945 - 1966 a total of around 1 270 000 individuals absconded from Eastern to Western European nation states.¹⁵⁴ There is also documentation by West German authorities that there was an identical flight of about 3 735 000

¹⁴⁵ Holborn (1988) (n 36 above).

¹⁴⁶ Holborn (1988) (n 36 above), see also Kulischer (n 129 above) 25.

¹⁴⁷ Holborn (1988) (n 36 above).

¹⁴⁸ Holborn (1988) (n 36 above).

¹⁴⁹ EM Kulischer, *Europe on the Move: War and population changes, 1917 - 1947* (1948) 255 - 273.

¹⁵⁰ Holborn (1988) (n 36 above) note that these figures are based principally on those compiled by the occupation authorities in post-war Germany and by the International Refugee Organization.

¹⁵¹ Holborn (1988) (n 36 above).

¹⁵² Holborn (1988) (n 36 above).

¹⁵³ Holborn (1988) (n 36 above).

¹⁵⁴ Holborn (1988) (n 36 above).

German refugees from East Berlin and other parts of East Germany into West Germany. An equivalent total number of people escaped from Communist China to other Asian countries.¹⁵⁵

In addition, Holborn states that the second half of the twentieth century witnessed a mass exodus of people from Asia.¹⁵⁶ They were mostly farmers who fled ‘undeveloped and often politically unstable countries’ and in effect were exposed to further widespread destitution and misery.¹⁵⁷ There was a migration of about 15 million people who crossed the newly partitioned border of ‘British India’ in 1947 into the two sovereign states of India and Pakistan. Holborn opines that this is the greatest mass migration ever recorded.¹⁵⁸ A programme to cater for about 8 million Hindu refugees who crossed from Pakistan to India was established in 1954; in the same vein the Pakistani government took care of Muslims who moved from India to Pakistan.¹⁵⁹

The war between India and Pakistan over Kashmir generated another forced migration in August 1965.¹⁶⁰ The occupation of Korea by the US and Soviet militaries¹⁶¹ led to hostilities that gave rise to the displacement of millions of people who became vagrants across the country.¹⁶²

Another movement was of ‘Vietnamese’ as ‘42 000 semi - nomadic tribesmen’ fled to South Vietnam.¹⁶³ The refugees travelled across difficult terrain harassed by Vietminh forces. Civilian planes were employed to fly refugees to the south, while a U.S. Navy task force conveyed

¹⁵⁵ Holborn (1988) (n 36 above), see also LW Holborn, *The International Refugee Organization, a Specialized Agency of the United Nations: Its History and Work*, 1946 - 1952, (1956) 15; see also International Labour Office, *International Migration, 1945 - 1957* Geneva: The Office (1959) chapter 1, 201; see also JR McDonald ‘The repatriation of French Algerians, 1962-1963’ *International Migration* (1965) 46 -155; see also Holborn (1988) (n29 above); see also R F Smith, ‘Refugees American academy of political and social science’ (1966) *Annals* 47.

¹⁵⁶ Holborn (1988) (n 36 above).

¹⁵⁷ Holborn (1988) (n 36 above).

¹⁵⁸ Holborn (1988) (n 36 above).

¹⁵⁹ U.S. Congress, House, Committee on the Judiciary, ‘Refugees in India and Pakistan’, report prepared by Emanuel Celler. 83d Congress (1954); see also International Labour Office (n 155 above) 108 - 120; see also Holborn (1988) (n 36 above).

¹⁶⁰ Holborn (1988) (n 36 above).

¹⁶¹ Holborn (1988) (n 36 above).

¹⁶² Holborn (1988) (n 36 above); see also FJ Cohley ‘Vietnam Since Geneva’ (1958/ 1959) *Thought* 526.

¹⁶³ As above. 528.

other refugees by sea from embarkation points along the coast.¹⁶⁴ These groups received massive assistance from the Vietnamese Refugee Commission and the Catholic Committee on Resettlement of Refugees; the governments of the United States, France, the Philippines, New Zealand and Australia, UNICEF, WHO and various private charitable organisations also provided assistance.¹⁶⁵ Schechtman observes that about 315 refugee villages had been created for the new refugees on emergent agrarian lands by 1960.¹⁶⁶ After escalation of the war in 1954 there was a further massive exodus of refugees from insecure to more secure areas for safety and protection due to ‘panic flight from areas of military operation; escape from Vietcong terrorism, extortion, and recruitment; and movement away from communist controlled areas, both at the urging of religious leaders and as a result of government resettlement programs’.¹⁶⁷ Some refugees fled their homes as a result of typhoons and floods. The International Development (AID) documented that there were approximate ‘1 001 808 refugees in South Vietnam as at 31 January 1966’.¹⁶⁸

In another report of the same period the Office for Refugees and Migration Affairs of the US Department of State approximated the number of South Vietnamese refugees in South Vietnam as at 1961 to be 1.4 million. Laotian refugees who fled communist control were about 350 000 between 1960 - 1965.¹⁶⁹ Refugees were resettled by the Government of the Republic of Vietnam, supported by AID and 24 other American charitable organisations.¹⁷⁰

In 1938 the attack on China by Japanese troops led to an exodus of refugee from the southern part of China.¹⁷¹ In addition, the protracted Chinese civil war which led to the formation of the ‘Chinese communist government in 1949 and the relocation of the Nationalist government to

¹⁶⁴ RW Lindholm (ed.) 1959 Vietnam: The First Five Years. East Lansing: (1959) 63-76.

¹⁶⁵ Cohley (n 162 above) 528.

¹⁶⁶ JB Schechtman, *The Refugee in the World: Displacement and Integration* (1963) 168.

¹⁶⁷ Holborn (1988) (n 36 above).

¹⁶⁸ U.S. Congress, House, Committee on the Judiciary (n 160 above).

¹⁶⁹ Holborn (1988) (n 36 above).

¹⁷⁰ U.S. Congress, Senate, ‘Committee on the Judiciary, Subcommittee to Investigate Problems Connected with Refugees and Escapees’ (1965a) *Refugee Problems in South Vietnam and Laos: Hearings*. 89th Congress, 1st Session, Washington: Government printing office; see also U.S. Congress, Senate, Committee on the Judiciary, Subcommittee to Investigate Problems Connected with Refugees and Escapees (1966a) *U.S. Apparatus of Assistance to Refugees Throughout the World*. 89th Congress, 2d Session. Washington: Government printing office.

¹⁷¹ Holborn (1988) (n 36 above).

Formosa' led to the mass production of refugees.¹⁷² Schechtman records that about 337 000 people escaped from China to east and southeast of Asia and were subjected to various hazards.¹⁷³ 14 000 refugees, who were of similar cultural and religious background to Laotians, were integrated into the northern part of Laos by 1960.¹⁷⁴ Over 1 million refugees from China were among the 3.2 million refugees in Hong Kong in 1962.¹⁷⁵ It is recorded that beginning 1948-1966 approximately 40 000 European refugees migrated from China to Hong Kong and the Philippines.¹⁷⁶

In addition to the refugees who fled across the sea¹⁷⁷ it is documented that an extra 200 000 refugees joined the millions of refugees already in Hong Kong by 1962.¹⁷⁸ The total estimated number of Chinese refugees who were forced to migrate to Hong Kong and Macao from China between 1948-1966 is 2 080 000 as documented by the 'British government in Hong Kong and the joint committee consisting of representatives of the UN High Commissioner for Refugees, the International Committee for European Migration, and the U.S. Escapee Program'.¹⁷⁹

There was also a massive forced migration of thousands of 'Tibetans over the Himalayas' that was generated by the declaration of Chinese communist rule over Tibet in 1950 and the revolt in Lhasa.¹⁸⁰ It is recorded that an estimated 43 000 refugees fled to India, about 7 000 were resettled by the Indian government and about 28 000 did self-settlement. The remaining 8 000 refugees are believed to have migrated elsewhere.¹⁸¹ About 7 000 fled to Nepal where the responsibility for the resettlement of the refugees was placed on the shoulders of the Swiss Government and the Swiss Red Cross by a bilateral agreement between the Government of Nepal

¹⁷² Holborn (1988) (n 36 above).

¹⁷³ Schechtman (n166 above) 310-322.

¹⁷⁴ As above.

¹⁷⁵ Schechtman (n166 above) 312; see also United Nations, Hong Kong Refugees Survey Mission 'The Problem of Chinese Refugees in Hong Kong' (1955), 955. Note that the real figures are difficult to determine because there were other refugees who were former Hong Kong residents returning after the war.

¹⁷⁶ Holborn (1988) (n 36 above).

¹⁷⁷ Holborn (1988) (n 36 above).

¹⁷⁸ Holborn (1988) (n 36 above).

¹⁷⁹ Holborn (1988) (n 36 above); see also U.S. Congress, House, Committee on the Judiciary (1966a) (n170 above) 11-13; see also International Labour Office (n 152 above) 128-129.

¹⁸⁰ Holborn (1988) (n 36 above).

¹⁸¹ Holborn (1988) (n 36 above).

and Switzerland.¹⁸² The US government and private individuals were responsible for emergency relief and the International Committee of the Red Cross (ICRC) assisted with vocational training and the resettlement of Tibetan refugees with aim of establishing self-reliance.¹⁸³ There were also 3 000 refugees in Bhutan and another 3 000 in Sikken who migrated from Tibet.¹⁸⁴

With reference to Palestinian Arab refugees Holborn posits that approximately 500 000 people fled their houses because of hostilities between Arabs and Israelis that emerged from the UN demarcation of Palestine commencing 1948-1949.¹⁸⁵ Those who escaped were mainly ‘Arabs, Armenians, Greeks, and non-Jewish nationals of other countries’. It is recorded that as at 30th June 1966 about 1 317 000 refugees were registered with the ‘United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)’, 707 000 in Jordan, 307 000 in the Gaza Strip, 164 000 in Lebanon, and 140 000 in Syria.¹⁸⁶ About 70% of the refugees were offered basic life necessities, about 40% had been provided with shelters in 54 camps and others secured personal houses.¹⁸⁷

It is recorded that over ‘228 000 children were schooling with about 168 000 in 406 UNRWA-UNESCO schools’.¹⁸⁸ The UNRWA also established vocational institutions for the training of teachers, operated 88 health clinics to deliver preventive and curative health care to the refugees. In addition, food supplements and milk were made available to about 250 000 refugee children.¹⁸⁹

The persecution of the Jews by the German National Socialist government prompted the establishment of the State of Israel in 1948.¹⁹⁰ The Israeli refugees who were resettled in the new state had migrated from central and eastern Europe, North Africa, and the Middle East and

¹⁸² International Council of Voluntary Agencies (ICVA) ‘The refugee problem since 1955’ by Jacques Vernant, ICVA General Conference Document No. 20F. Unpublished manuscript, ICVA, Geneva, (1965) 23.

¹⁸³ Holborn (1988) (n 36 above).

¹⁸⁴ Holborn (1988) (n 36 above).

¹⁸⁵ Holborn (1988) (n 36 above).

¹⁸⁶ United Nations, Relief and Works Agency (UNRWA) for Palestine Refugees in the Near East, *UNRWA 1966 and the Palestine Refugees: Facts and figures* (1966) 2A43E4D980F2C20685256A48004D0424 (accessed 2 June 2016).

¹⁸⁷ Holborn (1988) (n 36 above).

¹⁸⁸ UNRWA (n186 above) see also Holborn (1988) (n 36 above).

¹⁸⁹ Holborn (1988) (n 36 above).

¹⁹⁰ Holborn (1988) (n 36 above).

there were 1 209 282 immigrants by 1964.¹⁹¹ Their resettlement was made possible with the assistance of the Jewish Agency for Israel, the Joint Distribution Committee, and the United Jewish Appeal, as well as the Intergovernmental Committee for European Migration and the United Nations High Commissioner for Refugees.¹⁹²

The western hemisphere has a history of political refugees although the number of migrants is not so great. The majority are wealthy politicians in exile who sought transitory asylum.¹⁹³ On the other hand, other refugees escaped political persecution in their countries and were vagrants with 'little' or no resources for their livelihood. This situation created repeated tension 'between their countries of origin and the countries of asylum'.¹⁹⁴ Holborn maintains that establishing the figures for refugees in this region is tricky because most of the forced migration is intricate and secretive.¹⁹⁵

Skilled and professional Haitians have sought refuge in the Dominican Republic, the United States and several Caribbean countries.¹⁹⁶ Another group of refugees are Bolivian workers who fled the persecution of their government. Paraguay refugees at that time were contenders against the current government.¹⁹⁷ Some refugees fled 'the Dominican Republic after the fall of the Bosch government in 1963 and the revolution of 1965' but are poorly documented.¹⁹⁸

The Cuban refugee migration has been described as one of the largest and most challenging flight of people in the western hemisphere. A revolution in 1959 led to migration to Latin America and the United States.¹⁹⁹ It is documented that the total number of people involved was about 350 000 by October 1963,²⁰⁰ about 275 000 entered the US and others went to Spain,

¹⁹¹ Holborn (1988) (n 36 above).

¹⁹² Holborn (1988) (n 36 above).

¹⁹³ Holborn (1988) (n 36 above).

¹⁹⁴ Inter-American Commission on Human Rights, *Draft Report on the Political Refugees in America*, prepared by the Secretariat of the Commission. OEA/Ser. L/V/II. II, Doc. 7 Rev. Washington: Pan American Union (1965); see also Holborn (1988) (n 36 above).

¹⁹⁵ Holborn (1988) (n 36 above).

¹⁹⁶ Holborn (1988) (n 36 above).

¹⁹⁷ Holborn (1988) (n 36 above).

¹⁹⁸ Holborn (1988) (n 36 above).

¹⁹⁹ Holborn (1988) (n 36 above).

²⁰⁰ Holborn (1988) (n 36 above).

Puerto Rico and various Latin American countries.²⁰¹ Many were protected by the UNHCR.²⁰² The US government established a resettlement policy to accommodate as many refugees as possible outside the main entrance of Miami.²⁰³ The refugees also received help from voluntary resettlement agencies acting on behalf of the US government.²⁰⁴ There was a financial assistance programme, coupled with educational, retraining and vocational programmes managed by ‘the United States federal government, through the Department of Health, Education, and Welfare’.²⁰⁵

Holborn declares that of the 185 000 refugees who were documented in the Cuban refugee centre in Miami about 100 000 were relocated to self-supporting opportunities in 3 000 communities throughout the 50 states and Puerto Rico as at 1st December 1965.²⁰⁶ Furthermore, because of the treaty between the Cuban and US governments for the reunification of refugee families another mass exodus of Cuban refugees to the US started in December 1965.²⁰⁷ The pact stipulated that around 4 000 Cubans should be flown to the United States every month and by 9th December 1966 the overall figure of refugees who had arrived and were resettled was 50 051, i.e. 76% of the refugee population.²⁰⁸ These refugees initially were granted parole status that was inimical to their economic integration and later was converted to permanent residence by the US Congress in October 1966.²⁰⁹

Prior to the end of the World War a large population of Germans in East Prussia fled westwards and thousands were drowned in an overloaded ship that sank in the Baltic sea.²¹⁰ An additional estimated 60 000 Germans escaped from Hungary, some travelling by boat up the Danube.²¹¹ An example of the suffering that was endured is the total depletion of the food supply in the city of Königsberg by 1945 and the resort to the consumption of offal and human flesh sold in

²⁰¹ Holborn (1988) (n 36 above).

²⁰² Holborn (1988) (n 36 above).

²⁰³ Holborn (1988) (n 36 above).

²⁰⁴ Holborn (1988) (n 36 above).

²⁰⁵ Holborn (1988) (n 36 above).

²⁰⁶ Holborn (1988) (n 36 above).

²⁰⁷ Holborn (1988) (n 36 above).

²⁰⁸ Holborn (1988) (n 36 above).

²⁰⁹ Holborn (1988) (n 36 above).

²¹⁰ B Wasserstein, ‘BBC history World Wars: European refugee movements after World War Two’ (2011) http://www.bbc.co.uk/history/worldwars/wwtwo/refugees_01.shtml, (accessed 1 June 2015).

²¹¹ As above.

the form of meatballs.²¹² Another expulsion of Germans was from Romania in the Autumn of 1944 when tens of thousands of Swabian Germans of the Banat²¹³ and more from the ancient Saxon communities of Transylvania, long established outposts of German farmers and business men, returned to Germany.²¹⁴

The BBC reported that ‘the end of the war in Europe was only the beginning of the misery for millions of people left homeless by the fighting, released from captivity or expelled as an act of European history’.²¹⁵ It is recorded that millions of Germans were banished from Eastern Europe. ‘Hundreds of thousands of Jews, survivors of the genocide perpetrated by the Nazis, sought secure homes beyond their native lands’. Refugees in Eastern Europe ran away from the new Communist governments.²¹⁶

At the Potsdam Conference in July 1945 the ‘British, American and Russian leaders agreed to ... recognize that the transfer to Germany of German populations ... remaining in Poland, Czechoslovakia and Hungary will have to be undertaken’.²¹⁷ It also stated that ‘... any transfers that take place should be effected in an orderly and humane manner’.²¹⁸ Contrary to the agreement, it is recorded that the expulsion was effected ‘in a ruthless and often brutal manner’.²¹⁹ The expulsion included Germans who migrated from Eastern Europe who had settled in the German captured regions as a division of the extended programme for German control of Eastern Europe.²²⁰ However, many people who were banished came from lineages whose ancestors had been established in the eastern Commonwealth for generations and who did not know an alternative place as home.²²¹

²¹² Wasserstein (n 210 above).

²¹³ Wasserstein (n 210 above).

²¹⁴ Wasserstein (n 210 above).

²¹⁵ Wasserstein (n 210 above).

²¹⁶ Wasserstein (n 210 above).

²¹⁷ Wasserstein (n 210 above).

²¹⁸ Wasserstein (n 210 above).

²¹⁹ Wasserstein (n 210 above).

²²⁰ Wasserstein (n 210 above).

²²¹ Wasserstein (n 210 above).

In the 1970s, particularly between 1970 and 1973, there was a military coup in Chile after Salvadore Allende tried to initiate a socialist system.²²² It is recorded that about 13 000 Chileans flew to Canada in order to avoid ‘persecution and the authoritarian rule perpetrated by General Pinochet’.²²³ It is documented that by 1978 about ‘2.5% of Chilean’ had migrated to Canada.

Between 1955 and 1971 there was hostility between West and East Pakistan, because of disagreements over political representation and the economic system.²²⁴ It is recorded that ‘after a sequence of disputed elections, the Bangladesh Liberation War broke out in 1971 between the two states’.²²⁵ West Pakistan troops endeavoured to subdue East Pakistan by controlling the towns, but because of a mass opposition the West Pakistani army perpetrated a sequence of exterminations and human rights atrocities.²²⁶ These measures led to a mass movement of Bengalis to Canada in their hundreds, despite the independence obtained by East Pakistan in 1971 leading to the establishment of the new state of Bangladesh.²²⁷ Fear of persecution and economic instability after the war meant that Pakistanis in their thousands relocated to Canada between 1971 and 1986.²²⁸

4.4 The Syrian Crises

The Syrian civil war has been described as the worst armed conflict of the 21st century.²²⁹ It began as a peaceful anti-government protest in 2011. It is recorded that the war has claimed over ‘460 000’ lives,²³⁰ millions have been injured and more than 12 million people, the country’s pre-war population, have been rendered homeless.²³¹ Refugees spread all over the world,

²²² Government of Canada (n 52 above).

²²³ Government of Canada (n 52 above).

²²⁴ Government of Canada (n 52 above).

²²⁵ Government of Canada (n 52 above).

²²⁶ Government of Canada (n 52 above).

²²⁷ Government of Canada (n 52 above).

²²⁸ Government of Canada (n 52 above).

²²⁹ Al Jazeera ‘Syria civil war explained from the beginning’ (2017) <http://www.aljazeera.com/news/2016/05/syria-civil-war-explained-160505084119966.html> (29 June 2017).

²³⁰ As above; see also BBC ‘Syria: The story of the conflict’ (2016) <http://www.bbc.com/news/worldmiddleeast26116868> (29 June 2017).

²³¹ As above.

especially to Lebanon, Jordan, and Turkey.²³² A UN commission of inquiry revealed that both the government forces and the rebels have committed war crimes, murder, torture, rape and enforced disappearances.²³³ It is documented that Lebanon plays host to 1 017 433 refugees and Jordan 655 404.²³⁴ Turkey has 2 764 500 and Iran 228 894 refugees as at 9 March 2017.²³⁵ Syrian women in refugee camps experience all forms of sexual violence in Jordanian refugee camps, including rape and child marriage.²³⁶

4.5 Refugee Crises in Africa

Holborn opines that after the World Wars and the realisation of freedom by more than ‘35’ African countries from 1951-1966 the number of wars in Africa rose which was complemented by a multifaceted movement and displacement of communities as a consequence of a complex chain of events.²³⁷ There were inherent ‘tribal and ethnic rivalries in many of the newly independent countries’ and restrictive conditions under continuing white minority rule resulted in flight to adjoining territories, which combined with a ‘long-existing tendency for economic migration’.²³⁸

Holborn observes that the statistic of the real number of refugees is not exact as the dynamic of forced migration in Africa demonstrates a diversity of causes such as poverty, lack of development in the countries of origin and asylum as well as complex motivation leading to these movements.²³⁹ Also affecting the statistics of African refugees is the variety of attempted so-

²³² BBC (n230 above).

²³³ Al Jazeera (n 229 above); see also BBC (n230 above).

²³⁴ Al Jazeera (n 229 above); see also BBC (n230 above).

²³⁵ M Corps, ‘Quick facts: What you need to know about the Syria crisis (2017) <https://www.mercycorps.org/articles/iraqjordanlebanonsyriaturkey/quickfactswhatyouneedknowaboutsyrriacrisis> (accessed 29 June 2017).

²³⁶ P Greenwood, ‘Rape and domestic violence follow Syrian women into refugee camps’ (2013) <https://www.theguardian.com/world/2013/jul/25/rapeviolencesyriawomenrefugeecamp> (accessed 29 June 2017).

²³⁷ Holborn (1988) (n 36 above).

²³⁸ Holborn (1988) (n 36 above).

²³⁹ Holborn (1988) (n 36 above).

lutions to resolve the problem, ranging from repatriation in the case of Algerians and the Congolese to attempts at local integration, especially in the case of irredentist movements associated with Somalians.²⁴⁰

Holborn asserts that an approximate number of 650 000 were in adjacent regions at the end of 1966.²⁴¹ In 1966 over 300 000 refugees escaped to the Republic of the Congo, a minimum of 250 000 arrived in Angola and 25 000 came from Rwanda. In addition, 40 000 migrated from the Sudan and the rest came from many other countries.²⁴² In response the UNHCR intervened so as to assist in the coordination of the care of the refugees ‘between the Congolese authorities, the UN Organization in the Congo, the International Red Cross and a number of voluntary agencies’.²⁴³

At the end of 1966 Burundi received approximately 78 000 refugees from Rwanda and the Congo, and the Central African Republic sheltered over 6 000 Congolese and 25 000 Sudanese. By the end of 1965 around 2 000 Burundi had crossed into Rwanda.²⁴⁴ Between 1964 and 1965 approximately 50 000 Guinean refugees migrated to Senegal and received humanitarian aid from the Senegalese government and the United Nations in collaboration with the United States and France.²⁴⁵

Tanzania played host to an estimated number of 30 000 refugees, in addition to 12 000 from Mozambique and another 12 000 from Rwanda who had been refugees in the Congo.²⁴⁶ In December 1965 Zambia asked for emergency aid for 5 000 refugees whom they sheltered and

²⁴⁰ Holborn (1988) (n 36 above).

²⁴¹ Holborn (1988) (n 36 above).

²⁴² Holborn (1988) (n 36 above); see also UNRWA (n 186 above); see also U.S. Congress, Senate (1966a) (n170 above) 98.

²⁴³ Holborn (1988) (n 36 above); see also UNRWA (n 186 above); see also U.S. Congress, Senate (1966a) (n170 above) 98.

²⁴⁴ Holborn (1988) (n 36 above); see also UNRWA (n 186 above); see also U.S. Congress, Senate (1966a) (n 170 above) 98.

²⁴⁵ Holborn (1988) (n 36 above); see also UNRWA (n 186 above); see also U.S. Congress, Senate (1966a) (n 170 above) 98.

²⁴⁶ Holborn (1988) (n 36 above); see also UNRWA (n 186 above); see also U.S. Congress, Senate (1966a) (n 170 above) 98.

this number increased by 1 000 Angolan refugees at the end of May 1966.²⁴⁷ Uganda accommodated refugees from Rwanda, the Sudan and the Congo who arrived during 1965- 1966; the approximate number by the middle of 1966 was 140 000.²⁴⁸

In addition, an uncertain number of refugees from sundry locations sought asylum in other African countries, including Kenya, Chad, and Ethiopia, where they were well-received by the governments of those countries, which established emergency and resettlement programmes for the refugees in collaboration with UNHCR.²⁴⁹ The policies of the Nationalist government in South Africa led to a mass exodus of its citizens who sought refuge in neighboring countries, especially in Tanzania. Similarly, refugees left South West Africa and Rhodesia in 1966.²⁵⁰

The above review of African refugees does not take account about 1 million Eastern Nigerians who fled their land of birth following the September 1966 killing of Easterners in the Northern Region.²⁵¹ The Eastern Region government established the Eastern Region Refugee Commission in Enugu, Nigeria in order to manage the influx.²⁵² Since they were citizens of Nigeria and their status the consequence of the civil war in 1967 they did not qualify to receive assistance under international refugee relief programmes and the burden of their resettlement was borne by Nigeria.²⁵³

The latest South Sudan conflict which was the result of large scale violations of human rights, drought and famine gave rise to the escape of thousands of individuals from South Sudan, making it the world's major refugee catastrophe.²⁵⁴ The estimated number of refugees who fled

²⁴⁷ Holborn (1988) (n 36 above); see also UNRWA (n 186 above); see also U.S. Congress, Senate (1966a) (n 170 above) 98.

²⁴⁸ Holborn (1988) (n 30 above); see also UNRWA (n 186 above); see also U.S. Congress, Senate (1966a) (n 170 above) 98.

²⁴⁹ Holborn (1988) (n 36 above); see also UNRWA (n 186 above); see also U.S. Congress, Senate (1966a) (n 170 above) 98.

²⁵⁰ Holborn (1988) (n 36 above); see also UNRWA (n 186 above); see also U.S. Congress, Senate (1966a) (n 170 above) 98.

²⁵¹ Holborn (1988) (n 36 above); see also UNRWA (n 186 above); see also U.S. Congress, Senate (1966a) (n 170 above) 98.

²⁵² Holborn (1988) (n 36 above); see also UNRWA (n 186 above); see also U.S. Congress, Senate (1966a) (n 170 above) 98.

²⁵³ Holborn (1988) (n 36 above); see also UNRWA (n 186 above); see also U.S. Congress, Senate (1966a) (n 170 above) 98.

²⁵⁴ B Baloch, Refugee crisis in South Sudan now world's fastest growing, UNHCR (2017) <http://www.unhcr.org/news/latest/2017/3/58cbfa304/refugee-crisis-south-sudan-worlds-fastest-growing.html>

South Sudan as at 17 March 2017 to adjoining countries is 1.6 million against a pre-war population of 11million.²⁵⁵

5 Intervention by the international community

The first effort by the global community to manage the influx of refugee was by the League of Nations (The League) through the establishment in late 1930 of a high commission named after Fridtjof Nansen and known as ‘The Nansen International Office for Refugees’.²⁵⁶ The administrative centre commenced work on 1st April 1931.²⁵⁷ The bureau replaced the initial universal organisation handling refugees, the High Commission for Refugees, which had been created by the League of Nations with Fridtjof Nansen at the head on 27 June 1921.²⁵⁸

In 1923 the initial obligation on the part of the High Commission to shelter Russian refugees was expanded to take in Armenian refugees who had escaped genocide.²⁵⁹ The High Commission delivered substantial aid along with legal and political safeguards for refugees.²⁶⁰ The International Labour Organisation (ILO) took responsibility for the physical needs of the refugees in 1924, but later the duty to provide for the necessities of life reverted to the High Commission.²⁶¹ As the problem of refugees escalated there was a further expansion of the High Commissioner's powers to accommodate Assyria - Chaldean refugees from Turkey.²⁶²

After Nansen died in May 1930 the office of the High Commissioner for Refugees ended and the League of Nation Secretariat took charge of refugee protection. The responsibility to provide for the necessities of life for refugees was entrusted to the Nansen International Office for

(accessed 30 June 2017).

²⁵⁵ As above.

²⁵⁶ FW Haberman (ed.), ‘Nansen International Office for Refugees - History’ The Nobel Foundation, Nobelprize.org. Nobel Media AB 2014, from Nobel Lectures, Peace 1926-1950, (1972) <http://www.nobelprize.org/nobelprizes/peace/laureates/1938/nansen-history.html> (accessed 25 May 2016).

²⁵⁷ As above.

²⁵⁸ Nansen International Office for Refugee, ‘The Nobel Peace Prize 1938’ (2007) <http://www.nobelprize.org/nobelprizes/peace/laureates/1938/nansen-history.html> (accessed 31 May 2016); see also Chelule (n 37 above) 84.

²⁵⁹ As above.

²⁶⁰ Haberman (ed.) (n 255 above).

²⁶¹ Haberman (ed.) (n 255 above).

²⁶² Haberman (ed.) (n 255 above).

Refugees, a self-governing body under the powers of the League.²⁶³ The office was funded by the League with funds declining at the end of its assignment on 31 December 1938. The funds for relief and welfare were now dependent on private donations and derived mainly from the revenue generated from the issuance of the ‘Nansen Certificate’, an auxiliary international passport, and the proceeds from sales of stamps in aid of refugee in France and Norway.²⁶⁴

As well as successes, the Nansen Office was overwhelmed by incapacitating difficulties during the period of its survival, which include a lack of stable and adequate resources, economic recession which diminished refugees’ prospects for jobs, the weakening of the status of the League after the events of 1931 and 1935, the flood of refugees from Germany, Italy, Spain and the restriction of the activities of League.²⁶⁵ Despite the challenges the Nansen Office recorded the following achievements which included the adoption of the Refugee Convention of 1933 by fourteen countries, ‘a modest charter of human rights’.²⁶⁶

In 1933 after the National Socialists took power in Germany the number of refugees rose and led to the establishment of a High Commission for Refugees from Germany by the League of Nation, whose main task was to take responsibility for the problem of German refugees. This Commission’s directive was further extended to accommodate refugees from both Austria and the Sudetenland, and was dissolved on 31 December 1938, concurrently with the Nansen Office.²⁶⁷ Both commissions were disbanded and replaced by the Office of the High Commissioner for Refugees under the protection of the League, with its centre of operations situated in London.²⁶⁸

Other organisations came to the rescue of refugees, particularly around the period of World War II which generated a massive exodus of people, including the United Nations Relief and Rehabilitation Administration (UNRRA) of 1943²⁶⁹ that was established to take responsibility

²⁶³ Haberman (ed.) (n 255 above).

²⁶⁴ Haberman (ed.) (n 255 above).

²⁶⁵ Haberman (ed.) (n 255 above).

²⁶⁶ Haberman (ed.) (n 255 above).

²⁶⁷ Haberman (ed.) (n 255 above).

²⁶⁸ Haberman (ed.) (n 255 above).

²⁶⁹ New World Encyclopaedia Contributors, ‘Refugee’ New World Encyclopaedia, (2015) <http://www.newworldencyclopedia.org/entry/Refugee> (accessed 1 June 2016); see also E Elliott, The United States and forced repatriation of Soviet Citizens, (1973) 88(2) *Political Science Quarterly* 256.

for providing assistance to areas recovered from the Axis power in Europe as well as China. Its mandate included the return of over 7 000 000 refugees to their home country; 1 000 000 of them declined repatriation.²⁷⁰

The UNRRA was also responsible for thousands of former Russian citizens who were deported to the USSR²⁷¹ and 12 000 000 Germans who were expelled from German lands annexed by Poland and the USSR in pre-war eastern Germany after its defeat in World War II at the Potsdam Conference.²⁷² Some were moved to the altered and separate regions of Allied-occupied Germany.²⁷³ From the cessation of World War II until the construction of the Berlin Wall in 1961 more than three million refugees migrated from East to West Germany seeking asylum from Soviet occupation and came under the care of the UNRRA.²⁷⁴

In 1949 the UNRRA closed and its refugee responsibilities were transferred to the International Refugee Organization (IRO), a provisional body under the United Nations, established in 1945 with an obligation to complete the UNRRA's duties of repatriation or resettlement of European refugees²⁷⁵ IRO was dissolved in 1952 after 'resettling about 1 000 000 refugees'.²⁷⁶ The definition of a refugee at this time referred to an individual with either a Nansen passport or a 'Certificate of Eligibility' issued by the International Refugee Organisation.²⁷⁷

In 1949 the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)²⁷⁸ was established as a temporary body to cater for Palestinian Arab Refugees. Their obligation was to reintegrate refugees, either by repatriation or by resettlement. Since the obligation was far from being realised their duty was extended from the 1st of May 1950 to 31st December of 1965.²⁷⁹ In 1951 the United Nations Convention Relating to the Status of Refugees was produced.²⁸⁰ This convention defined a refugee and stated the relationship between a

²⁷⁰ As above.

²⁷¹ New World Encyclopaedia Contributors (n 268 above).

²⁷² New World Encyclopaedia Contributors (n 268 above).

²⁷³ New World Encyclopaedia Contributors (n 268 above).

²⁷⁴ New World Encyclopaedia Contributors (n 268 above).

²⁷⁵ New World Encyclopaedia Contributors (n 268 above).

²⁷⁶ New World Encyclopaedia Contributors (n 268 above).

²⁷⁷ New World Encyclopaedia Contributors (n 268 above).

²⁷⁸ Holborn (1988) (n 36 above).

²⁷⁹ Holborn (1988) (n 36 above).

²⁸⁰ Government of Canada (n 52 above).

refugee and a host state. It came into force in 1954 and its scope covered refugees who were generated by World War II. The ambit of the convention was expanded through a protocol in 1967 to include refugees other than those from the Second World War.²⁸¹

History reveals that some people escaped the status of refugees because the borders of countries were open and there was no restriction on migration. However, others who are citizens or permanent residents of various countries today were refugees. Refugees should be treated with respect and dignity and not as objects of charity because no one knows whose turn it might be to be a refugee.

The problems faced by refugee women can be traced to the diverse and numerous circumstances that led to their forced migration. Typically, forced migration is the result of sudden, life-threatening events such as war or famine,²⁸² discrimination, psychological harassment, physical and sexual violence, targeted murders of families and close political associates, social persecution²⁸³ and human rights violations. It is believed that whereas voluntary migrants usually bring benefit to the receiving country; the arrival of forced migrants in the short term at least creates problems.²⁸⁴ The implication is that from the beginning the arrival of refugees is seen as a problem by receiving states.

6 Factors/causes of refugee production

Forced migration has been attributed to social change.²⁸⁵ According to Wiesner states in the pursuit of their interests do not consider the consequences of their actions, whether it will generate a refugee problem, and they do not care about what becomes of these uprooted persons.²⁸⁶

Refugee problems also arise from aggression and war.²⁸⁷ Drüke structured the circumstances

²⁸¹ Government of Canada (n 52 above).

²⁸² BBC 'Causes and impacts relating to forced and voluntary migration' (2016) <http://www.bbc.co.uk/education/guides/z8g334j/revision/3>, (accessed 1 February 2016).

²⁸³ Refugee Law Project, 'From frying pan to fire: Psychological challenges faced by vulnerable refugee women and girls in Kampala', A qualitative in-depth study report (2014) http://www.refugeelawproject.org/.../From_the_Frying_Pan_into_the_Fire.pdf (accessed 2 February 2016).

²⁸⁴ As above.

²⁸⁵ L Drüke Preventive Action for Refugee Producing Situations (1993) 70.

²⁸⁶ LA Wiesner, Victims and Survivors: displaced persons and other war victims in Vietnam, 1954 -1975, (1988) 598; see also Drüke (n 284 above) 72.

²⁸⁷ D MeirLevi, 'The origins of the refugee problem' (2005) <http://www.aish.com/jw/me/48916622.html> (accessed 2 April 2016).

that lead to the mass production of refugees into two main classes. First, refugees can be generated internally or externally through the actions of those who hold political power over them, and the exercise of authority usually conceals the agenda in political strife, for example, the recent history of Vietnam and Central America falls into this category.²⁸⁸ The second group is the people themselves, who initiate opposition to the policies of their rulers in their quest for social change which may put them at risk of persecution, torture, or even death, as seen in Chile.²⁸⁹ Druke-Bolewski classifies the causes of refugees into the following three models.²⁹⁰

6.1 The Suhrke model

Suhrke's model describes the following categories of conflicts as causes that can generate refugees. She notes that protracted warfare, international wars and certain kinds of ethnic tension tend to produce major outflows, whereas conflicts such as elite rivalry, coups d'état and governmental suppression of critics lead to a trickle of a few, highly-politicised individuals.²⁹¹

6.2 The Beyer Model

Beyer suggests that the following classes of people are of impending humanitarian concern: conventional refugees, victims of civil strife, conscientious objectors, self-exiles, victims of natural disasters, migrants and perhaps persons belonging to governments in exile or liberation movements.²⁹²

6.3 The Rizvi model

Rizvi's model divides the factors into primary factors which consist of well-founded fear of

²⁸⁸ Druke (n 285 above) 72.

²⁸⁹ Druke (n 285 above) 72.

²⁹⁰ L Druke-Bolewski, 'Causes of Refugee problem and the international response' in Nash and Humphrey (eds.) *Human rights and the protection of refugees under international law* (1987) 125-130.

²⁹¹ A Suhrke 'Global Refugee Movements and Strategies of Response' in Kitz (ed.) *U.S. Immigration and refugee policy: Global and domestic issues*, Heath (1983) 157 - 173; see also Druke - Bolewski (n 290 above) 125.

²⁹² G Beyer, *Improving International Response to Humanitarian Situations* (1987) 12-15; See also Druke-Bolewski (n289 above) 125.

being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion as enumerated in the 1951 UN Refugee Convention.²⁹³ Secondary factors include external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality²⁹⁴ Auxiliary factors such as economic, ecological and demographic change.²⁹⁵

7 Effect of refugee problem on females

Women and children are been perceived as being weak and vulnerable, in a time of crisis women and girls are targeted and as a result are vulnerable to all forms of violence, especially sexual violation. This subsection captures the evolution of sexual violence, its dynamic, followed by the factors that predispose female refugees to sexual violation because of the refugee problem.

8 The evolution of sexual violence

This section captures the historical records and reviews a variety of historical sources from various parts of the world in order to offer a survey of views on SV in the past in several societies as a justification for addressing sexual violence against refugees. Although not exhaustive, an overview of the occurrence of sexual violence and how it was addressed is provided.

8.1 Biblical period

It is documented,²⁹⁶ that if a man kidnaps a girl that is a virgin and deflowers her, if he is caught he is liable to pay a fine of ‘fifty shekels of silver’ to her father., The girl automatically

²⁹³ UN refugee Convention (1951) (n 15 above) art 1.

²⁹⁴ OAU refugee Convention (n 25 above) art 1 (2).

²⁹⁵ Druke-Bolewski (n 290 above) 126.

²⁹⁶ Thompson (n 38 above) Deuteronomy 22:28-29,206.

becomes his wife Because ishe has been dihonoured and in this way the man takes responsibility for his action.²⁹⁷ Violation of a virgin in those days was considered to degrade the victim and her father, and for that reason attracted a penalty in the form of a fine and forced marriage. That provision violates the woman's right to the choice of a spouse. The Mishnaic system makes a finer distinction in Ketub 3:4 where it is clarified that 'the seducer...must pay on the three counts of disgrace, deterioration in value, and a basic fine... specified in the Talmud as fifty shekels, whereas the rapist... must pay on the additional count of compensation for bodily pain'.²⁹⁸

In Assyrian law of the second millennium B.C.E if a man violates a virgin, the perpetrator's wife will be taken by the father of the victim as a penalty.²⁹⁹ Violated herself she cannot return to her husband who marries the woman he violated.³⁰⁰ If her father is unwilling to give her in marriage to the perpetrator, then he will have to receive the extra third for the virgin in silver and give his daughter to whomever he wishes.³⁰¹ If the perpetrator is single, 'the ravisher shall give the extra third in silver to her father as the value of a virgin and her perpetrator shall marry her and not reject her'.³⁰²

In another biblical account Dinah, the daughter of Jacob, was raped by a Hittite prince, *Shechem*.³⁰³ Shechem fell in love with Dinah, and asked to marry her.³⁰⁴ Shechem's father offered gifts and a dowry and told Jacob that Dinah and Shechem should cohabit, trade with each other and marry.³⁰⁵ Dinah's brothers were displeased and answered deceitfully that the marriage could be arranged if all the Hittite men were circumcised.³⁰⁶ The Hittite men complied, but three days later Jacob's sons entered the Hittite city, killed all the men, took vengeance for the defilement of their sister and retrieved Dinah, and took the wives of the men they slew. At that

²⁹⁷ Thompson (n 38 above) Deuteronomy 22:28-29,206.

²⁹⁸ RJV Heibert 'Deuteronomy 22:28-29 and its pre - mishnaic interpretations (1994) 56 *Catholic Biblical Quarterly*, 214.

²⁹⁹ WH Propp 'Kinship in 2 Samuel 13' (1993) 55 *Catholic Biblical Quarterly*, 42.

³⁰⁰ As above.

³⁰¹ As above

³⁰² Propp (n 299 above).

³⁰³ Thompson, (n 38 above) Genesis 34:1-35:1, 35-36.

³⁰⁴ Thompson, (n 38 above) Genesis 34:1-35:1, 35-36.

³⁰⁵ Thompson, (n 38 above) Genesis 34:1-35:1, 35-36.

³⁰⁶ Thompson, (n 38 above) Genesis 34:1-35:1, 35-36.

time rape was viewed as an insult against the brothers and fathers and dealt with entirely as an affair between men.³⁰⁷

These biblical accounts interpreted rape to mean sex between a man and female ward without the consent of her male guardian.³⁰⁸ A woman, single or betrothed, was regarded as a minor, but if a woman was married the man who raped her as well as the woman were to be killed.³⁰⁹ Complicity was broadly interpreted, for example, if a woman was raped within a city she was thought to have been able to summon aid.³¹⁰

8.2 Medieval Europe: England

From the time of St. Jerome (347-419) patristic interpretations of Dinah's rape in Genesis 34 emphasised Dinah's responsibility for her defilement.³¹¹ Bernard of Clairvaux holds that Dinah should have stayed sequestered and away from the windows and doors of her father's home, should not have been off visiting other girls, that her curiosity was an immorality and a devil's snare.³¹² In addition, it was alleged she had the responsibility to ensure the protection of the interests of her male relatives in her virginity.³¹³ By way of contrast secular sources view rape in more practical terms; medieval literary sources often are more nuanced and sophisticated than ecclesiastical ones.

The first quasi-national English laws concerning rape are contained in Alfred the Great's DOMBOC, a codification of his own and earlier laws produced during the period 871- 899.³¹⁴ Although not without ambiguity, the statutes appear to specify compensation be paid to the female victim as well as a fine payable to the king.³¹⁵ The compensation and fine to be paid

³⁰⁷ Thompson, (n 38 above) Genesis 34:1-35:1, 35-36.

³⁰⁸ Thompson, (n 38 above) Genesis 34:1-35:1, 35-36.

³⁰⁹ Thompson, (n 38 above) Genesis 34:1-35:1, 35-36.

³¹⁰ Thompson, (n 38 above) Genesis 34:1-35:1, 35-36.

³¹¹ Schroeder, J.A. 'The rape of Dinah: Luther's interpretation of a biblical narrative' (1997) XXVIII /3 *Sixteenth Century Journal* 780.

³¹² As above.

³¹³ Schroeder (n 311 above) 780.

³¹⁴ C Hough 'Alfred's Domboc and the language of rape: a reconsideration of Alfred chapter 11' (1997) *Medium /Evum* 16.

³¹⁵ As above 5, 19.

increase with the status of a free woman and the intrusiveness of the assault, but compensation was halved for those who are not virgins.³¹⁶ Interestingly, free women could give evidence under oaths. Alfred's statutes show that women's status in pre-conquest England was considerably higher than it was later to become and that as a likely consequence sexual assaults against women were viewed more seriously than they were later.³¹⁷

The statute of Westminster in 1285 proclaimed that rape of a virgin or married woman was a felony punishable by death and that the king could prosecute the offender.³¹⁸ However, until the end of the 13th century the victims were the prosecutors of the perpetrator.³¹⁹ The victim had to show physical evidence of resistance and had to repeat the charge in the royal court using the same words as in the county court.³²⁰ A statute of 1382 awarded fathers the right to accuse someone of rape.³²¹ These legal changes seem designed to protect wealthy families from the threat to their property caused by eloping couples.³²² In 1487, during the reign of Henry VII, Parliament passed the 'Act against taking away of women against their will', which made the abduction of 'women having substances' a felony.³²³ Since the property of a woman passed to her husband upon her death, it was necessary to protect women from being abducted and forced into marriage.³²⁴

Carter³²⁵ examined 97 records of rape hearings in rural and urban England from 1218-1276 and found that of the hearings involved aristocratic perpetrators and only one aristocratic victim.³²⁶ Statistics reveal that there were many more rural than urban cases and ecclesiastics were the largest group of accused rapists (28% of the total).³²⁷ The record of victims states if

³¹⁶ Hough (n 314 above) 16.

³¹⁷ Hough (n 314 above) 13.

³¹⁸ JM Carter, *Rape in medieval England: An historical and sociological study* (1985) 16.

³¹⁹ As above.

³²⁰ Carter (n 318 above) 16.

³²¹ JB Post 'Sir Thomas West and the statute of rapes, 1382' (1980) *Bulletin of the Institute of Historical Research* 16.

³²² SP Pistono 'Susan Brownmiller and The History of rape' *Women's Studies* 1988; *Post* (1980) 16.

³²³ EW Ives 'Against taking away of women: The inception and operation of the Abduction Act of 1487' in E W Ives, RJ Knecht & JJ Scans brick (Eds.) *Wealth and power in Tudor England: Essays presented to S. T Bindoff* London: Knecht & Scans brick (1978) 21 - 44.

³²⁴ As above.

³²⁵ Carter (n 318 above) 17.

³²⁶ Carter (n 318 above) 17.

³²⁷ Carter (n 318 above) 17.

they were virgins or not.³²⁸ Roughly half of the cases resulted in the arrest of the complainant for false allegation, and in approximately a third, the alleged rapists were convicted.³²⁹ The most common punishment for the rapist was a fine, as has been found in other studies of this period.³³⁰

8.3 Italy

There is a record of a substantial number of sex offences and rapes of children were severely punished. Rapes of post-adolescent girls were not punished very severely, and rapes of married women were punished the most severely.³³¹ Rape was trivialised because of problems of ‘corroboration or potential blackmail of the rich by the poor. However, physical injury and breaking into a house to commit the crime were viewed in a more serious light.³³² In general, property crimes were viewed as more serious than nonfatal crimes against the person.³³³

8.4 Germany and France

The 12th-century French text relating the activities of Renart the Fox³³⁴ is instructive in this regard.

‘The authors of the Renart trial scenes demonstrate with comic accuracy, the fallibility of oaths, the superstitious nature of ordeals, the dishonesty of the secular judiciary, and the impotence of feudal law enforcement’. The subversive effects of this mockery show ‘a generous space for the legal protection of the rapist and the silencing of the most appropriate witness: the victim’.³³⁵

³²⁸ Carter (n 318 above)17.

³²⁹ Carter (n 318 above) 17.

³³⁰ JM Marshall, Rape in medieval England: An historical and sociological study (1985) 17.

³³¹ G Ruggiero, Violence in early renaissance Venice (1980) 18.

³³² As above.

³³³ Ruggiero (n 331 above) 18.

³³⁴ K Gravidal K ‘Law and literature in the French middle ages: Rape law on trial in Le Roman de Renart’ (1991) *Romanic Review* 4.

³³⁵ As above.

Luther analysed Dinah's rape from the viewpoint of her aggrieved father, in contrast to the opinions of St. Jerome and Bernard of Clairvaux.³³⁶ Luther agreed with St. Jerome that the windows and doors of houses were dangerous places for women and girls because they are 'feeble, negligent, thoughtless, and therefore, exposed to the traps of the devil'.³³⁷ In Luther's view Dinah's rape is a tribulation sent by God to test her father's faith.³³⁸ Rather than simply blaming Dinah's curiosity, Luther used the tale to warn parents to watch over their children lest they come to harm by the very real risk of abduction and rape.³³⁹ In Luther's view Dinah's immorality is the result of her curiosity and her disobedience in leaving the house, not in committing adultery of which only Shechem is guilty.³⁴⁰

8.5 Early modern period in Europe

Van der Heijden examined judicial records of 17th -century Holland and noted that women were regarded as offenders, they were more often punished for sexual offences than men.³⁴¹ These offences included fornication, adultery, concubinage and having illegitimate children.³⁴² The rape of a young virgin received severe punishment because the rape was regarded as a dishonour,³⁴³ whereas the rape of married women incurred a lesser punishment.³⁴⁴ The rape of adult women was looked at with suspicion, often the victims were held jointly guilty with the perpetrator for the assault because they were regarded as sexually insatiable.³⁴⁵ Victims of incestuous rapes received inconsistent treatment, and magistrates tended to take an 'offence-centred' view of incest by holding the victim as an accomplice.³⁴⁶

³³⁶ Schroeder (n 318 above) 777.

³³⁷ Schroeder (n 318 above) 777.

³³⁸ Schroeder (n 318 above) 777.

³³⁹ Schroeder (n 318 above) 777.

³⁴⁰ Schroeder (n 318 above) 777.

³⁴¹ M Van der Heijden, 'Women as victims of sexual and domestic violence in seventeenth-century Holland: Criminal cases of rape, incest, and maltreatment in Rotterdam and Delft' (2000) 33 (3) *Journal of Social History*, 624; see also CA Conley 'Rape and justice in Victorian England' (1986) 29 (4) *Victorian Studies* 521, 535 - 436.

³⁴² Van der Heijden (n 341 above) 624; see also Conley (n341 above) 521.

³⁴³ Conley (n 341 above) 521.

³⁴⁴ Conley (n 341 above) 521

³⁴⁵ Conley (n 341 above) 521.

³⁴⁶ Van der Heijden (n 341 above) 623.

A statute of Elizabeth I of England defined rape as ‘carnal knowledge of a woman forcibly and against her will’.³⁴⁷ This definition remained unchanged through to the 19th century.³⁴⁸ English courts construed ‘will’ broadly to encompass meaningful consent; a sleeping or drugged woman who was assaulted, for example, is considered a rape victim.³⁴⁹ This definition emphasised a woman's consent but made rape difficult to prove.

Capp investigates the double standards by which men and women were held responsible for certain offences using different standards of conduct in the early modern period (1500 - 1800). Capp used Bridewell records and Old Bailey reports, supplemented by information from ecclesiastical and secular courts in the provinces.³⁵⁰ Women as well as men recognised that because of the double standard sexual invective was more effectively used against women than men. A fact which explains why women had more frequent recourse to defamation suits in church courts.³⁵¹ Men of the middling class prized a good reputation.³⁵² The value of a good reputation provided women with opportunities both for redress of wrongs done to them and exploitation.³⁵³

Capp summarises; ‘fear of exposure or defamation could render respectable men vulnerable to wronged or calculating women and, while the sexes were never equally matched in the politics of sexual relations and reputation, it is wrong to see women as no more than passive and helpless victims’.³⁵⁴ They were also ‘agents: sometimes heroic, sometimes highly resourceful, at times cynical and shameless’.³⁵⁵ Men of means and reputation were vulnerable to legal suit or blackmail through allegations of siring children, adultery and rape. It is likely that out-of-court settlements were very common.

³⁴⁷ Conley (n 341 above) 535.

³⁴⁸ WA Davis Jr. ‘The rape of Tess: Hardy, English law, and the case for sexual assault’ (1997) 52 (2) *Nineteenth - Century Literature* 224.

³⁴⁹ As above; see also *R. v. Mayers* (1872), (1875) 12 *Cox's Criminal Law Cases*, 312; see also RV Young (1878), (1882) 14 *Cox's Criminal Law Cases*, 115.

³⁵⁰ B Capp ‘The double standard revisited: Plebeian women and male sexual reputation in early modern England’ (1999) 162 *Past and Present* 70.

³⁵¹ As above.

³⁵² Capp (n 350 above) 71.

³⁵³ Capp (n 350 above) 71.

³⁵⁴ Capp (n 350 above) 73.

³⁵⁵ Capp (n 350 above) 70.

Conley documented the reluctance of English courts to convict men for rape from the trial documents of Kent County between 1859 and 1880.³⁵⁶ He shows ‘conviction and acquittal data provide an operational definition of rape as a brutal act of violence usually committed in a public place on an apparently respectable woman who was previously unknown to her assailant and had done nothing even to acknowledge his presence’.³⁵⁷ Judges always dismissed charges of rape if the woman’s protector (father or husband) had accepted money as a settlement for the wrongdoing of the alleged perpetrator. More importantly, the perceived ‘respectability’ of the alleged rapist was a powerful defence, and the working-class status of the alleged victim a powerful handicap, in the outcome of the prosecution process’.³⁵⁸

8.6 Early modern period in Asia

Ng discusses sexuality and rape laws in Qing China, a prudish and sexually stifling culture in which ‘filial piety’ and female virginity were promoted by the government.³⁵⁹ The massive Qing legal code contains a section on ‘sexual violations’ in which the criteria for establishing rape are delineated, the victim has a duty to adduce evidence to the fact that she fought back throughout the attack in the form of ‘eyewitnesses, torn clothing, or physical marks’ of a scuffle.³⁶⁰ At the outset, if violence gives rise to submission, the crime was classified as illegal ‘intercourse by mutual consent’ summed up in the phrase ‘forcible beginning, amicable ending’.³⁶¹ The stringency of this definition was part of a more general effort to reduce litigation in the population. In addition, the laws were designed to portray the government and its soldiers as disciplined and peaceful by discouraging disquieting allegations of rape against Qing soldiers.³⁶²

The state sponsored a cult of chastity in which it was avowed that: ‘It is a small matter to starve to death, but a serious matter to lose one’s virtue’.³⁶³ Women were expected to defend their

³⁵⁶ Conley (n 341 above) 521.

³⁵⁷ Conley (n 341 above) 536.

³⁵⁸ Conley (n 341 above) 527.

³⁵⁹ Ng VW ‘Ideology and sexuality: Rape laws in Qing China’ (1987) 46 (1) *Journal of Asian Studies* 57.

³⁶⁰ As above 58.

³⁶¹ Ng (n 359 above) 58.

³⁶² Ng (n 359 above) 58.

³⁶³ Ng (n 359 above) 68.

chastity against rapists up to death. The few convictions that were attained were based on the fact the women were uncorrupted, guiltless and were stifled.³⁶⁴ Women who were found to have engaged in an unlawful sexual act by not counter-attacking adequately during the assault were given ‘80 blows with a heavy bamboo stick if unmarried and 90 if married’.³⁶⁵

8.7 19th and early 20th-century North America

Dubinsky notes that sexual conflict in Ontario (Canada) at the end of the 19th and beginning of the 20th century³⁶⁶ led to the enactment of a law against a heterosexual act and demonstrates the level of inequality and unfair sexual conduct on the part of authorities, and shows the partial application of the same principles to different groups in the population in favour of the influential in society.³⁶⁷ The laws declared a coerced sexual act or sex with minors as an offense in order to avert the sexual violation of women because it was believed that men forcefully violate women.³⁶⁸

These laws were based on the patriarchal postulation that males are considered sexually active, hence it is only males that deliberately hunt women.³⁶⁹ This supposition, Dubinsky holds, stayed alive and well in contemporary North America as can be seen in the perception of sexual harassment.³⁷⁰ Berryman-Fink and Riley find that having a ‘feminist orientation’ relates positively to the perception of sexual harassment and that women perceive more behaviours to be sexually harassing than did men, although men and women shared the same opinion at the extremes.³⁷¹ Some conduct does not constitute sexual harassment, whereas others are obviously harassment or coercion. Men and women tend to disagree about sexually tinged but not

³⁶⁴ Ng (n 359 above) 66.

³⁶⁵ Ng (n 359 above) 64.

³⁶⁶ K Dubinsky ‘Maidenly girls and designing women: Prosecutions for consensual sex’ in Dubinsky K, *Improper advances: Rape and heterosexual conflict in Ontario, 1880 - 1929* (1993) 22.

³⁶⁷ As above.

³⁶⁸ Dubinsky (n 366 above).

³⁶⁹ Dubinsky (n 366 above).

³⁷⁰ C Berryman - Fink and KV Riley *The national survey of crime severity* (1997) 22.

³⁷¹ As above.

overtly coercive behaviour. With respect to unambiguous sexual coercion, data from the National Crime Survey³⁷² show little differences between the sexes in the perception of severity for all crimes, including rape, which is perceived to be more serious by women than men.³⁷³

8.8 Recent trends in North America

The last decade of the 20th century saw a striking decrease in the number of rapes in the United States and Canada. Data showing the rate of sexual assault in Canada³⁷⁴ contains sexual assault incidents reported to the police in Canada between 1983 and 2000.³⁷⁵ Yearly changes in these rates are affected by multiple factors, such as changes in reporting and recording behaviour, along with real changes in the criminal behaviour.³⁷⁶ The rate more than doubled between 1983 and 1993 and then dropped by 35% over the following 7 years.³⁷⁷

Another set of similar data from the United States illustrates the rate of forcible rape incidents reported to the police declined by 26% from 1992-2001.³⁷⁸ An even more dramatic decline is revealed by US victimisation data (self-report data from the National Crime Victimization Survey) shown in another report.³⁷⁹ The rate of victimisation by sexual assault dropped by 68% from a peak between 1991-2002.³⁸⁰ The decline in the number of rapes is not specific; the 1990s saw a decline in most criminal activities.³⁸¹

8.9 Rape and war

Old Testament accounts of warfare provide stark descriptions of rape, bride capture, and murder. The women of Median were taken captive by the Israelites and virgins were preserved for

³⁷² ME Wolfgang et al, *The national survey of crime severity* (1985) 27 - 29.

³⁷³ As above.

³⁷⁴ Wolfgang (n 372 above) 27 - 29.

³⁷⁵ Wolfgang (n 372 above) 27 - 29.

³⁷⁶ RM O'Brien 'UCR violent crime rates, 1958 - 2000: Recorded and offender - generated trends' (2003) *32 Social Science Research* 504.

³⁷⁷ As above.

³⁷⁸ O'Brien (n 376 above) 507.

³⁷⁹ O'Brien (n 376 above) 507.

³⁸⁰ O'Brien (n 376 above) 508.

³⁸¹ O'Brien (n 376 above) 508.

themselves.³⁸² Such practices are recorded in the books of Deuteronomy, Judges and Samuel.³⁸³ In more modern times the widespread sexual violation of women by soldiers in occupied enemy territory has often been documented.³⁸⁴ Mass rape was perpetrated by American soldiers in Vietnam, by Pakistani soldiers in Bengal, by German soldiers in eastern Europe and by Soviet troops in the invasion of Germany, and so on.³⁸⁵ The savage repression of the Scots by the English after the Culloden debacle in 1745 involved kidnapping and rape.³⁸⁶

In 1799 American General James Clinton instructed his men not to rape Red Indian women in the Ohio county because Indian men did not rape female prisoners.³⁸⁷ The soldiers did not comply.³⁸⁸ When the incident was reported by an 'Onondaga chief' the women and children who were victims of the rape were executed. Additionally, those women and children who had been taken captive to be sexually abused by the soldiers were also massacred in a shameful and scandalous manner.³⁸⁹

Harris³⁹⁰ examines the portrayal of French female victims of rape by German soldiers in 1914-1915.³⁹¹ Despite greatly exaggerated British and American propaganda concerning German sexual atrocities, particularly in Belgium,³⁹² the rapes in France were carefully documented and appear not to be a figment of the nationalist imagination.³⁹³ As the war dragged on the image of female sacrifice was supplemented by an contrasting image of women betraying their husbands who were fighting at the front by cohabiting with the occupying German soldiers.³⁹⁴

³⁸² Thompson (n 38 above) Num. 31:9.9 - Num. 31:35.10, 216.

³⁸³ Thompson (n 38 above) Deut. 20:13 & 14 - 3, 203 - 204; see also Judg. 21:14 - 20, 274; see also 1 Sam. 30:1 - 30:2.5, 312.

³⁸⁴ Pistono (n 322) 16; C Niarchos 'Women, war and rape: Challenges facing the International Tribunal for the former Yugoslavia' (1995) 17 *Human Rights Quarterly* 649 - 690, 673; see also R Seifert 'The second front: The logic of sexual violence in Wars' (1996) 19 *Women's Studies International Forum* 35 - 43.

³⁸⁵ As above.

³⁸⁶ J Prebble, 'Culloden. Markham' (1967) 205.

³⁸⁷ TS Abler 'Scalping, torture, cannibalism and rape: An ethno historical analysis of conflicting cultural values in war' (1992) XXXIV (1) *Anthropologica* 14-15.

³⁸⁸ As above.

³⁸⁹ Abler (n 387 above) 15.

³⁹⁰ R Harris 'Child of the barbarian: Rape, race and nationalism in France during the First World War' (1993) 144 *Post and Present* 201.

³⁹¹ As above.

³⁹² NF Gullace, 'Sexual violence and family honor: British propaganda and international law during the First World War' (1997) 102 (3) *American Historical Review* 719.

³⁹³ As above.

³⁹⁴ Gullace (n 392 above) 719.

After the Second World War many women in Vichy France were accused of ‘horizontal collaboration’ and publicly shamed.³⁹⁵

The Japanese occupation of Nanking led to the rape and murder of over 20 000 young Chinese girls by Japanese soldiers.³⁹⁶ It is documented that there were many killings and about 10 000 rapes when the Japanese army took Hong Kong.³⁹⁷ Elsewhere, large numbers of mostly Korean women were forced into sexual slavery; these captives euphemistically were referred to as ‘comfort women’.³⁹⁸ The Russian invasion of Germany in 1945 resulted in rape on a truly massive scale, ‘Soviet soldiers treated German women much more as sexual spoils of war than as substitutes for the Wehrmacht on which to vent their rage’.³⁹⁹

After the Second World War an attempt was made to make rape in wartime illegal. The 1949 Geneva Convention IV states that ‘women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault’.⁴⁰⁰ Although laudable in intent, it is not clear that legal statutes have saved any women from wartime rape. Buss⁴⁰¹ describes the sexual violence committed in Bosnia, as a policy of ethnic cleansing targeted against Muslim women.⁴⁰² Even though all the parties were associated with mass rape during the war, it was considered as a strategy against Bosnian Muslim women only by Bosnian Serbs.⁴⁰³ It is recorded by the Warburton Commission that the number of ‘raped Muslim women ranged between 10 000 and 60 000 with 20 000 the likely figure’.⁴⁰⁴ Niarchos⁴⁰⁵ notes that virgins and young women between 13 and 35 were targeted to be raped in Bosnia as

³⁹⁵ Gullace (n 392 above) 719.

³⁹⁶ Chang I, *The rape of Nanking: The forgotten holocaust of World War II* (1998) 119; see also D Yang, ‘Convergence or divergence? Recent historical writings on the Rape of Nanjing’ (1999) *American Historical Review* 844; see also Roland CG ‘Massacre and rape in Hong Kong: Two case studies involving medical personnel and patients’ (1997) *Journal of Contemporary History*, 57, 59.

³⁹⁷ As above.

³⁹⁸ Yang (n 396 above) 844.

³⁹⁹ A Beevor *The fall of Berlin 1945* (2002) 27

⁴⁰⁰ GC IV, article 27, part III, sec. 1.

⁴⁰¹ DE Buss ‘Women at the borders: Rape and nationalism in international law’ (1998) 6 (2) *Feminist Legal Studies* 171.

⁴⁰² As above.

⁴⁰³ Buss (n 401 above) 171.

⁴⁰⁴ Buss (n 401 above) 171.

⁴⁰⁵ Buss (n 401 above) 182.

part of ethnic cleansing, an apparent goal was the birth of children of mixed ‘ethnic’ descent in the Muslim population.⁴⁰⁶

Modern history rarely shows a respite from warfare somewhere, and the technological ability to wage war has steadily increased.⁴⁰⁷ Despite the focus of scholarly literature on rape and on the sexual coercion that occurs in relatively peaceful modern societies, it is clear that much sexual violence takes place during wartime.⁴⁰⁸ In fact, based on many media accounts of mass rape during warfare it is evident that rape is a common practice. It is unknown whether the individual differences in propensity to rape identified are equally relevant to times of war or whether rape is so common during conflict that it becomes a near-universal activity that cuts across individual differences.

9 The dynamics of sexual violence

In any occurrence of sexual violence, the dynamic is varied; rarely will the act be committed for a single reason. The dynamic depends on whether the violence is inflicted on civilians or combatants, against interned people or people in the community, on refugees from conflict or in a time of peace. The discussion below does not seek exhaustively to cover the dynamic, rather it seeks to explore some elements present in the commission of sexual atrocities. The aim in this section is to affirm that the act of sexual violence is a deliberate crime that must be addressed. The discussion below illustrates the frame of mind of the sex offender towards all victims, whether female, male, gay, lesbian, bisexual, transgender and intersex.

Some sex offenders use the act as a means of expressing rage and hatred towards their victims, which is coupled to a need to exercise of control, display dominance and wield power. No matter the aim in committing the act, the essentials of power, anger and sexuality are always innate.⁴⁰⁹ Others use it as a means of punishment, to cure, to straighten out and correct or put

⁴⁰⁶ Buss (n 401 above) 182.

⁴⁰⁷ Buss (n 401 above) 182.

⁴⁰⁸ Buss (n 401 above) 182.

⁴⁰⁹ AN Groth ‘The rapist’s view’ in AW Burgess Ed. *Violence through a forensic lens* 2n Ed. Nursing Spectrum, King of Prussia, PA, (2000) 138; see also WHO, *Guidelines for medico - legal care for victims of sexual violence* (2008) 10.

right the undesirable.⁴¹⁰ Some of the elements in the dynamic are discussed below.

9.1 Power and dominance

The crime of sexual violence has been denoted as an act born out of aggression with the aim of exercising power and control and is not a craving for sexual gratification.⁴¹¹ It is not committed out of passion but arises out of a ferocious, destructive and intimidating conception to ‘degrade, dominate, humiliate, terrorise and control the victim’ so that the victim loses self-esteem. In addition, the act violates the ‘victims sense of privacy, safety, and well - being’.⁴¹²

It has been established that sexual violence against women is about power and dominance⁴¹³ and this factor is also true when it is perpetrated against men.⁴¹⁴ The traditional peacetime dynamic around the exercise of power and dominance that especially applies to women is equally present in times of conflict.⁴¹⁵ Sexual violence is about power and dominance regardless of whether it occurs in peace time or in a time of conflict.⁴¹⁶

⁴¹⁰ P Strudwick, ‘Crisis in South Africa: The shocking practice of “corrective rape” - aimed at “curing” Lesbians’ Independent (2014) <http://www.independent.co.uk/news/world/africa/crisis-in-south-africa-the-shocking-practice-of-corrective-rape-aimed-at-curing-lesbians-9033224.html> (accessed 1 June 2017); see also L Smith, ‘Corrective rape: The homophobic fallout of post-apartheid South Africa, the Telegraph’ (2015) <http://www.telegraph.co.uk/women/womens-life/11608361/Corrective-rape-The-homophobic-fallout-of-post-apartheid-South-Africa.html> (accessed 1 June 2017); see also L Mwambene and M Whea, ‘Realisation or oversight of a constitutional mandate? Corrective rape of black African lesbians in South Africa’ (2015) 15 *African Human Rights Law Journal* 59.

⁴¹¹ WHO (n 409 above) 9.

⁴¹² Coomaraswamy R. ‘Preliminary report submitted by the Special Rapporteur on violence against women: its causes and consequences’ New York, NY, United Nations, 1997 (report number E/CN.4/1997/47); see also AW Burgess Ed. *Violence through a forensic lens*. King of Prussia, PA, Nursing Spectrum, (2000); see also WHO (n 409 above) 9.

⁴¹³ S Brownmiller *Against our will: Men, women and rape* (1976) 31; see also C Chinkin, ‘Rape and sexual abuse of women in international law’ (1994) 5 *European Journal of International Law* 326 - 327; see also Groth, *Men who rape* (1979) 2; see also CN MacKinnon, ‘Reflections on sex equality under law’ (1991) 100 *Yale Law Journal* 1281, 1302 - 1303.

⁴¹⁴ Groth, (n 413 above) 138, 126 - 130; see also M Scarce, *Male on male rape: The hidden toll of stigma and shame basic* (1997) 10.

⁴¹⁵ Brownmiller (n 413 above) 31.

⁴¹⁶ CN Mackinnon, ‘Rape, genocide, and women’s human rights’ in A Stiglmeier (ed.), *Mass rape: The war against women in Bosnia - Herzegovina* Nebraska Press (1994) 183, 188 - 189; see also Seifert, ‘War and rape: A preliminary analysis’ in A Stiglmeier (ed.), *Mass rape: The war against women in Bosnia - Herzegovina* (1994) 54, 55; see also Chinkin (n 413 above) 146, 328; see also A DelZotto and A Jones ‘Male - on - male sexual violence in wartime: Human rights last taboo?’ paper presented to the Annual Convention of the International Studies Association (2002) <http://adamjones.freeservers.com/malerape.htm> (accessed 24 May 2017).

However, in a time of war, due to the breakdown of law and order, conventional authority is prone to modification, thus the scales of control are redesigned and there is an opportunity to shift the balance in society.⁴¹⁷ Sexual violence partly is about preserving and re-establishing an equilibrium,⁴¹⁸ so the act is more likely to be committed in times of potential imbalance, such as which produce a refugee crisis. A study indicates that ‘a comparison of low-rape and rape-prone societies reveals that the occurrence of rape is particularly high where male power has become unstable’.⁴¹⁹ The high incidence of male sexual violence during conflict is convincingly explained by the argument that sexual violence against men in war occurs for much the same reason as it does against women striving for equality and independence in male - dominated societies, i.e. in both situations there is an attempt to suppress challenges to the social status of the dominant group.⁴²⁰

The designs of power and dominance are present in the constructions of chastity in females and virility in males.⁴²¹ For instance, in some cultures women are considered to represent the chastity of the family and the community.⁴²² Accordingly, sexual violence against female members of a community is intended to suggest that the men of the community have failed in their duty to protect ‘their’ women. In this way sexual violence against females is a form of communication between men⁴²³ that buttresses the ‘conquered status of masculine impotence’.⁴²⁴ Arguably, communication and the impotence are more pronounced when it is men themselves who are the victims of sexual violence.⁴²⁵

⁴¹⁷ As above.

⁴¹⁸ MacKinnon (n 416 above) 13; see also S Sivakumaran ‘Sexual violence against men in armed conflict’ (2007) 18 (2) *European Journal of International Law* 267.

⁴¹⁹ R Seifert ‘The second front: The logic of sexual violence in wars’ (1996) *Women’s Studies International Forum* 19, 41.

⁴²⁰ A Jones, ‘Straight as a rule: Heteronormativity, gendercide, and the non - combatant male’ (2006) *Men and Masculinities*, 8, 451, 462.

⁴²¹ AK Wing and S Merchán, ‘Rape, ethnicity, and culture: Spirit Injury from Bosnia to Black America, (1994) 25 (1) *Columbia Human Rights Law Review*, 20 - 25.

⁴²² As above.

⁴²³ UN Commission on Human Rights, ‘Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission resolution 1997 /44, para. 12, 26 January 1998, E/CN.4/1998/54, <http://www.refworld.org/docid /3b00efbd24.html> (accessed 24 May 2017).

⁴²⁴ Seifert (n 419 above) 59.

⁴²⁵ Seifert (n 419 above) 59.

The construction of masculinity requires the ability to exert power over others, particularly by means of the use of force.⁴²⁶ Men are considered to represent virility, strength and power in the family and the community and are able to protect not only themselves but others as well.⁴²⁷ Sexual violence against male members of a household or community not only suggests the empowerment and masculinity of the offender but also the disempowerment of the victim.⁴²⁸ The effects of disempowerment do not take place merely at an individual level but suggest the disempowerment of the family and community. As well, the chastity of the family and community is considered lost when female members are sexually violated. Disempowerment takes place not only through women's bodies but those of men as well.

On occasion sexual violence against women during conflict takes place in public, in front of the victims' communities and their families and particularly in front of their husbands.⁴²⁹ This situation is particularly humiliating to the victims. On an individual level there is the additional facet of public humiliation, shame, and stigma, because of the public nature of the incidence.⁴³⁰ The violations are a form of public discourse and the victims are faceless. These public sexual violations are a means of communicating a sense of fear and vulnerability to the rest of the community and throughout the area, thus an entire community may be compelled to flee.⁴³¹ Indeed, this may be the actual goal of the public nature of the sexual violence in the first place.⁴³² Thus, the power of the perpetrators is justified and displayed for all to see.

⁴²⁶ UN Commission on Human Rights (n 423 above) para. 64.

⁴²⁷ D Zarkov, 'The body of the other man: Sexual violence and the construction of masculinity, sexuality and ethnicity in Croatian Media' in Moser and Clark (eds.) *Victims, perpetrators or actors: Gender, armed conflict and political violence* (2001) 69, 77.

⁴²⁸ As above.

⁴²⁹ UN Commission on Human Rights, 'Situation of human rights in the territory of the former Yugoslavia' annex II, para. 48(a) 23 February 1993, E/CN.4/RES/1993/7, submitted by Mr Tadeusz Mazowiecki <http://www.refworld.org/docid/3b00f2300.html> (accessed 25 May 2017); see also J Wagner, 'The Systematic use of rape as a tool of war in Darfur: A blueprint for international war crimes prosecutions' (2005) 37 *Georgetown Journal of International Law*, 193, 205; see also B Nowrojee, 'Making the invisible war crime visible: Post - conflict justice for Sierra Leone's rape victims' (2005) 85 (18) *Harvard Human Rights Journal* 89.

⁴³⁰ DG Dutton *et al.*, 'Extreme mass homicide: From military massacre to genocide' (2005) 10 *Aggression and violent behaviour* 464. Violence against family members in front of their family suggests that knowledge of a human social taboo against family sex is part of the consciousness of the rapist. Its function is to generate a human emotion, humiliation.

⁴³¹ AK Askin, War crimes against women: Prosecution in international war crimes tribunals (1997) 262 - 263.

⁴³² B Allen, Rape warfare; the hidden genocide in Bosnia - Herzegovina and Croatia (1996) 62 - 63.

These factors, similarly, are in play when males suffer sexual violence in public.⁴³³ At the individual level the victim and their community are stigmatised, and this sends a signal to the community that their male members, who are their protectors, are unable to protect themselves. If they are unable to protect themselves, how are they to protect ‘their’ women and community? In this way the ‘masculinity’ of the man is lost, therefore, the family and community are made to feel vulnerable. The disempowerment of the community again is lost as a result of the dominance over its male members.

The philosophies of power and dominance are largely similar in the victimisation of male and female subjects of sexual violence, particularly rape. Another form of sexual violence in which the dynamic of power and dominance evident is that of forced nudity;⁴³⁴ women are forced to strip and ‘subjected to humiliating strip searches, forced to parade or dance naked in front of soldiers or in public and to perform domestic chores while nude’.⁴³⁵ In a particularly notorious incident, women were forced to take off their clothes and dance nude on a table while male soldiers watched for their self - gratification.⁴³⁶ Subsequently, the International Criminal Tribunal for the former Yugoslavia held this incident to constitute an inhumane act for the purposes of crimes against humanity.⁴³⁷

⁴³³ Human Rights Watch, ‘Seeking justice: The prosecution of sexual violence in the Congo War’ (2005) 17(1) (A) 20 - 21; Amnesty International, ‘Democratic Republic of Congo: Mass rape - time for remedies’ (2004), 6, 15-16 http://www.amnesty.eu/static/documents/DRC_main.pdf (accessed 23 August 2017).; see also UN Commission on Human Rights, *Report on the situation of human rights in the Democratic Republic of the Congo*, submitted by the Special Rapporteur, Mr Roberto Garretón, in accordance with Commission on Human Rights resolution 2000/15, UN DocE/CN.4/2001/40, paras 144 and 162, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G01/108/37/PDF/G0110837.pdf?OpenElement> (accessed 26 May 2017); see also UN Commission on Human Rights, *Report on the situation of human rights in the Democratic Republic of the Congo*, submitted by the Special Rapporteur, Mr Roberto Garretón, in accordance with Commission on Human Rights resolution, UN Doc E/CN.4/2000/42, para.116, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G01/102/04/PDF/G0110204.pdf?OpenElement> (accessed 26 May 2017); see also P Oosterhoff et al. ‘Sexual torture of men in Croatia and other conflict situations: An open secret’ (2004) 12 (23) *Reproductive Health Matters* 74.

⁴³⁴ UN Commission on Human Rights ‘Report of the Special Rapporteur on violence against women, its causes and consequences’, Ms Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2000/45: Violence against women perpetrated and/or condoned by the State during times of armed conflict (1997 - 2000), UN Doc. E/CN.4/2001/73, para. 44, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G01/104/44/PDF/G0110444.pdf?OpenElement> (accessed 26 May 2017).

⁴³⁵ As above.

⁴³⁶ *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, IT-96-23-T & IT-96-23-1/T, paras 766 - 774 (22 Feb. 2001).

⁴³⁷ As above, para. 782.

Further purposes of enforced nudity is to facilitate humiliation and degrading treatment, to provoke a lack of self-worth and dignity, exacerbated when the forced nudity is accompanied by threats of a sexual nature. Some male survivors state that ‘the humiliation of being interrogated while naked was a very drastic event in their lives’.⁴³⁸ Depending on the cultural context in which this forced nudity takes place, the effects may be particularly severe. Another survivor account states that ‘we stood nude in front of Union of Congolese Peoples (UPC) officials ... I was so shocked [that] I had never seen my father in this way. In our culture, it is not right. first, they molested us ... then they raped us’.⁴³⁹

9.2 Emasculation

The word emasculate is defined as a process by which a man is made to feel like a lesser male via the taking away of his power and confidence, for instance, a man may feel emasculated if his wife is working while he is unemployed.⁴⁴⁰ The word also means ‘to castrate, deprived of virility, strength or vigor, weaken’.⁴⁴¹ It denotes ‘effeminacy, effeminate, sissiness, unmanliness, womanishness, softness, altering, neutering, and mutation’.⁴⁴² Sexual violence against both sexes is about the display of power and dominance linked to masculinity and in the context of male sexual violation, power and dominance manifest themselves in the form of emasculation.

Gender stereotyping suggests that men cannot be victims of sexual violence but are only the perpetrators. Thus, men do not see themselves as potential victims of sexual abuse or potential targets for perpetrators in the way women do.⁴⁴³ Men have the ability to resist any potential attack. Male sexual violation is considered inconsistent with a certain understanding of masculinity. The victims of sexual violence are thought to be weak and helpless, whereas men are

⁴³⁸ HV Tienhoven ‘Sexual torture of male victims’ (1993) 3 *Torture* 134.

⁴³⁹ Human Rights Watch (2005) (n 433 above) 21.

⁴⁴⁰ Cambridge University Press, ‘Emasculate’ in Cambridge Dictionary (2017) <http://dictionary.cambridge.org/dictionary/english/emasculate> (accessed 30 May 2017).

⁴⁴¹ As above.

⁴⁴² Free Dictionary ‘Emasculate’ in the *Free Dictionary*, <http://www.thefreedictionary.com/emasculate> (accessed 30 May 2017).

⁴⁴³ Sivakumaran, (n 418 above) 270.

presumed to be strong and powerful. Thus, masculinity and victimhood are seemingly inconsistent;⁴⁴⁴ when men are sexually violated their masculine attributes are considered to have been diminished, they have been emasculated. In ancient times a male who was sexually penetrated was considered to have lost his manhood and could no longer be considered a warrior or a ruler.⁴⁴⁵ Societal perceptions of male victims of sexual violation are that these victims are not ‘real men,’ for ‘real men’ would not have let this happen to them. The idea of emasculation may be the very reason for sexual violence, according to a study on women, peace and security by the UN Secretary - General, ‘the sexual abuse, torture, and mutilation of male detainees or prisoners is often an attack, employed to destroy the male victim ‘sense of masculinity or manhood’.⁴⁴⁶ The loss of masculinity is a constant concern to survivors of the act.

Certain factors connote power and dominance, primarily gender, but others include sexuality, ethnicity, race, and religion. The concept of hegemonic masculinity is that of a heterosexual male; to deviate from this hetero-normative male standard is to be ‘less’ masculine.⁴⁴⁷ To cast aspersions on the individual’s sexuality is to subordinate the victim to the perpetrator and to strip him of his masculinity. Accordingly, emasculation may take place in several ways. The precise manner in which ‘feelings of a loss of masculinity take place will likely depend on the conduct of the perpetrator, the particular disposition of the individual victim and the behaviour of those who find out about the SV, namely the family, the community, and society’.⁴⁴⁸ Either way, the consequence is that victims are regarded as men without manhood through the dominant, ‘*über* - masculine’ stance of the perpetrator.

The actual gender of the victim is considered to have been changed, the characteristic of masculinity is attributed to the perpetrator and femininity to the victim.⁴⁴⁹ The idea that male victims have been feminised may stem from the behaviour of perpetrators before, during or after

⁴⁴⁴ EA Stanko and K Hobdell, ‘Assault on Men: Masculinity and male victimization’ (1993) 33 (3) *Brit Journal Criminology* 413.

⁴⁴⁵ S Donaldson ‘Rape of males’ in WR Dynes (ed.), *Encyclopaedia of homosexuality* (1990), II, 1094, 1094.

⁴⁴⁶ UN Secretary - General (UNSG), Women, peace and security, 2002, Security Council resolution 1325 (2000) 16, para. 59, <http://www.refworld.org/docid/4a54bc0f19.html> (accessed 29 May 2017).

⁴⁴⁷ A Jones, ‘Straight as a rule: Heteronormativity, gendercide, and the noncombatant male’ (2006) 8 *Men and Masculinities* 451, 453.

⁴⁴⁸ As above.

⁴⁴⁹ Allen (n 426 above) 27-28; see also I Skjelsbaek ‘Sexual violence in times of war: A new challenge for peace operations?’ (2001) 8 *Int’l Peacekeeping* 69, 71.

the sexual assault. A survivor of rape during armed conflict reports that while he was being raped the perpetrators kept saying ‘you are no longer a man, you are going to become one of our women’.⁴⁵⁰ This situation does not greatly differ from male rape committed in time of peace.⁴⁵¹ In Algeria, ‘it was revealed unofficially by the authorities that men who had been raped in detention, should no longer have the status of adult males in the community’.⁴⁵²

The treatment given to survivors of rape, whether male or female, by the community may also be similar. In some communities’ female victims of sexual violence are shunned and considered to be outcasts,⁴⁵³ which also applies to male victims. Thus, a male survivor of rape states: ‘I feel that people in the community look down on me, when I talk to other men, they look at me as if I am worthless now’.⁴⁵⁴ On the other hand, the ostracism female victims face from their families⁴⁵⁵ is absent in the treatment of male victims, possibly because of male - dominant headship in many households and societies.

The intention of the rape may be to diminish the social status of the male survivor by ‘reducing’ him to a ‘feminised male’ which one commentator describes as ‘one of the most lethal gender roles in modern times’.⁴⁵⁶ He asks: ‘what greater humiliation can one man impose on another man or boy than to turn him into a de facto “female” through sexual cruelty?’⁴⁵⁷ This view is mirrored in the comments of victims, one states ‘they wanted us to feel as though we were

⁴⁵⁰ Amnesty International, (n 427 above) 19.

⁴⁵¹ CN MacKinnon ‘Reflections on sex equality under law’ (1991), 100 *Yale Law Journal* 1281,1307.

⁴⁵² M Peel et al, ‘The sexual abuse of men in detention in Sri Lanka’ (2000) 355 *The Lancet* 2069, 2069; 66.

⁴⁵³ AK Wing and S Merchán, ‘Rape, ethnicity and culture: Spirit injury from Bosnia to Black America’ (1994) 25 *Columbia Human Rights Law Review* 1, 20- 25; K Fitzgerald, ‘Problems of prosecution and adjudication of rape and other sexual assaults under international law’ (1997) 8 *European Journal of International Law*, 650; see also K Engle, ‘Feminism and its (Dis)contents: Criminalizing wartime rape in Bosnia and Herzegovina’ (2005) 99 (4) *American Journal of International Law* 807 - 808; see also TA Salzman, ‘Rape camps as a means of ethnic cleansing: Religious, cultural, and ethical responses to rape victims in the Former Yugoslavia’ (1998) 20 *Human Rights Quarterly* 348, 368.

⁴⁵⁴ Amnesty International, (n 408 above) 19.

⁴⁵⁵ Brownmiller, (n 407 above) 79-80; see also Wing and Merchán, (n 447 above) 20-25; see also Askin, (n 425 above) 267 - 270; see also J Wagner, ‘The systematic use of rape as a tool of war in Darfur: A blueprint for international war crimes prosecutions’ (2005) 37 *Georgetown Journal of International Law*, 205- 213; see also Engle (n 447 above) 807 - 808; see also T Meron, *Bloody Constraint: War and Chivalry in Shakespeare* (1998) 59-60.

⁴⁵⁶ Jones (n 447 above) 452.

⁴⁵⁷ A DelZotto and A Jones ‘Male-on-male sexual violence in wartime: Human rights last taboo?’ paper presented to the Annual Convention of the International Studies Association’ (2002) <http://adamjones.free.servers.com/malerape.htm> (accessed 24 July 2017).

women' and 'this is the worst insult, to feel like a woman'.⁴⁵⁸ The notion of feminisation is reinforced through the general view in society, even amongst those working in the field such as medical and aid workers, that only women can be raped.⁴⁵⁹ This opinion is not helpful in terms of the law, but where there has been change it is relatively recent.⁴⁶⁰

Another way in which male victims of sexual violence may feel emasculated is through the process of homo - sexualisation. The dominant construct of masculinity is heterosexual masculinity; the heterosexual male is held to be the symbol of power. Heterosexual males are presumed to fill the rank and file of the armed forces.⁴⁶¹ The homosexual male is considered to be less masculine and more effeminate.⁴⁶² Therefore, constructing the male victim of sexual assault as homosexual is a means by which he is emasculated,⁴⁶³ thereby reducing his social status. It is also a means by which the heterosexual male feels 'tainted' with homosexuality.⁴⁶⁴ By implication this has severe consequences. If homosexuality is involved, even just a 'taint', it can be business as usual and a blind eye turned to the situation no matter how egregious it may be.⁴⁶⁵ This situation might change as a result of the promotion of gay rights.

Homo - sexualisation is particularly pronounced in the context of male rape. During a rape it is not uncommon for the victim to experience an erection or to ejaculate, causing him to question his sexuality.⁴⁶⁶ This outcome could be worrisome for those who were forced to rape a

⁴⁵⁸ S Faramarzi, 'Former Iraqi prisoner turns against his American jailers for humiliating him as allegations of U.S. torture are investigated' A.P., May 2, 2004, http://www.tulsaworld.com/news/former-iraqi-prisoner-turns-against-his-american-jailers-for-humiliatingarticle_df8217e0-d280-5234-bab0-ef0be42b33d2.html (accessed 24 July 2017); see also CN MacKinnon, 'Women's September 11th: Rethinking the International Law of Conflict' (2006) 47 *Harvard Int'l L J* 1, 25.

⁴⁵⁹ P Oosterhoff et al 'Sexual torture of men in Croatia and other conflict situations: An open secret' (2004) 12 (23) *Reproductive Health Matters* 75.

⁴⁶⁰ In the UK, this was as late as 1994 with the introduction of the Criminal Justice and Public Order Act. This is another way in which the traditional stereotypes that (1) men cannot be victims and (2) it is women that need protection are reinforced.

⁴⁶¹ On instances of female warriorship see JS Goldstein, *War and gender* (2001) 59 - 127; see also B Ehrenreich, *Blood Rites: Origins and history of the passion of war* (1997), 126. As Ehrenreich later notes, 230 that 'the de-gendering of war does not mean that 'masculinity' will cease to be a desirable attribute; only that it will be an attribute that women as well as men can possess'.

⁴⁶² Seifert (n 419 above) 60; Goldstein (n 455 above) 374.

⁴⁶³ Zarkov (n 427 above) 79.

⁴⁶⁴ Sivakumaran (n 418 above) 293 - 299.

⁴⁶⁵ On the status of sexual orientation in international law, see D Sanders, 'Human rights and sexual orientation in international law' (2002) 25(1) *International Law Journal of Public Administration* 13 - 44.

⁴⁶⁶ Groth, (n 407 above) 138-139; see also American Medical Association, 'Strategies for the treatment and prevention of sexual assault' 21; see also M Peel et al., 'The Sexual Abuse of Men in Detention in Sri Lanka' (2000) 355 *The Lancet* 2069 - 2070.

male during conflict.⁴⁶⁷ However rape is about power and dominance and not sexual gratification, which explains why the male rapist retains his heterosexual (powerful) status and the male victim loses his heterosexual status and is considered homo - sexualised (made weak, effeminate).⁴⁶⁸ If two male victims are forced to rape one another the traditional power dynamic no longer applies, both male victims are deemed to have lost their heterosexual status for power rests with the enforcer of the rape. In this situation the enforced rape 'taints' both parties with homosexuality and strips both of their masculinity and any power they may possess.⁴⁶⁹

In questioning their masculinity, male survivors also question their sexuality. They suffer from the dual misconceptions that it is homosexual men who are raped and that heterosexual men do not rape other heterosexual men.⁴⁷⁰ This reasoning may explain why male victims of sexual assault not only stay silent but actively deny the sexual abuse or, if it is mentioned at all, will be in the form of witnessing other men that were sexually abused but never themselves. Only late in a counselling or therapeutic process may male victims acknowledge that they were sexually abused.⁴⁷¹

The concept of masculinity plays out in ideas of virility and procreative capacity. Simply put, male survivors of sexual torture often display the fear of infertility in relation to injury to their sexual organ suffered as a result of the violation. They also suffer from an inferiority complex because they are no longer regarded as a complete man or have lost the traditional function of a man towards his wife.⁴⁷² This fear may be due to the many castrations that take place in armed conflict, as well as the frequency of violence aimed at the male reproductive organ. At times perpetrators explicitly express the intention of depriving the victim of their procreating capability, for example, stating in the course of deliberately aiming beatings at testicles that 'you'll never make Muslim children again'.⁴⁷³ Also, women are raped in order to impregnate

⁴⁶⁷ As above.

⁴⁶⁸ American Medical Association (466 above) 21; see also Peel et al (n 466 above) 2069 - 2070.

⁴⁶⁹ Sivakumaran, (n 418 above) 293 - 299.

⁴⁷⁰ WHO, 'Guidelines for medico - legal care for victims of sexual violence' (2003) 16, <http://apps.who.int/iris/bitstream/10665/42788/1/924154628X.pdf> (accessed 29 May 2017).

⁴⁷¹ Tienhoven (n 438 above) 134; see also Oosterhoff (n 459 above) 74.

⁴⁷² Tienhoven, (n 438 above) 134.

⁴⁷³ Application of the Genocide Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Yugoslavia* (Serbia and Montenegro)) Application of the Republic of Bosnia and Herzegovina, para. 44D (c).

them with the aim of fostering the perpetrator's ethnicity.⁴⁷⁴ In cases where the survivors have their reproductive capabilities intact they may experience psychological difficulties leading them to suffer from sexual and relationship difficulties.⁴⁷⁵

This situation is particularly pertinent in the case of sexual violence against women in armed conflicts of an ethnic, racial or religious dimension, in which the prevention of their giving birth to infants of the same ethnic, racial or religious group may be a particular focus of perpetrators.⁴⁷⁶ This goal may be achieved by forcible impregnation, by damaging the reproductive organs or by stigmatising raped women.⁴⁷⁷ This stigma may be such that female rape survivors will be shunned by their community, considered un - marriageable by male members of the same group or lead to the women themselves having negative associations with sexual activity.

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Forcible impregnation resulting in giving birth to infants of the perpetrator's group⁴⁷⁹ is a distinct offense and has severe effects on women.⁴⁸⁰ The linkage between the prevention of procreation on the part of both sexes is recognised in the Rome Statute of the International Criminal Court, which lists enforced sterilisation as a crime against humanity which it defines in the elements of crimes as the deprivation of 'biological reproductive capacity'.⁴⁸¹ This definition is wide enough to encompass sexual violence against males such as castration or other

⁴⁷⁴ MC Bassiouni, 'Rape and sexual assault' Final Report of the United Nations Commission of Experts, Established pursuant to Security Council Resolution 780 (1992) UN Doc. S/1994/674, 59 - 60, para. 250(b) <file:///C:/Users/Oghenerioborue/Downloads/File-KSAp8QWQliyQM8aa.pdf> (accessed 10 April 2018).

⁴⁷⁵ WHO (n 470 above) 16.

⁴⁷⁶ C Chinkin, 'Rape and sexual abuse of women in international law' (1994) 5 *European Journal of International Law* 330; see also SK Fisher, 'Occupation of the womb: Forced impregnation as genocide' (1996) 46 *Duke Law Journal* 91; see also TA Salzman 'Rape camps as a means of ethnic cleansing: Religious, cultural, and ethical responses to rape victims in the former Yugoslavia' (1998) 20 *Human Rights Quarterly*, 365 - 366.

⁴⁷⁷ As above.

⁴⁷⁸ Chinkin (n 476 above) 330; see also Fisher (n 476 above) 91; see also Salzman (n 476 above) 365 - 366.

⁴⁷⁹ Fisher, (1996) (n 476 above); see also K Boon, 'Rape and forced pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent' (2001) 32 *Columbia Human Rights Law Review* 625; see also R Carpenter, 'Surfacing children: Limitations of genocidal rape discourse' (2000) 22 *Human Rights Quarterly* 428.

⁴⁸⁰ R Copelon, 'Surfacing gender: Re - engraving crimes against women in humanitarian law' (1994) 5 *Hastings Women's Law Journal* 243, 243 - 244, 256.

⁴⁸¹ ICC Elements of Crime 'Crime against humanity of sexual violence,' International Criminal Court (2011) Article 7 (1) (g) - 5 (1) <http://www.icc.cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/elementsofcrimeseng.pdf> (accessed 31 July 2014).

genital mutilation that leads to the inability to procreate.

9.3 ‘Emasculation’ of the group

Any consideration of sexual violence in conflict cannot be divorced from the very particular context in which it takes place. In conflicts of an ethnic, racial or religious character, sexual violence is often targeted against individuals belonging to particular ethnic, racial or religious groups so as symbolically to dominate the entire rather than being of sporadic or opportunistic in nature.⁴⁸² An analysis of the ways in which male and female bodies are symbolically constructed is useful in this context. The symbolic construction of the female body tends to reinforce the idea of the community, for example, ‘Marianne’ personifying revolutionary France, the Statue of Liberty the United States, the Bavarian national statue ‘Bavaria’ and ‘Mother India’.⁴⁸³ Accordingly, an attack on the female body is a symbolic attack on the personification and culture of the entire community.⁴⁸⁴

The way in which sexual violence against women symbolise to offender and victim alike the destruction of the national, racial, religious or ethnic culture depending on the context of the conflict, sexual violence against both sexes symbolises the disempowerment of the national, racial, religious or ethnic group. The castration of a man is considered to emasculate him, to deprive him of his power. The castration of a man may also represent the symbolic emasculation of the entire community. This gesture is particularly pronounced in an ethnic conflict where ‘the castration of a single man of the ethnically defined enemy is a symbolic appropriation of the masculinity of the whole group’.⁴⁸⁵

Sexual humiliation of a man of another ethnicity is proof not only that he is a lesser man, but

⁴⁸² Human Rights Watch (n 427 above).

⁴⁸³ Seifert (n 419 above) 39; see also R Kapur, ‘The Tragedy of victimization rhetoric: Resurrecting the “Native” subject in international/post - colonial feminist legal politics’ (2002) 15 *Harvard Human Rights Journal* 1, 22; on the imagery between the body and the state see R Knop, ‘Re - Statements: Feminism and state sovereignty in international law, problems’ (1993) 3 *Transnational Law & Contemporary Problems*, 293, 326.

⁴⁸⁴ Seifert (n 419 above) 39.

⁴⁸⁵ Seifert (n 419 above) 39.

also that his ethnicity is a lesser ethnicity'.⁴⁸⁶ This act is not particular to castration but is applicable to situations generally.⁴⁸⁷ Notions of power and dominance are interwoven throughout ideas of emasculation, feminisation, homo-sexualisation and the prevention of procreation. It is the loss of power, amongst other things, that is common to all. Power is the essential attribute in all forms of sexual violence, be it rape, enforced sterilisation or forced nudity. The heterosexual male is considered all - powerful; rape and other forms of sexual violence against men and against women serve to reinforce this status.

10 Jurisprudence of rape as a crime against humanity

The purpose in this segment is to illustrate the level of sexual violence in times of armed conflict which precipitates the flight of women to foreign countries as refugees and how these situations have been dealt by various special international tribunals.

In 1998 the Rwanda Tribunal convicted Jean-Paul Akayesu of rape as a crime against humanity.⁴⁸⁸ Mr. Akayesu was the highest-ranking political official in a commune in which about 2 000 Tutsis were slaughtered by a Hutu political militia group called the *Interhamwe*.⁴⁸⁹ During the killings many Tutsi women fled their homes and sought sanctuary in the communal headquarters where Akayesu presided. The women pleaded with Akayesu to protect them.⁴⁹⁰ Testimony revealed that the women were subjected to rape, to gang rape, and to sexual humiliation; death followed after.⁴⁹¹ The *Akayesu* Trial Chamber pronounced a detailed opinion based on the rape testimony it heard. The judges cited the testimony of a Tutsi witness, identified as JJ, who asserted that she was taken by force from near the 'municipal office' into the cultural centre in a group of approximately fifteen girls and women, where they were raped.⁴⁹²

⁴⁸⁶ Zarkov (n 427 above) 78.

⁴⁸⁷ Jones (n 447 above) 460.

⁴⁸⁸ *Prosecutor v. Jean-Paul Akayesu, Judgement*, ICTR-96-4-T, September 2, 1998, para. 688.

⁴⁸⁹ As above.

⁴⁹⁰ *Prosecutor v Jean-Paul Akayesu* (n 488 above).

⁴⁹¹ *Prosecutor v Jean-Paul Akayesu* (n 488 above).

⁴⁹² *Prosecutor v Jean-Paul Akayesu* (n 488 above).

She was raped by different men up to the point of death.⁴⁹³ The trial Chamber heard the testimony of a Hutu woman, identified as PP, who witnessed the cruel rape of Alexia a Tutsi woman.⁴⁹⁴ Witness PP attested to the fact that ‘one person held her neck, others took her by the shoulders, and others held her thighs apart as numerous *Interhamwe* continued to rape her, Bongo after Pierre and *Habarunena* after Bongo’.⁴⁹⁵

The Trial Chamber concluded that the sexual assault described in the testimony constituted rape under article 3, the crimes against humanity provision of the Rwanda Statute.⁴⁹⁶ The court found the incidents of sexual violence to constitute acts of genocide under the prohibition of ‘causing serious bodily or mental harm to members of the group’.⁴⁹⁷ In finding Mr. *Akayesu* guilty, the Trial Chamber for the first time in international law undertook to define rape; there had been no universally accepted definition in international law.⁴⁹⁸ Rape has been defined in national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered intrinsically as sexual. The Chamber defines ‘rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive’.⁴⁹⁹ Mr. *Akayesu* was sentenced to life imprisonment for genocide and crimes against humanity, including the rapes committed upon Tutsi women by the *Interhamwe*.⁵⁰⁰

The jurisprudence of the Yugoslavia Tribunal developed these considerations on parallel lines. Yet its conception of rape is distinctly different. In a 1998 case against an individual named *Furundzija*, the Yugoslav Tribunal employed a more mechanical definition of rape in treating it as a war crime.⁵⁰¹ In 2000 a Trial Chamber in *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Foca case)⁵⁰² charged three Bosnian Serbs with rape, torture and

⁴⁹³ *Prosecutor v Jean - Paul Akayesu* (n 488 above).

⁴⁹⁴ *Prosecutor v Jean - Paul Akayesu* (n 488 above).

⁴⁹⁵ *Prosecutor v Jean - Paul Akayesu* (n 488 above).

⁴⁹⁶ *Prosecutor v Jean - Paul Akayesu* (n 488 above).

⁴⁹⁷ *Prosecutor v Jean - Paul Akayesu* (n 488 above).

⁴⁹⁸ *Prosecutor v Jean - Paul Akayesu* (n 488 above).

⁴⁹⁹ *Prosecutor v Jean - Paul Akayesu* (n 488 above).

⁵⁰⁰ *Prosecutor v Jean - Paul Akayesu* (n 488 above).

⁵⁰¹ *Prosecutor v Anto Furundzija* (Appeal Judgement), IT-95-17/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 21 July 2000.

⁵⁰² *The Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Foca case) IT-96-23-T & IT-96-23-1/T, paras 127 - 133 (22 Feb. 2002).

enslavement. During the trial it was revealed that hundreds of Bosnian Muslim women and girls had been caught up in the military takeover of the town of *Foca*, in eastern Bosnia.⁵⁰³ The women were held in a series of Serb-run detention centres. Some of the women were eventually released, but others were held by individual Serb soldiers and forced to serve as their personal sexual slaves.⁵⁰⁴

Each of the accused was found guilty of rape as a crime against humanity under article 5 of the Yugoslavia Tribunal Statute and all were sentenced to terms of imprisonment ranging from sixteen to twenty-eight years.⁵⁰⁵ In rendering its decision, the Trial Chamber defined rape in a way that placed it in the category of crimes against humanity; the *actus reus* of the crime of rape in international law is constituted by sexual penetration, however insignificant: '(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator, where such sexual penetration occurs without the consent of the victim'.⁵⁰⁶

Consent must be voluntary, of the victim's free will, read in the context of the surrounding circumstances. The *men's rea* is the intention to effect this sexual penetration and the knowledge that it occurs without the consent of the victim.⁵⁰⁷ This definition combines the mechanical terms employed in the *Furundzija case* with new considerations,⁵⁰⁸ specifically, the *Kunarac* definition adds the requirement that the sexual intercourse occurs without the victim's consent and that the perpetrator is aware of the absence of consent.⁵⁰⁹ On appeal in the *Kunarac case*, the Appeal Chamber offered extensive clarification of the meaning of lack of consent as an element of rape in a crime against humanity.⁵¹⁰ The Appeal chamber stipulated that the conditions of the rape must be such that true consent is not possible.⁵¹¹ It rejected the

⁵⁰³ As above.

⁵⁰⁴ *Foca case* (n 502 above).

⁵⁰⁵ *Foca case* (n 502 above).

⁵⁰⁶ *Foca case* (n 502 above).

⁵⁰⁷ *Foca case* (n 502 above).

⁵⁰⁸ *Prosecutor v Anto Furundzija* (n 501 above).

⁵⁰⁹ *Foca case* (n 502 above).

⁵¹⁰ *Foca case* (n 502 above).

⁵¹¹ *Foca case* (n 502 above).

ground of appeal put forth by the defendant who argued that resistance to rape had to be ‘continuous’ or ‘genuine’.⁵¹² The appellate court concluded that: the appellants were convicted of raping women held in de facto military headquarters, detention centers and apartments maintained as soldier residence and the most egregious aspect of the conditions was that the victims were considered the legitimate sexual prey of their captors.⁵¹³ Typically, the women were raped by more than one perpetrator and with a regularity that is nearly inconceivable and victims who initially sought help or resisted were treated to an extra level of brutality.⁵¹⁴ Such detention amounted to circumstances that were so coercive as to negate any possibility of consent.

Even though the *Furundzija/Kunarac*’s definition of rape resembles the definition used in many national laws, it is designed for application in periods of armed conflict or in the context of crimes against humanity. Accordingly, any allegation of the possibility of consent must be taken into account focusing on the military, social, and political upheaval that prevails in such circumstances. To prove that a victim-survivor of rape did not consent it is crucial to introduce evidence of the actual circumstances of the offense. Elements such as abduction and detention of civilians can be invoked to show the perpetrator’s awareness of inherently coercive circumstances.

This broad approach to the evidence of consent also reflects the original intent of rules of procedure and is evidence of Rule 96,⁵¹⁵ which is in force at both tribunals. Rule 96 discounts consent as a defence against the charge of sexual assault and rape if a victim has been ‘subjected to or threatened with violence, duress, detention, or psychological oppression’.⁵¹⁶ The definition of rape as a crime against humanity at the Rwanda Tribunal has incorporated the *Furundzija/Kunarac* approach which is followed since 2003. In *Prosecutor v Kajelijeli*⁵¹⁷ the Trial Chamber noted that ‘given the evolution of the law in this area...the Chamber finds the *Furundzija/Kunarac* approach of persuasive authority’.⁵¹⁸

⁵¹² Foca case (n 502 above).

⁵¹³ Foca case (n 502 above).

⁵¹⁴ Foca case (n 502 above).

⁵¹⁵ Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, IT/32/Rev.50, 8 July 2015.

⁵¹⁶ As above.

⁵¹⁷ *The Prosecutor v Juvénal Kajelijeli* (Judgment and Sentence), ICTR-98-44A-T, International Criminal Tribunal for Rwanda (ICTR), 1 December 2003.

⁵¹⁸ As above.

An important stage in the evolution of the interpretation of rape as a crime against humanity is exemplified by the findings of the Yugoslavia Tribunal as a result of the development of a gender-neutral orientation which acknowledges that men and boys can be subjected to rape. In *Prosecutor v Cesic*⁵¹⁹ the Trial Chamber sentenced Bosnian Serb *Ranko Cesic* to eighteen years in prison for committing ten camp killings and for committing rape upon two brothers.⁵²⁰ The Trial Chamber found that the victims were forced to act at gunpoint and were watched by others and that the sexual assault was preceded by threats as several guards watched and laughed while the act was performed.⁵²¹ The family relationship and the fact that others watched, made the humiliating and degrading treatment particularly serious. The violation of the moral and physical integrity of the victims justified that the rape is considered particularly serious as well.

11 Causes of vulnerability to sexual violence in refugee camps

Refugees who reside in camps are entirely subject to the caprices of host states, as has been noted by the United Nations High Commissioner for Refugees (UNHCR) and various Non-Governmental Organisations (NGOs).⁵²² Refugees in camps do not have ‘the democratic means to change those in positions of authority’⁵²³ or have recourse to an effective judicial system as one of the ways to obtain increased accountability for whatever violations they suffer.⁵²⁴ In addition, even though the UNHCR and other actors have a duty to respect and ensure the human rights of refugees, with recourse to state institutions such as a human rights commission or a judicial system, refugees are left without any means of effectively demanding or enforcing their rights.⁵²⁵

⁵¹⁹ *Prosecutor v Ranko Cesic (Sentencing Judgement)*, IT-95-10/1-S, International Criminal Tribunal for the former Yugoslavia (ICTY) 11 March 2004.

⁵²⁰ As above.

⁵²¹ *Prosecutor v Ranko Cesic* (n 519 above).

⁵²² AL Purkey ‘Whose right to what justice? The administration of justice in refugee camps’ (2011) *New England Journal of International & Comparative Law* 123.

⁵²³ As above; see also A Farmer, ‘Refugee Responses, state-like behaviour, and accountability for human rights violations: A case study of sexual violence in guinea's refugee camps’ (2006) 44 *Yale Human Rights & Development Law Journal* 72.

⁵²⁴ Purkey (n 522 above) 123; see also Farmer (n 523 above) 72.

⁵²⁵ Purkey (n 522 above) 124, see also Farmer (n 523 above) 73.

The need for an effective administration of justice in camps cannot be overemphasised because refugee communities have characteristics that make their populations, especially women and children, predominantly vulnerable to human rights violations as crime rates tend to increase during and after displacement.⁵²⁶ There are many factors that predispose refugees in camps to sexual violence. These include the collapse of social and family support structures, geographical location and local environment (high crime area), design and social structure of camp (overcrowded, multi-household dwellings, communal shelter), design of services and facilities and a predominantly male camp leadership.⁵²⁷ Moreover, gender-biased decision-making, the unavailability of food and fuel and a lack of income generation lead to entering isolated forest and bush areas in search of firewood.

Other contributory factors to vulnerability include poor police protection, the inadequate presence of UNHCR/NGO staff in camps, insufficient security patrols and lack of individual registration and identity cards.⁵²⁸ The hostility of the local population because they consider refugees as being more privileged also contributes to the refugees' vulnerability.⁵²⁹ The details of some of these features are discussed as follows:

11.1 Uncertain legal status in host states

Refugees in camps are characterised by their uncertain⁵³⁰ and limited⁵³¹ legal status, which

⁵²⁶ UNHCR, 'U.N. High Commissioner for Refugees, Operational protection in camps and settlements: A reference guide of good practices in the protection of refugees and other persons of concern' (2006) 27, <http://www.unhcr.org/publ/PUBL/448d6c122.pdf> (accessed 2016-05-02); see also Purkey (n 522 above) 124; see also UN High Commissioner for Refugees (UNHCR) 'UNHCR tool for participatory assessment in operations, (2006) 28, <http://www.refworld.org/docid/462df4232.html> (accessed 19 May 2016).

⁵²⁷ UNCHR, 'Sexual and gender - based violence against refugees, returnees and internally displaced: guidelines for prevention and response persons' (2003) 12, <http://www.unicef.org/emerg/files/glsgbv03.pdf> (accessed 17 May 2016).

⁵²⁸ As above.

⁵²⁹ UNCHR, (2003) (n 527 above) 12.

⁵³⁰ R Da Costa 'The administration of justice in refugee camps: A study of practice', External Consultant: Department of International Protection, United Nations High Commissioner for Refugees, U.N Doc. PPLA/2006/01 (2006) 5 - 6, <http://www.unhcr.org/protect> (accessed 2 May 2016); see also Purkey (n 522 above) 124.

⁵³¹ Information, Counselling, and Legal Assistance programme (ICLA) 'The consequences of limited legal status for Syrian refugees in Lebanon' ICLA Norwegian Refugee Council (NRC) Lebanon (2014) https://www.nrc.no/arch/_img/9177958.pdf (accessed 16 May 2016).

leads to a lack of legal protection and assistance⁵³² and affects refugees in numerous ways. For instance, according to Lebanese domestic law any immigrant, including refugees, who enters the country without the required documentation is regarded as an illegal immigrant.⁵³³ Thus, Syrian refugees who do not have the required documentation or whose identity document have expired and cannot be renewed because of the expense⁵³⁴ are considered illegal and are tagged as persons with limited legal status.⁵³⁵ These factors usually have negative effects such as restrictions on basic rights, for example, freedom of movement, the right to work or earn a livelihood, which can culminate in abject poverty, a lack of freedom of expression and educational opportunities⁵³⁶ and access to UNHCR registration.⁵³⁷

Apart from a confined situation of dependence and poverty, refugees also suffer from an ‘inferior’ legal status in host states where, if viewed as people without rights, they are seen as not requiring legal protection.⁵³⁸ An uncertain legal status the fear of repatriation or deportation, mistreatment, arrest or detention at checkpoints, kidnapping and violent attacks.⁵³⁹ There may be a reluctance on the part of the refugees to report violations, where such a facility is available. Limited legal status robs them of the right to seek redress or gain access justice. A Syrian male refugee narrates: ‘I lost my daughter who was seven years old and went to the police to help me look for her. They arrested me for six days, because I had no proof of legal stay and did not look for my daughter, she is still missing’.⁵⁴⁰

Other challenges created by a lack of legal documentation include access to services.⁵⁴¹ First, a lack of access to health care services, ICLA reports the lack of documentation is a hindrance to access to public medical services.⁵⁴² Before refugees can receive such services they are required to produce either an identification document or passport, which frequently they do not

⁵³² Da Costa (n 530 above) 6; see also ICLA (n 531 above) 5, 15 - 16.

⁵³³ ICLA (n 531 above) 5.

⁵³⁴ That is 200 United States dollar per individual yearly (USD 200), in ICLA (n 531 above) 14.

⁵³⁵ ICLA (n 531 above) 5.

⁵³⁶ Da Costa (n 530 above) 6; ICLA (n 531 above) 5.

⁵³⁷ ICLA (n 531 above) 15 - 16.

⁵³⁸ Da Costa (n 530 above) 6.

⁵³⁹ ICLA (n 531 above) 15 - 16, 17.

⁵⁴⁰ ICLA (n 531 above) 17.

⁵⁴¹ ICLA (n 531 above) 18.

⁵⁴² ICLA (n 531 above) 18

have. Consequently, they abjure public medical facilities for fear of arrest, detention and repatriation by security officers either at the facility or at a check point.⁵⁴³ They resort to purchasing drugs from chemist shops or consult doctors they may not be able to afford.⁵⁴⁴ Furthermore, identity documents are required to be submitted before gaining access to health facilities partially subsidised by the UNHCR.⁵⁴⁵ Another barrier to accessing a health facility is the lack of registration with the UNHCR which deprives them of all benefits associated with registration.⁵⁴⁶

11.2 Poverty

Refugees in camps are plagued by extreme poverty which exacerbates their vulnerability to SV.⁵⁴⁷ The United Nations Development Programme (UNDP) avows that in order to facilitate the eradication of poverty there must be access to justice.⁵⁴⁸ Poverty places women and girls in a susceptible condition, in which they might be compelled to exchange sex for food or other items.⁵⁴⁹ Adolescent girls engage in sexual relationships in return for material gifts; single mothers resort to prostitution to feed themselves and their children. Also, young girls from poor homes get married to men who can feed them who otherwise would not have been considered as prospective husbands, for example, poor elderly men who use the girls for free labour and sexual purposes, often they are left to take care of dependents when they have been abandoned or when their men are dead.⁵⁵⁰

Thus, poverty plays a leading role amongst refugees in respect of early and child marriages⁵⁵¹

⁵⁴³ ICLA (n 531 above) 18.

⁵⁴⁴ ICLA (n 531 above) 18.

⁵⁴⁵ ICLA (n 531 above) 19.

⁵⁴⁶ ICLA (n 531 above) 19.

⁵⁴⁷ Purkey (n 522 above) 124.

⁵⁴⁸ UNDP, 'U.N. Dev. programme, programming for justice: Access for all: a practitioner's guide to a human rights - based approach to access to justice' (2005) <http://www.apjrf.com/APJRF%20Content/UNDP%20-%20Programming%20For%20Justice%20-%20Access%20For%20All.pdf> (accessed 5 June 2016).

⁵⁴⁹ Da Costa (n 530 above) 5.

⁵⁵⁰ Da Costa (n 530 above) 5.

⁵⁵¹ Da Costa (n 530 above) 5; see also UN Women, 'Gender - based violence and child protection among Syrian refugee in Jordan, with special focus on early marriage' (2013) 2, <https://data.unhcr.org/syrianrefugees/download.php?id=4351> (accessed 18 March 2016).

or contracting marriages with partners, whom under normal circumstances they may not have considered as a spouse. For instance, elderly men have greater bargaining power than they or their families have in this precarious condition.⁵⁵² Exploitation, abuse, and various forms of sexual and gender-based violence increase as a direct consequence of displacement and extreme poverty.⁵⁵³ Moreover, a lack of financial resources means refugees whose rights have been violated are unlikely to seek redress.

11.3 Refugee camps

Rosa da Costa describes refugee camps as anomalous establishments.⁵⁵⁴ These camps are declared a cause of vulnerability to sexual violence among refugees⁵⁵⁵ because of their location, poor facilities and insecurity.

Location of camps

The majority of these camps are situated in remote areas with sparse populations and are economically underdeveloped. For example, in Kenya, refugees are confined to camps located in the semi-arid areas of Northern Kenya, away from the main centres of economic activity and urban centres.⁵⁵⁶ In Tanzania, Nyarugusu refugee camp, designated to be one of the largest,⁵⁵⁷ is located in the western province of Kigoma and lies 150 km from Lake Tanganyika and close to the Burundian border. The north-western part of Tanzania hosts refugees in Nduta, Mtendeli and Karago camps bordering the DRC and Burundi.⁵⁵⁸ Uganda has two refugee settlements,

⁵⁵² Da Costa (n 530 above) 5.

⁵⁵³ Da Costa (n 530 above) 5.

⁵⁵⁴ Da Costa (n 530 above) 122.

⁵⁵⁵ J Leatherman 'Sexual violence and armed conflict: Complex dynamics of re - victimization' (2007) 12(1) *International Journal of Peace Studies* 64.

⁵⁵⁶ PM-A De Montclos and PM Kagwanja, 'Refugee camps or cities? The Socio - economic dynamics of the Dadaab and Kakuma Camps in Northern Kenya' (2000) *Journal of Refugee Studies*, 205 - 206; see also Black & Sessay, 'Forced migration, land-use change and political economy in the forest region of Guinea' (2000) *African Affairs* 96 (385): 587 - 605.

⁵⁵⁷ N Lee 'A life of escaping conflict: "I don't feel like a Burundian- I am a refugee' The Guardian (2015) <https://www.theguardian.com/global-development/2015/oct/14/life-escaping-conflict-nyarugusu-tanzania-i-dont-feel-like-burundian-i-am-a-refugee> (accessed 26 May 2017).

⁵⁵⁸ The Poul Due Jensen Foundation 'Nyarugusu refugee camp' (2016) http://www.poulduejensensfond.dk/media/48422/2016_12_nyarugusu_fact_sheet.pdf (accessed 30 January 2016).

Nakivale located near the Tanzanian border in Isingiro district, southern Uganda⁵⁵⁹ and Kyangwali which lies in the Hoima district in Western Uganda, near Lake Albert, the natural boundary between the DRC and Uganda.⁵⁶⁰ In Kampala the capital city, which hosts the second largest number of refugee in Uganda, they are scattered in the city's low-income areas,⁵⁶¹ for instance, Somali refugees in Kisenyi, Congolese refugees in Katwe and Ethiopian refugees in Kabalagala.⁵⁶²

These remote areas lack resources and infrastructure, which has the effect of isolating refugee populations and rendering them more dependent and/or vulnerable.⁵⁶³ There is a lack of easy access to services including medical services, communications, markets, legal institutions, which situation is complicated by refugees restricted mobility.⁵⁶⁴ Refugees have fewer options available to them for the resolution of problems and in the day-to-day management of their lives.⁵⁶⁵ Their ability to receive and transmit information about their situation to governments, NGOs or international organisations as safe sources of an opportunity to lodge their complaints and grievances is constrained.⁵⁶⁶

The remote location of camps is a security threat, especially when armed or military components are in or close to refugee camps or if the camp is located close to an unstable region of the host country that is riddled with poverty, civil strife and general insecurity or banditry.⁵⁶⁷ Refugees are exposed to attack and are in danger of forced military recruitment and suffer human rights violations and sexual violence.⁵⁶⁸

⁵⁵⁹ N Omata & J Kaplan, 'Refugee livelihoods in Kampala, Nakivale and Kyangwali refugee settlements: Patterns of engagement with the private sector,' Refugee Studies Centre, Oxford Department of International Development. University of Oxford, Working Paper Series (2013) 6, <http://www.rsc.ox.ac.uk/fationsipubles/lic/working-paper-series/wp95-refugee-livelihoods-kampala-nakivale-kyangwali-2013.pdf>, (accessed 10 May 2016).

⁵⁶⁰ As above.

⁵⁶¹ Omata & Kaplan (n 559 above) 6.

⁵⁶² Omata & Kaplan (n 559 above) 8.

⁵⁶³ Da Costa (n 530 above) 6.

⁵⁶⁴ Da Costa (n 530 above) 6.

⁵⁶⁵ Da Costa (n 530 above) 6.

⁵⁶⁶ Da Costa (n 530 above) 6.

⁵⁶⁷ Da Costa (n 530 above) 7.

⁵⁶⁸ Da Costa (n 530 above) 7.

Camp Security

Da Costa opines that camps lack proper monitoring due to the small number of UNHCR professional staff available because funding is not commensurate with the camps' needs for protection, assistance and monitoring.⁵⁶⁹ Management in these camps is left to locally-hired staff and refugees themselves.⁵⁷⁰ The limited monitoring and remote location of the camps are acknowledged as an impediment to the security needs in camps.⁵⁷¹ Furthermore, when crimes, especially sexual violence, are committed the victims do not report them due to fear of reprisal and stigmatisation.⁵⁷²

11.4 Lack of capacity (resources) or willingness of host governments

Da Costa observes that host states lack the capacity or are unwilling to enforce the law and protect refugees in camps.⁵⁷³ Although there are forms of policing in camps, they are inadequate in terms of quantity and quality, for instance, there is a lack of any or sufficient female policing personnel, an absence of night patrols and the available personnel do not have sufficient training.⁵⁷⁴ In addition, the perpetrators of certain crimes and exploitative practices are amongst those whose duty it is to provide physical protection. Host states do not want to be directly involved in dispute resolution, especially when it is between two refugees.⁵⁷⁵

The unwillingness to provide protection is exacerbated in situations where the camps are situated in remote areas where both the locals and refugees do not have access to legal facilities.⁵⁷⁶ Refugees are allowed implicitly to set up their own dispute resolution mechanisms with little or no supervision.⁵⁷⁷ The unwillingness of the host state to protect and enforce the law in the camps can lead to human rights violations and the entrenchment of a culture of impunity.⁵⁷⁸

⁵⁶⁹ Da Costa (n 530 above) 7.

⁵⁷⁰ Da Costa (n 530 above) 7.

⁵⁷¹ Da Costa (n 530 above) 7.

⁵⁷² Da Costa (n 530 above) 7.

⁵⁷³ Da Costa (n 530 above) 5.

⁵⁷⁴ Da Costa (n 530 above) 6.

⁵⁷⁵ Da Costa (n 530 above) 5.

⁵⁷⁶ Da Costa (n 530 above) 6.

⁵⁷⁷ Da Costa (n 530 above) 6.

⁵⁷⁸ Da Costa (n 530 above) 6.

Refugee alternative dispute resolution mechanisms are tailored in accordance with their culture and religion and may not reflect international human rights standards.⁵⁷⁹ The lack of capacity on the part of the host state to protect and enforce laws in refugee camps is a hindrance to gaining access to justice.⁵⁸⁰

11.5 The breakdown of traditional community and family support structures

An effect of forced migration is the breakdown of community and family structures that results from the separation from or loss of family members, especially males who are the bread winners and provide a sense of security against attack.⁵⁸¹ The changes created by displacement influence the traditional roles and functions of individuals as well as cultural traditions.⁵⁸² For instance females now head households, become breadwinners, and take charge of their own security and that of the other members of their household.

Furthermore, ‘the community and social protection mechanisms for dependents, often considered to include women and children, are no longer capable of functioning properly to provide the minimum safeguards they may have been historically set up to ensure’.⁵⁸³ The absence of a profound ‘male’ dependency created for women and children by patriarchal practices and traditions results in situations of crisis and insecurity and diminishes their chances of survival.⁵⁸⁴ In addition, there is an absence of the traditional protection provided by the extended family and other social structures.⁵⁸⁵

12 Perpetrators of sexual violence against female refugees in camps

A perpetrator is defined as ‘a person, group of persons, or institution that directly or indirectly

⁵⁷⁹ Da Costa (n 530 above) 6.

⁵⁸⁰ Da Costa (n 530 above) 6.

⁵⁸¹ Da Costa (n 530 above) 7; see also Purkey (n 522 above) 125.

⁵⁸² Da Costa (n 530 above) 7; see also Purkey (n 522 above) 125.

⁵⁸³ Da Costa (n 530 above) 7.

⁵⁸⁴ UNCHR (n 527 above) 13.

⁵⁸⁵ UNCHR (n 527 above) 13.

inflicts, supports and condones violence⁵⁸⁶ or other abuse against a person or a group of persons and is in a position of real or perceived power, decision-making and/or authority, who can thus exercise control over their victims', who may depend on them for their survival.⁵⁸⁷ The crime of sexual violence against female refugees in camps is perpetrated by a myriad of actors including people known or unknown to them. They are often men in positions of relative power and influence who either control access to goods and services or who have wealth and/or income.⁵⁸⁸ Power and influence are used to exchange for sexual favors from refugees.⁵⁸⁹

Intimate partners may be perpetrators of violence. Intimate partners include husbands or boy-friends. In most societies the accepted gender role for male intimate partners is one of decision-making and power over the female partner, unfortunately, power and influence are often exerted through discrimination, violence, and abuse.⁵⁹⁰ Family members, close relatives, and friends may be involved in sexual violence. Girls are more likely to suffer sexual and gender-based violence in the domestic sphere, including neglect and incest. These human rights violations are not always reported since they involve fathers, stepfathers, grandfathers, brothers and/or uncles as the perpetrators. Harmful traditional practices take place with the knowledge and sometimes the participation of family members and close relatives and friends.⁵⁹¹

Influential community members such as teachers, leaders, politicians and other community members in positions of authority abuse their power through acts of sexual violence. The victim/survivor in these situations is even more reluctant to report the violence because of the perpetrators' position of trust and power within the community.⁵⁹²

Smugglers are often perpetrators of violence.⁵⁹³ Security forces and soldiers, including

⁵⁸⁶ M Arakawa 'A new forum for Comfort Women: Fighting Japan in United States federal court' (2013) *Berkeley Women Law Journal*, 174-200

⁵⁸⁷ UNCHR (n 527 above) 13.

⁵⁸⁸ UNHCR and Save the Children - UK 'Note for implementing and operational partners' (2002) <http://www.unhcr.org/3c7cf89a4.html> (accessed 29 December 2015).

⁵⁸⁹ As above.

⁵⁹⁰ UNCHR (n 527 above) 14.

⁵⁹¹ UNCHR (n 527 above) 14.

⁵⁹² UNCHR (n 527 above) 14.

⁵⁹³ The New Arab, 'Europe: Female migrants, refugees "face violence and sexual harassment"' (2016) <https://www.alaraby.co.uk/english/society/2016/1/18/europe-female-migrants-refugees-face-violence-and-sexual-harassment> (accessed 18 January 2017).

peacekeepers, are the embodiment of absolute power. Usually, they are armed and have the mandate to ensure security in the camp. In some settings soldiers can and do detain and/or arrest people with impunity.⁵⁹⁴ Often soldiers and security forces are in the position to grant or to withhold rights and privileges. Crossing borders, going through checkpoints, and requesting goods and services from armed forces increases the risk of being subjected to SV, especially for refugee women⁵⁹⁵ by police and border guards.⁵⁹⁶

Humanitarian aid workers, care givers, international, national and refugee staff of humanitarian aid organisations, including NGOs, UN agencies and host government ministries, holding positions of great authority in refugee settings.⁵⁹⁷ The refugee community perceives them to have money, influence, and power. Unfortunately, there have been cases of abuse of power by workers and committing acts of SV.⁵⁹⁸ Other groups of perpetrators are those who work in service delivery institutions, discriminatory practices in the delivery of social services who help maintain and increase gender inequalities.⁵⁹⁹ Withholding information, delaying or denying medical assistance, offering unequal salaries for the same work and obstructing justice are some forms of violence perpetrated by institutions.⁶⁰⁰

The report indicates there is an extreme disparity in finances between the refugee community and their neighbours, thus refugees are exploited by a relatively prosperous ‘elite’ including UN staff, peacekeepers and NGO workers, whose resources are considerably higher than those of the refugees.⁶⁰¹ These perpetrators who can afford to pay for sex whenever and with whom they choose, do so with impunity, since their victim are not able to complain about their situation, for fear of removal of their source of basic survival.⁶⁰²

⁵⁹⁴ As above.

⁵⁹⁵ The New Arab (n 593 above).

⁵⁹⁶ A Mulugeta ‘Slow Steps of Progress: The reproductive health rights of refugee women in Africa’ (2003) 55 *Agenda: Empowering Women for Gender Equity*. 77; see also The New Arab (n 593 above).

⁵⁹⁷ UNCHR (n 527 above) 15.

⁵⁹⁸ UNCHR (n 527 above) 15.

⁵⁹⁹ UNCHR (n 527 above) 15.

⁶⁰⁰ UNCHR (n 527 above) 15.

⁶⁰¹ UNHCR and Save the Children - UK (n 588 above).

⁶⁰² UNHCR and Save the Children - UK (n 588 above).

The findings of the assessment indicate that sexual violence and exploitation of children appear to be extensive in the communities visited and involve actors at all levels, including those who are engaged to protect the very children they are exploiting embracing UN staff, security forces, the staff of international and national NGOs, government officials and community leaders.

13 The typology of sexual violence against female refugees in camps

Sexual violence takes various forms, however, there are general and specific forms applicable to refugees in camps. *Basile et al*, enumerate the types of SV suffered by women in general to include;

completed or attempted forced penetration of a victim, completed or attempted alcohol/drug-facilitated penetration of a victim; completed or attempted forced acts in which a victim is made to penetrate a perpetrator or someone else; completed or attempted alcohol/drug - facilitated acts in which a victim is made to penetrate a perpetrator or someone else; non-physically forced penetration which occurs after a person is pressured verbally or through intimidation or misuse of authority to consent or acquiesce; unwanted sexual contact and non-contact unwanted sexual experiences.⁶⁰³

Sexual violence against female refugees is not limited to the following;

13.1 Rape

Rape is a 'humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim', in contravention of the 'rights to dignity, to privacy and the integrity of every person' 'basic to the ethos of the Universal declaration of Human rights and most Constitutions around the world and 'to any defensible civilisation'.⁶⁰⁴ It is a 'horrifying crime and is a cruel

⁶⁰³ KC Basile *et al*. 'Sexual violence surveillance: Uniform definitions and recommended data elements', Version 2.0. Atlanta (GA): National Centre for Injury Prevention and Control, Centres for Disease Control and Prevention; 2014, 11, https://www.cdc.gov/violenceprevention/pdf/sv_surveillance_definitions1-2009-a.pdf (accessed 8 March 2017).

⁶⁰⁴ *S v Chapman* 1997 (2) SACR 3 (SCA) at 5b-c.

and selfish act in which the aggressor treats with utter contempt the dignity and feelings of his victims'.⁶⁰⁵

The act of rape is described as 'the invasion of any part of the body of a person by a conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body'.⁶⁰⁶ The penetration can be the result of the use of force, the threat of force or other types of coercion in order to 'create a fear of violence, duress, detention, psychological oppression or abuse of power against such person or another person, taking advantage of a coercive environment, or against a person incapable of giving genuine consent'.⁶⁰⁷ Rape can include child sexual abuse, defilement and incest, 'any act where a child is used for sexual gratification and any sexual relations or interaction with a child'.⁶⁰⁸ Rape can be in the form of forced sodomy or forced or coerced anal intercourse,⁶⁰⁹ as well as attempted forced or coerced intercourse with no penetration.⁶¹⁰

It is recorded that among the victims of rape in Darfur were as young as eight years old.⁶¹¹ A victim narrated her ordeal as follows;

I went with a group of women searching for firewood at the border, but I was alone when I was attacked. A man from Chad, not a soldier, caught me, beat me and raped me. Afterward, I became sick, with fever and dizziness. My arms and legs and belly swelled up and I was yellow. I went to the clinic, but I only get paracetamol and fluid. When my husband came back some months later and found that I was pregnant, he left me. Now I have two babies from this, but not enough milk or food. I am very sad.⁶¹²

This is a typical story told by victims of the horror and pain they endure and consequences of

⁶⁰⁵ *N v T* 1994 (1) SA 862 (C) at 864G.

⁶⁰⁶ ICC (2011) Art 7 (1) (g)-1 (1); see also UNCHR (n 527 above) 3, 16.

⁶⁰⁷ UNCHR (n 527 above) 6; see also ICC (2011) (Art 7 (1) (g) - 1 (2).

⁶⁰⁸ UNCHR (n 527 above) 16.

⁶⁰⁹ UNCHR (n 527 above) 16.

⁶¹⁰ UNCHR (n 527 above) 16.

⁶¹¹ Human Rights Watch (HRW) 'Sexual Violence and its Consequences among Displaced Persons in Darfur and Chad' (2005) 7 <https://www.hrw.org/legacy/backgrounder/africa/darfur0505/darfur0405.pdf> (accessed 10 March 2017).

⁶¹² As above.

sexual violence on its victims.

13.2 Sexual abuse and torture

Sexual abuse, also called ‘molestation,’ is denoted as the coercion of undesired sexual acts by one person upon another, when it falls short of being regarded as a sexual assault’.⁶¹³ The predator is called a ‘sexual abuser’ or ‘molester’.⁶¹⁴ The phrase ‘sexual abuse’ is used to include an act by an adult to arouse sexually either a child or an adult, especially when the victim is not in a position to consent.⁶¹⁵ In Tanzania sexual abuse indicates all ‘illegal sexually oriented acts or words done or said in relation to any person for gratification or for any other illegal purposes’.⁶¹⁶

The acts that constitute sexual abuse embrace but are not restricted to abuse of power to extort sexual favours, ‘sextortion’; sexual acts without the consent of the victim or carnal knowledge, for instance ‘rape or sexual assault’.⁶¹⁷ It includes ‘sexual kissing, fondling, exposure of genitalia, and voyeurism, the exposure to or use of a child for pornography or vulgar sexual conversation with a child’.⁶¹⁸ There is as well the advantageous use of a position of authority to induce unsolicited sexual acts short of physical force and forced or coerced incest.⁶¹⁹ Sexual abuse involves the actual or threatened physical intrusion of a sexual nature, including inappropriate touching, by force or under unequal or coercive conditions.⁶²⁰

13.3 Sexual exploitation

Exploitation is defined loosely as ‘the action or fact of treating someone unfairly’ to profit

⁶¹³ Tanzania Women Judges Association (TAWJA) ‘Stopping the abuse of power for purposes of sexual exploitation: Naming , shaming , and ending sextortion’ A Toolkit, A program of the Tanzania Women Judges Association in collaboration with the International Association of Women Judges (IAWJ), funded by a grant from the Royal Netherlands Government Ministry of Foreign Affairs, MDG3 Fund (2012) 12, http://www.iawj.org/IAWJ_International_Toolkit_FINAL.pdf, (accessed 16 July 2017).

⁶¹⁴ As above.

⁶¹⁵ TAWJA (n 613 above) 12.

⁶¹⁶ The Sexual Offences Special Provisions Act, 1998, section 3.

⁶¹⁷ TAWJA (n 613 above) 12.

⁶¹⁸ TAWJA (n 613 above) 12.

⁶¹⁹ TAWJA (n 613 above) 12.

⁶²⁰ HRW (n 611 above) 7.

from their work or ‘the fact of making use of a situation to gain unfair advantage for oneself’.⁶²¹ It is denoted as the ‘act of taking advantage or unjust advantage of something or another person for one’s own benefit’.⁶²² When someone takes advantage of another person’s vulnerability to gratify sexual cravings it is sexual exploitation. For instance, refugees usually are in a precarious situation because they are at the mercy of donor charity, as a result they are regularly taken advantage of by various individuals. For example, some refugee children describe their experience of sexual exploitation as follows:⁶²³

*when them big man go loving with small girl for money. Them big men can go loving to small girls, they can call girl when she [is] walking along the road, and then the girl go and they go in house and lock the door. And, when the big man has done his business he will give the small girl money or gifts.*⁶²⁴

A study by UNHCR and Save the Children UK in refugee camps,⁶²⁵ reveals that participants, whose ages are between 13 and 18, that they have knowledge of girls who have experienced sexual violation or sexual exploitation.⁶²⁶ In certain circumstances older men date young girls in order to gain access to their sisters or mother.⁶²⁷ The participants in the study confirm the exploitative nature of the exchange as the only available means for them to receive food and other basic necessities or to pay for education.⁶²⁸ They report that even though their parents are aware of the situation some parents turn a blind eye and others encourage their children to engage in sex as a means of survival.⁶²⁹

⁶²¹ Oxford University Press, ‘Exploitation’ in *English Oxford Living Dictionary*, Oxford University Press (2017) <https://en.oxforddictionaries.com/definition/exploitation> (accessed 27 October 2017).

⁶²² BA Garner, ‘Exploitation’ in *Black’s Law dictionary*, 8th Edition, Thomson west, (2004) 619.

⁶²³ UNHCR and Save the Children - UK (n 588 above). Note the English quoted is a language called colloquial or broken or pidgen English spoken in West Africa. A literal translation is ‘when an adult male tells a minor female that I love you and entices her with money as she is walking on the street and she follows him, he sleeps with her and in return gives her money or a gift in exchange for sex. See also T Hassan ‘Female refugees face physical assault, exploitation and sexual harassment on their journey through Europe, Amnesty International (2016) <https://www.amnesty.org/en/latest/news/016/01/female-refugees-face-physical-assault-exploitation-and-sexual-harassment-on-their-journey-through-europe>... (accessed 17 February 2016).

⁶²⁴ UNHCR and Save the Children - UK (n 588 above).

⁶²⁵ UNHCR and Save the Children - UK (n 588 above).

⁶²⁶ UNHCR and Save the Children - UK (n 588 above).

⁶²⁷ UNHCR and Save the Children - UK (n 588 above).

⁶²⁸ UNHCR and Save the Children - UK (n 588 above).

⁶²⁹ UNHCR and Save the Children - UK (n 588 above).

The report exposed the most vulnerable group of children who were sexually exploited to include those without the care of their parents, children in child-headed households, orphaned children, children in foster care, children living with extended family members and children living with just one parent.⁶³⁰ In interviews with men it was observed that men generally believe that younger girls are more desirable as sexual partners. These men included agency workers and community leaders and their view is coupled to a belief that sex with a virgin cleanses a man from infection.⁶³¹

13.4 Forced prostitution

Forced prostitution is described as forced or coerced sex work undertaken in exchange for material resources,⁶³² services and support and usually targeting highly vulnerable women or girls unable to meet the basic human needs of themselves and/or their children. The typical perpetrator is a person in a privileged position, in possession of money or control of material resources and services and perceived as powerful, such as humanitarian aid workers.⁶³³

13.5 Sexual harassment

Sexual harassment is any unwanted, usually repeated, and unreciprocated sexual advance, unsolicited sexual attention, a demand for sexual access or favours, sexual innuendo or other verbal or physical conduct of a sexual nature, the display of pornographic material, when these practices interfere with work or are made a condition of employment or create ‘an intimidating, hostile or offensive work environment’.⁶³⁴

⁶³⁰ UNHCR and Save the Children - UK (n 588 above).

⁶³¹ UNHCR and Save the Children - UK (n 588 above).

⁶³² Also referred to as sexual exploitation.

⁶³³ UNCHR (n 527 above)16.

⁶³⁴ UNCHR (n 527 above)16; see also The New Arab (n 584 above); see also K Lister K, “‘It was disgusting:’ Female refugees face trauma and sexual violence on the road’ (2016) https://broadly.vice.com/en_us/article/it-was-disgusting-female-refugees-face-trauma-and-sexual-violence-on-the-road (accessed 10 March 2017).

13.6 Protective and forced marriages

Protective and forced marriages in refugee camps are marriages contracted out of fear of sexual violation and against the will or without the consent of the girl.⁶³⁵ This form of marriage is described as identical to rape by Abdel Bari *Atwan* of Al-Quds Al-Arabi,⁶³⁶ he alleges that men from certain Gulf nations request their delegations to assist them with coercing Syrian girls sheltered in provisional refugee camps in Jordan and Iraq.⁶³⁷ They take advantage of the precarious circumstances of girls in the refugee camps by going through a form of momentary marriage which is a species of rape. He proposes that it should be stopped and the perpetrators must be prosecuted.⁶³⁸

These temporary marriages are known as ‘pleasure marriages’ (*Nikah al-Mut’ah*), a pre-Islamic custom allowing men to marry for a limited period⁶³⁹ Syrian refugees aged 14 and 15, who fled to Jordan and Iraq, are forced into marriage.⁶⁴⁰ The marriage can last be as short as 30 minutes and no divorce is necessary for ‘pleasure marriages’ because the husband may declare the marriage void.⁶⁴¹ The perpetrators of pleasure marriages claim that the purpose of this exploitation is to alleviate the misery of Syrian refugees.⁶⁴²

13.7 Early or child marriage

Early or child marriage, as a form of SV, is described as a type of violence in which boys and girls under 18 years of age who are considered too young to give valid consent are forced into

⁶³⁵ M Obradovic, ‘Protecting female refugees against sexual and gender-based violence in camps’ (2015) Humanitarian Affairs: Human Security, Migration, Vulnerabilities, Women, United Nations University, <http://ourworld.unu.edu/en/protecting-female-refugees-against-sexual-and-gender-based-violence-in-camps> (accessed 20 January 2015).

⁶³⁶ KA Toameh ‘How Muslim men are “helping” Syrian refugees’ (2012) <http://www.gatestoneinstitute.org/3339/syrian-refugees> (accessed 20 January 2016).

⁶³⁷ As above.

⁶³⁸ Toameh (n 636 above).

⁶³⁹ Toameh (n 636 above).

⁶⁴⁰ Toameh (n 636 above).

⁶⁴¹ Toameh (n 636 above).

⁶⁴² Toameh (n 636 above).

marriages.⁶⁴³ Although the practice existed prior to the Syrian crises, a study shows it has doubled among Syrian refugees in Jordan.⁶⁴⁴ Child marriage amongst refugees is alleged to have been created by a crises situation, Syrian refugees report the causes to include dwindling resources and a lack of economic opportunities, as well as the need to protect their daughters against the threat of SV.⁶⁴⁵ It is thought that a reason might be an effort to reduce the economic burden on families, via reducing the number of persons to be fed in a household⁶⁴⁶ and as a means of securing an exit from a refugee camp.⁶⁴⁷

14 Consequences of sexual violence on the victims

The consequences of SV for victims are numerous and diverse, including physical and psychological consequences. They may lead to serious injuries, unwanted or early pregnancies sexually transmitted diseases/infections (STI) including infertility and infection by the human immunodeficiency virus and acquired immune deficiency syndrome (HIV/AIDS) and venereal disease.⁶⁴⁸

Victims suffer from psychological trauma such as mental health problems⁶⁴⁹ and post-traumatic stress disorders(PTSD)⁶⁵⁰ as a result of miscarriages if raped and pregnant, prolonged hemorrhage, vesicovaginal and rectovaginal fistulas and producing insomnia, nightmares, chest and back pains, painful menstruation, complications resulting from unsafe abortions and suicide.⁶⁵¹ They also suffer as a result of divorce and abandonment by their spouse.⁶⁵²

⁶⁴³ UN Women, 'Gender - based violence and child protection among Syrian refugee in Jordan, with special focus on Early Marriage' (2013) 2, <https://data.unhcr.org/syrianrefugees/download.php?id=4351>, (accessed 18 March 2016).

⁶⁴⁴ Save the children, 'Too young to Wed: The growing problem of child marriage among Syrian girls in Jordan,' (2014) 1 http://www.savethechildren.org/atf/cf/%7B9def2ebe-10ae-432c-9bd0-df91d2eba74a%7D/TO_O_YOUNG_TO_WED_REPORT_0714.PDF (accessed 18 March 2016).

⁶⁴⁵ Save the children (n 644 above) 1.

⁶⁴⁶ Save the children (n 644 above) 5.

⁶⁴⁷ Save the children (n 644 above) 5.

⁶⁴⁸ J Ramji - Nogales 'Questioning hierarchies of harm: Women forced migration and international criminal law' (2011) *Intentional Criminal Law Review* 463, 820.

⁶⁴⁹ As above.

⁶⁵⁰ Ramji - Nogales (n 648 above) 821.

⁶⁵¹ R Mabuwa, 'Seeking Protection: Addressing sexual and domestic violence in Tanzania's refugee camps' Human Right Watch (2000) 39.

⁶⁵² HRW (n 611 above) 7.

Refugees victims of sexual violence are stigmatised, ostracised or even sanctioned by their families, which will worsen their experience of physical and psychological injury. Some of these consequences outlive the victims, for instance, children born from sexual assault may be stigmatised, discriminated against or suffer sexual violence themselves.

14.1 Health

There are serious and potentially life-threatening health outcomes with all types of SV. Some outcomes are fatal: homicide, suicide, maternal and infant mortality and HIV/AIDS-related mortality.⁶⁵³ Non-fatal effects are acute and chronic physical reproductive system injuries, such as bleeding, leading to shock, infectious diseases and disability. These diseases embrace ‘somatic complaints, chronic infections, chronic pain, gastrointestinal problems, eating disorders, sleep disorders, alcohol/drug abuse, miscarriage, unwanted pregnancy, unsafe abortion, STIs, including HIV/AIDS, menstrual disorders, pregnancy complications, gynaecological disorders and sexual disorders’.⁶⁵⁴

14.2 Psycho-social emotional and psychological consequences

The victim of SV may suffer from post-traumatic stress, insomnia, depression, anxiety, fear, anger, shame, insecurity, self-hate, self-blame, mental illness and suicidal thoughts and behaviours.⁶⁵⁵ The mother of a sixteen-year old victim narrates:

My daughter screams at night. She is not happy as she used to be before, she cannot sit in one place; she is mashautana (possessed). She is always worried and in continuous movement. I never talk to her about what happened, although she knows that I know what happened to her, of course, she does: I cleaned her wounds after her return every day, but still, talking about it is very difficult. Her father became very ill since that time. He never goes out with the rest of the men and he does nothing but staying inside the room. I feel very bad about the whole situation but there is nothing we can do; God only can help us. Now my daughter is married to her cousin, but where is he? He does not communicate with her or with us.⁶⁵⁶

⁶⁵³ HRW (n 611 above) 7.

⁶⁵⁴ UNCHR (n 527 above) 23.

⁶⁵⁵ UNCHR (n 527 above) 24.

⁶⁵⁶ HRW (n 611 above) 10 - 11.

Social consequences include blaming the victim or survivor, the loss of role or function in society, such as the loss of earning a livelihood, and some may develop apathy as a result of humiliation, rejection and isolation, the feminisation of men, poverty and increased gender inequality.⁶⁵⁷

The consequence of child marriage includes the deprivation of her right to education that leaves the girl child disadvantaged in respect of economic opportunity and consequently relegates her to perpetual poverty.⁶⁵⁸ Child marriage serves to perpetuate and reinforce gender inequality across a broad spectrum of rights.⁶⁵⁹ Child marriage isolates girls from family and friends, leading to social and psychological isolation and, in turn, affects access to sexual and reproductive health.⁶⁶⁰ The consequences can be highly damaging and even fatal; it has been found that a girl under 15 is five times more likely to die in childbirth than a grown woman.⁶⁶¹

15 The problem of access to justice

The consequences of sexual violence against female refugees have been sketched, the challenge is to examine whether these victims have access to justice. The UN convention⁶⁶² provides for access to a court in the host states, but it is another issue whether female victims of sexual violence in refugee camps really have access to courts in their host states.⁶⁶³ Despite the enormity of the crime and its terrible consequences for victims few perpetrators are apprehended and prosecuted.⁶⁶⁴ Where prosecution occurs the victims do not get justice⁶⁶⁵ and if convictions

⁶⁵⁷ HRW (n 611 above) 10 - 11.

⁶⁵⁸ Save the children (n 644 above) 5; see also HRW (n 611 above) 2.

⁶⁵⁹ Save the children (n 644 above) 5; see also HRW (n 611 above) 2.

⁶⁶⁰ Save the children (n 644 above) 2; see also HRW (n 611 above) 2.

⁶⁶¹ Save the children (n 644 above) 5; see also HRW (n 611 above) 2.

⁶⁶² UN Refugee Convention (1951) (n 14 above) art 1.

⁶⁶³ UN Refugee Convention (1951) (n 14 above) art1.

⁶⁶⁴ *Mabuwa* (n 651 above) 46.

⁶⁶⁵ *Mabuwa* (n 651 above). 46, this was a case of over fifty refugee women raped by Tanzania men, where 11 perpetrators out of 100 men who committed the crime were prosecuted, the magistrate dismissed the case because the prosecutor was late to court.

are secured and sentencing takes place;⁶⁶⁶ then the matter is regarded as finalised and the victim receives no remedy for the harm suffered.

It is a well-held opinion⁶⁶⁷ that the community's attitude of blaming the victim/survivor often is reflected in the court's behaviour and that many sexual crimes are dismissed or the perpetrators are given light sentences.⁶⁶⁸ In some cases the punishment meted out to perpetrators constitutes a further violation of the victim's rights and freedom, for instance in cases where the victim is forced into marriage with the perpetrator. The emotional damage to victims is compounded by the implication that the perpetrator is not at fault.⁶⁶⁹

16 Conclusion

The chapter traced the history of the refugee problem from before World War I to World War II and thereafter, the intervention by the international community and the causes of the refugee problem. Chapter 3 discusses the history and dynamics of sexual violence. The chapter examines the jurisprudence dealing with sexual violence under the various tribunals established by the ICC. It gives a historical perspective on the problem of sexual violence against female refugees and justifies the need for there being access to justice.

The circumstances of the production of a refugee situation was recognised as a cause of vulnerability to sexual violence and the researcher highlights other factors predisposing female refugees to sexual violence in camps. The researcher deliberates on the typology of sexual violence and identifies the perpetrators.

The conclusion to the discussion in this chapter is that the female refugees suffer all types of sexual violence. They are treated with neglect and without access to justice they live with the harm suffered for life. There is a need for the establishment of a mechanism to deal with this problem.

⁶⁶⁶ Mabuwa (n 651 above).

⁶⁶⁷ UNCHR (n 527 above) 24.

⁶⁶⁸ UNCHR (n 527 above) 24.

⁶⁶⁹ UNCHR (n 527 above) 24.

Chapter 4

International and regional refugee legislative frameworks for the enforcement of the rights of victims of sexual violence in refugee camps

1 Introduction

The preceding chapter captured the problem of female refugees from a historical perspective by an account of the history of refugee problems before and during the World Wars and thereafter, the history of SV, the dynamics and jurisprudence of sexual violations, the causes of sexual violence (SV), its typology and the effect on female refugees.

The theoretical foundations on which this chapter is built are the theories of the rule of law, of rights, of justice and deterrence, as discussed in chapter 2.

The objective in this chapter is to investigate whether there are international and regional legislative mechanisms that provide access to justice for female refugees who are victims of sexual violence in refugee camps. This chapter offers an answer to the following question: Are there legislative instruments that make access to justice available to the victims of sexual violence in camps under International Law?

In answering this question this chapter briefly investigates whether refugees are protected under international and regional legislative frameworks in Africa and Europe and Inter-America legislations. It enquires whether refugees are protected against sexual violence in camps under international and regional regulations. It explores if there is provision under international and regional legal frameworks that provides for the enforcement of the rights of victims of sexual violence through giving them access to justice.

2 General protection of refugees

This aspect of chapter 4 investigates whether refugees are protected under international and

regional mechanisms in the African Union (AU), the European Union (EU) and the Organisation of American States (OAS) through an analysis of various relevant instruments relating to the protection of refugees.

2.1 International legislative instruments

The status of the protection of refugees can be gleaned from the various international legal frameworks. The foundation for their protection is article 14 (1) of the 1948 Universal Declaration of Human Rights (UDHR)¹ which provides that ‘everyone has the right to seek and to enjoy in other countries asylum from persecution’.² This provision is a broad basis on which refugees can seek protection and the enforcement of their rights in other relatively safe states.

Article 44 of Geneva Convention IV declares that³ in times of hostilities refugees, who do not enjoy the protection of any nation, whose countries are parties to the war and who find themselves detained in the hands of the enemy, should not be treated as enemies by the detaining power.⁴ The reason is they no longer owe loyalty to their countries neither do they enjoy their protection.⁵ A classic example is that of ‘German Jews who had fled to France before 1940, and thereafter found themselves in the hands of German forces who were occupying French territory’.⁶ These special groups of refugees are to enjoy the provision of article 44 of the Geneva Convention IV.⁷

The aim of protecting refugees in times of war is dealt with in article 70 paragraph 2 which declares that refugees who had earlier sought protection in the territories of the occupied nation,

¹ UN General Assembly, Universal Declaration of Human Rights (UDHR), United Nation Treaty Series, 10 December 1948, 217 A (III), article 14, paragraph 1.

² As above.

³ Geneva Convention (IV) relative to the Protection of Civilian Persons in time of War (GC IV) (1949) United Nations Treaty series, vol. 75, p. 287. Entered into force 21 October 1950

⁴ As above.

⁵ Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgement (AC), 15 July 1999, paras. 164; see also CMN Case Matrix Network, ‘1. Such person or persons were protected under one or more of the Geneva Conventions of 1949 (2018) <https://www.casematrixnetwork.org/cmn-knowledge-hub/proof-digest/art-8/a/common-elements/1/> (accessed 15 March 2018)

⁶ As above, paras. 164.

⁷ *Prosecutor v. Duško Tadić*, (n 5 above); see also CMN Case Matrix Network (n 5 above).

should not be ‘arrested, prosecuted, convicted or deported from the occupied territory’,⁸ unless they have committed a crime that qualifies them to be handed over to another country for prosecution in times of peace in the territories under the control of the belligerent armed forces.⁹ The ICC upheld the provisions under articles 44 and 70 paragraph 2 of the Geneva Convention IV in the *Prosecutor v Duško Tadić*,¹⁰ judgement where the court included refugees in this delicate situation as protected persons during conflict.

Additional protection for refugees during conflict is article 73 of Protocol 1 Additional (AP 1) to the Geneva Conventions¹¹ which asserts that those who are already refugees before the onset of the war under any applicable ‘international law accepted by the parties’ or under any domestic law of the ‘state of refuge or state of residence shall be protected persons within the meaning of parts I and III of the fourth convention, in all circumstances and without any adverse distinction’.¹² In addition, a failure to adhere to the principles of article 73 has been regarded as a grave breach of AP I at article 85.¹³

The principal international instrument under the international protection regime for the reception and protection of refugees is the UN Convention Relating to the Status of Refugees (the UN Convention 1951).¹⁴ The original jurisdiction and scope of this convention was intended to cover those who became refugees before 1951.¹⁵ As refugee crises escalated in other parts of the world a Protocol extending the same protection to refugees post-1951 was adopted, namely the Protocol Relating to the Status of Refugees 1967 (The Protocol 1967).¹⁶ The protocol¹⁷ extends the protection in the UN Convention relating to the status of Refugee of 1951 to refugees who acquired their status after 1951. The Protocol accords post-1951 refugees the

⁸ GC IV) (n3 above).

⁹ GC IV) (n3 above).

¹⁰ *Prosecutor v Duško Tadić* (n 5 above) paras. 164 - 166.

¹¹ Protocol I Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (AP I) of 8 June 1977.

¹² As above, 3.

¹³ AP 1 (n 11 above).

¹⁴ UN General Assembly, Convention Relating to the Status of Refugees, 2 (UN refugee convention 1951) 8 July 1951, United Nations, Treaty Series, vol. 189, 137.

¹⁵ UDHR (n1 above).

¹⁶ UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606, 267.

¹⁷ As above.

same rights and privileges, standard of treatment and protection as enjoyed by pre-1951 refugees.

Article 33 of UN Refugee Convention¹⁸ declares that on no account shall any contracting state oust a refugee to another state where their life or freedom is in danger because of ‘race, religion, nationality, membership of a particular social group or political opinion’,¹⁹ except if the refugee has committed a crime which is a threat to the peace and security of that state or has been ‘convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country’.²⁰

The provisions of article 33 of the UN Refugee Convention are the basis for seeking refuge in a country without any fear of expulsion and by implication the enforcement of the rights of the refugee against any forms of violation once accepted in the country of refuge. This principle was upheld in the case of *M.S.S. v Belgium and Greece [GC]*,²¹ where the European Court of human rights (ECtHR) held that the Belgian administration had violated an asylum seeker from Afghanistan’s rights under article 3 of the European Convention on Human Rights²² by returning him to Greece, the country he had initially transited through to seek his asylum claim.²³

The judgement was an acknowledgement that the Greek government lacked adequate asylum procedures, thus placing the applicant at risk of being returned to Afghanistan where his life or freedom would be in danger.²⁴ This situation is a breach of article 33 (1) of the UN Refugee Convention.²⁵ From the above, it is submitted refugees are protected in times of war and peace and can move to any other nation to seek international protection in accordance with the Refugee Convention of 1951.

¹⁸ UN refugee convention (1951) (n14 above).

¹⁹ UN refugee convention (1951) (n14 above).

²⁰ UN refugee convention (1951) (n14 above).

²¹ *M.S.S. v. Belgium and Greece [GC]*, no. 30696109, ECHR 2011, judgment of 1 January 2011.

²² The 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, <http://www.refworld.org/docid/3ae6b3b04.html> (accessed 28 August 2016).

²³ *M.S.S v Belgium and Greece* (n 21 above)

²⁴ *M.S.S v Belgium and Greece* (n 21 above).

²⁵ UN Refugee Convention (1951) (n 14 above).

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which protects women generally against discrimination, does not offer refugee status to women, neither does it imbibe the principle of non-refouler²⁶. With regard to persons living with a disability (PLD) the UN Refugee Convention, 1951 has no specific reference to them in its definition of a refugee. But it is thought that a refugee can claim asylum status under the heading of a social group. The Convention on persons living with disabilities (CRPD) does not expressly provide for conferring refugee status, but article 18 (1) provides for their freedom of movement and nationality.²⁷

Article 18 (1) (c) (d) asserts that people living with disability have the right to emigrate from their country of citizenship and relocate to any country of their choice and that they cannot be denied access to any country on the ground of frailty.²⁸ If there is a need to flee to another country in order to seek refuge, then PLD should enjoy equal protection as does any other human being seeking asylum. Although the CRPD does not mention refugees specifically, can they invoke the provision of the CRPD in seeking asylum claims? The researcher is of the opinion that this will be difficult because most nations depend on domestic refugee law in the determination of asylum claims.

2.2 Regional instruments

Subsequent to the UN Refugee Convention, 1951 various regions produced a legal framework for the protection of refugees. This section investigates whether refugees generally are protected under the African Union, the European Union and the Organisation of American States.

Africa Union

²⁶ UN General Assembly, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 18 1979, United Nations, Treaty Series, vol. 1249, 13.

²⁷ UN General Assembly, Convention on the Rights of Persons with Disabilities (CRPD) resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106.

²⁸ As above.

Article 12 (3) of The African Charter on Human and Peoples' Rights (The African Charter)²⁹ declares that 'every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and the international conventions'.³⁰ In order specifically to address the problem of refugees in Africa the African Union adopted the Organisation of Africa Union (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (the OAU Refugee Convention).³¹ The OAU Refugee Convention upholds the principle of non-refoulement in article II (3)³² where it asserts that no one should be exposed to procedures such as rejection at the border of a country, return or expulsion, which would force 'him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in article I, paragraphs 1 and 2'.³³

The provisions of article II (3) of the OAU Refugee Convention have been upheld by the African Commission on Human and Peoples' Rights in *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea*,³⁴ where the Commission held the Republic of Guinea in violation of articles 2, 4 - 5, 12 (5) and 14 of the African Charter and OAU Refugee Convention and recommends the establishment of a joint commission made up of Sierra Leone and the Guinea government to assess the losses by various victims with a view to compensation.³⁵ The president of Guinea had pronounced that Sierra Leonean refugees should be arrested and confined to refugee camps, resulting in false arrests and mistaken identity, the looting of properties belonging to refugees, rapes and beatings. Some refugees were repatriated by soldiers and forced to go back to Sierra Leone where their lives were at risk.³⁶

²⁹ The African (Banjul) Charter on Human and Peoples' Rights (The African Charter), (Adopted 27 June 1981, OAU Doc.CAB /LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered force 21 October 1986.

³⁰ As above.

³¹ Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU refugee Convention) 10 September 1969, 1001 U.N.T.S. 45.

³² As above.

³³ OAU Refugee Convention (n 31 above).

³⁴ *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea*, 249/02, African Commission on Human and Peoples' Rights, December 2004.

³⁵ As above.

³⁶ *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v. Guinea* (n 33 above).

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) also protects refugees.³⁷ Although it does not provide for the right to asylum for female refugee or the principle of non-refouler, in article 10 (2) (c) it provides that refugee women should be included in decision-making that safeguards their 'physical, psychological, social and legal protection'.³⁸ Female refugees are to be included in decisions regarding the establishment of structures for camp management and their resettlement.³⁹ Article 11 (2) states that all civilians, including women, are protected.⁴⁰

The African Youth Charter (AYC) does not have provision for the right to asylum or the principle of non-refouler, however, it provides for every young person to move freely from any country to another.⁴¹ Refugees have a right to seek asylum and to remain in any country in Africa. Additionally, article 23 of the African Charter on the Rights and Welfare of the Child⁴² provides for the right to asylum for refugee children.

European Union

Article 18 of the Charter of Fundamental Rights of the European Union (The Charter of EU)⁴³ declares that the right to asylum shall be guaranteed in accordance with the 'UN Refugee Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty Establishing the European Community' (TEEC).⁴⁴ The EU charter in recognition of the need for the protection of refugees underscores in article 19 that joint eviction is forbidden⁴⁵ and that no individual may be removed, expelled or transferred to

³⁷ African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) 11 July 2003.

³⁸ As above.

³⁹ Maputo Protocol (n 37 above) art. 10 (2) (d).

⁴⁰ Maputo Protocol (n 37 above).

⁴¹ African Union, African Youth Charter (AYC) 2 July 2006, entered into force as at 31 May 2008 African Union, art. 3.

⁴² African Union, African Charter on the Rights and Welfare of the Child (ACRWC) (1990) entered into force on 29 November 1999.

⁴³ European Union, Charter of Fundamental Rights of the European Union (The EU Charter) 26 October 2012, 2012/C 326/02, <http://www.refworld.org/docid/3ae6b3b70.html> (accessed 8 May 2017).

⁴⁴ As above.

⁴⁵ The EU Charter (n 43 above) art 18(1).

a state where the individual will be at serious risk of being subject to the death penalty, ‘torture or any other inhuman or degrading treatment or punishment’.⁴⁶

In harmony with article 18 of the EU Charter, the Treaty Establishing the European Community⁴⁷ in article 63 prescribes that a common system for the reception, treatment of refugees and for burden-sharing in the EU community should be established.⁴⁸ The TEEC further proposes that the European Union Council in consonance with the principles stated in article 67, five years after the Treaty of Amsterdam should enact binding laws.⁴⁹ The EU Council is also to implement processes in harmony with the Refugee Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties on asylum status.⁵⁰ States are to establish mechanisms in form of standards and laws for ‘determining which member state is responsible for considering an asylum application by a national of a third country in one of the member states’.⁵¹

In addition, member states are to set ‘minimum standards for the reception of asylum seekers’⁵² as prerequisite to obtaining refugee status for citizens of a third state,⁵³ and uniform criteria ‘on procedures for granting or withdrawing refugee status’.⁵⁴ Member states are also to adopt methods on the treatment of the issues of refugees and displaced persons with respect to setting the lowest criterion for the delivery of provisional ‘protection to displaced individuals from third countries who cannot return to their country of origin and for persons who otherwise need international protection’.⁵⁵ States are to share equally the burden of ‘receiving and bearing the consequences of receiving refugees and displaced persons’.⁵⁶

⁴⁶ The EU Charter (n 43 above) art 18(2).

⁴⁷ European Union, Treaty Establishing the European Community (TEEC) (Consolidated version), Romey, 25 March 1957, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12002E/TXT&from=EN> (8 May 2017).

⁴⁸ As above.

⁴⁹ TEEC (n 47 above) 63.

⁵⁰ TEEC (n 47 above) 63(1).

⁵¹ TEEC (n 47 above) 63(1) (a).

⁵² TEEC (n 47 above) 63(1) (b).

⁵³ TEEC (n 47 above) 63(1) (c).

⁵⁴ TEEC (n 47 above) 63(1) (d).

⁵⁵ TEEC (n 47 above) 63(2) (a).

⁵⁶ TEEC (n 47 above) 63(2) (b).

In the European Union the Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence protects refugee women.⁵⁷ Article 4 (3) promotes fundamental rights, equality and the non-discrimination against all women in Europe and explicitly extends the same protection to refugee women and to persons living with disabilities.⁵⁸

In respect of refugee status, the convention⁵⁹ in article 60 provides that women should be conferred with refugee status as a result of the recognition of gender-based violence as a type of persecution⁶⁰ within the definition of refugee in ‘article 1, A (2), of the 1951 Convention relating to the Status of Refugees⁶¹ and as a form of serious harm giving rise to complementary / subsidiary protection’.⁶²

Article 61 asserts that parties should respect and incorporate the principle of ‘non-refoulement’ in their legislation and other measures in the treatment of women and in conjunction with their existing obligation under international law.⁶³ This provision is innovative because neither the 1951 UN refugee convention nor its Protocol of 1967 included violence and domestic violence, which embraces sexual violation, in the meaning of persecution. Additionally, women should not be sent back to countries where they will be under the threat of subjection to torture or inhuman or degrading treatment or punishment.⁶⁴

Organisation of American States (Inter-America)

With regard to the protection of refugees under the Inter-American system Article XXVII

⁵⁷ Council of Europe, Convention on Preventing and Combating Violence against Women and Domestic Violence (EU, Convention on Preventing and Combating Violence against Women and Domestic Violence) 11 May 2011.

⁵⁸ As above.

⁵⁹ EU, Convention on Preventing and Combating Violence against Women and Domestic Violence (n 57 above).

⁶⁰ EU, Convention on Preventing and Combating Violence against Women and Domestic Violence (n 57 above).

⁶¹ UN Refugee Convention (1951) (n14 above).

⁶² EU, Convention on Preventing and Combating Violence against Women and Domestic Violence (n 57 above) art 60 (1) (2) (3).

⁶³ EU, Convention on Preventing and Combating Violence against Women and Domestic Violence (n 57 above) art 61 (1).

⁶⁴ EU, Convention on Preventing and Combating Violence against Women and Domestic Violence (n 57 above) art 61 (2).

of the American Declaration on the Human Rights and the Duties of Man⁶⁵ states that ‘every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory in accordance with the laws of each country and with international agreements’.⁶⁶ Article 7 of the American Convention on Human Rights⁶⁷ declares that, ‘every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offences or related common crimes’.⁶⁸

Article 8 incorporates the principle of non-refouler and specifies that under no circumstance shall an alien be expelled or sent back to a state, notwithstanding whether that nation is the country of his nationality,⁶⁹ if ‘his right to life or personal freedom’ is not guaranteed and possibly is to be violated due to his ‘race, nationality, religion, social status, or political opinions’.⁷⁰ In addition, there must not be joint expulsion of aliens.⁷¹ The use of the word ‘alien’ reflects a narrower application than the phrase ‘no person’ in the UN refugee convention 1951. The beauty of this provision lies in the assertion that ‘in no case’ shall an alien be expelled; this means that under no circumstance should an alien be forced to vacate any of the contracting states in the Organisation of American States and therefore includes foreign migrants or refugees.

The Inter-American Court in *Expelled Dominicans and Haitians v Dominican Republic*⁷² held the Dominican government in breach of articles 7 and 8 of American Convention on Human Rights amongst other articles when they detained Haitians and Haitian-Dominican citizens and whom they expelled en mass back to their country. The Inter-American Court ordered the Do-

⁶⁵ Inter - American Commission on Human Rights, American Declaration of the Rights and Duties of Man (American declaration of the rights and duties of man) 2 May 1948.

⁶⁶ As above.

⁶⁷ Organization of American States, ‘American Convention on Human Rights’ (American Convention on Human Rights) Treaty Series, No. 36 (1969).

⁶⁸ As above.

⁶⁹ American Convention on Human Rights (n 67 above)

⁷⁰ American Convention on Human Rights (n 67 above).

⁷¹ American Convention on Human Rights (n 67 above) art 9.

⁷² *Case of the Haitians and Dominicans of Haitian Origin in the Dominican Republic v Dominican Republic* (Order of the President of the Inter-American Court of Human Rights) Inter-American Court of Human Rights (IACrHR) 14 September 2000.

minican government to stop the expulsions, replace the destroyed identity documents and establish public enlightenment programmes to ensure that racial profiling is not the reason behind expulsion.⁷³

Article III (5) of the Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (Cartagena)⁷⁴ buttresses the value and significance of the doctrine of non-refoulement by including the prohibition on the rejection of refugees at the border as a cornerstone of the international protection of refugees.⁷⁵ It states that this principle is considered vital and should be accepted as a rule of *jus cogens*.⁷⁶ Cartagena is soft law, but it is a commitment by its members to abide by the principles of the UN Refugee Convention, 1951⁷⁷ as customary international law and thereby bestows this provision with the status of a hard law. The states signatory to this declaration are bound by the provisions of the UN Refugee Convention 1951.

3 Related legal international and regional instruments on sexual violence

This section investigates whether there are related international and regional instruments that protect refugees against sexual violence.

3.1 International

The UN Refugee Convention, 1951 has no provision for criminalising SV, however, there are other international legal instruments that disallow SV. SV takes place in times of conflict and peace. Female refugees are the most vulnerable group, as discussed in chapter 3.

⁷³ As above,

⁷⁴ Regional Refugee Instruments & Related, Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, <http://www.refworld.org/docid/3ae6b36ec.html> (accessed 24 August 2016).

⁷⁵ As above.

⁷⁶ Cartagena Declaration on Refugees (n 74 above).

⁷⁷ Cartagena Declaration on Refugees (n 74 above).

Sexual violence is a contravention of the Hague Convention⁷⁸ which declares in article 46 that there should be respect for ‘family honor and rights’ with regard to civilians. This phraseology can be broadly interpreted to encompass the right of persons to be free of sexual violence.⁷⁹ The act of sexual violence also breaches article 3 (1) (a) and (c) common to the four Geneva Conventions,⁸⁰ which states that in time of conflict ‘persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause...’, in every situation must be ‘treated humanely’ without discrimination because of ‘race, colour, religion or faith, sex, birth or wealth, or any other similar criteria’.⁸¹ Article 3 (1) (a) prohibits ‘violence to life and person’ a broad offence which includes cruel treatment and torture,⁸² and defines cruel treatment as any treatment that amount to torture.⁸³ Torture refers to the pain and psychological effects inflicted on the victims through rape and all forms of sexual violence and is proscribed.⁸⁴ Article 3 (1) (c) also outlaws ‘outrages upon personal dignity’ which includes rape and other forms of sexual violence,⁸⁵ and ‘humiliating and degrading treatment’ against protected persons.⁸⁶

The terms ‘violence to life, cruel treatments, torture, outrage upon personal dignity, humiliating and degrading treatment’, are synonymous with the effect of sexual violence on the victims as

⁷⁸ Hague Convention (IV) respecting the laws and Customs of war on land and its annex: Regulations concerning the Laws and Customs of war on Land (Hague Convention IV) The Hague, 18 October 1907.

⁷⁹ As above.

⁸⁰ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the field, Geneva, (GC I) 12th August 1949, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea Geneva, (GC II) 12th August 1949, 75 U. N. T. S, 85, Geneva Convention (III), Relative to the Treatment of Prisoner of War, Geneva (GC III) 12th August 1949, 75 U. N. T. S. 135 and GC IV (n 3 above).

⁸¹ As above.

⁸² GC, I (n 80 above); see also GC II (n 80 above); see also GC III (n 80 above); see also GC IV (n 3 above); see also the *Prosecutor v Tihomir Blaškić* (Trial Chamber), March 3, 2000, para. 182.

⁸³ GC, I (n 80 above); see also GC II (n 80 above); see also GC III (n 80 above); see also GC IV (n 3 above) art 3 (1) (a); see also *Kvočka et al.*, (Trial Chamber), November 2, 2001, para. 161.

⁸⁴ GC, I (n 80 above); see also GC II (n 80 above); see also GC III (n 80 above); see also GC IV (n 71 above) art 3 (1) (a); see also *Kvočka et al* (n 82 above) para. 144; see also *Kunarac, Kovac and Vokovic*, (Appeals Chamber), June 12, 2002, para. 149 - 151; see also *Prosecutor v. Mucic et al.*, case No. IT-96-21, (Trial Chamber) November 16, 1998, para. 145, 494 - 496; see also *Furundzija*, (Trial Chamber), December 10, 1998, paras. 163 - 164:

⁸⁵ GC, I (n 80 above); see also GC II (n 80 above); see also GC III (n 80 above); see also GC IV (n 3 above) art 3 (1) (c); See *Aleksovski* (Trial Chamber) June 25, 1999, para. 229; see also *Kvočka et al.* (n 76 above) para. 173; see also *Furundzija* (n 77 above) para. 172-173.

⁸⁶ GC, I (n 80 above); see also GC II (n 80 above); see also GC III (n 80 above); see also GC IV (n 3 above).

upheld by ICTY in the *Prosecutor v Kvočka et al.*⁸⁷ Article 27 of Geneva Convention IV⁸⁸ explicitly affirms that ‘women shall receive special protection against any attack on their honor, against rape, enforced prostitution or any other form of indecent assault’.⁸⁹

The offence of SV is a breach of Protocol I.⁹⁰ Furthermore, article 75 (2) (b)⁹¹ outlaws SV as enforced prostitution, an outrage upon personal dignity and degrading treatment. Article 76 (1)⁹² asserts that women should be protected against rape, enforced prostitution and any other form of indecent assault. Article 78 (3) (c)⁹³ avows that children should be protected against sexual abuse. Article 4 (2) (e) of Protocol II generally guarantees humane treatment for all not participating in hostilities.⁹⁴ Moreover, it prohibits rape and all forms of indecent assault against those not taking a direct part in hostilities.⁹⁵

Article 7 (1) (g) of the Rome Statute⁹⁶ prohibits all forms of sexual violence in the form of ‘rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity’.⁹⁷ Article (1)⁹⁸ creates the court jurisdiction for addressing sexual violence as a war crime. Furthermore, the statute disallows all forms of SV as grave breaches of all four Geneva Conventions under article 8 (2) (b) (xxii).⁹⁹ Article 34 outlaws the inducement or coercion of children into sexual activity.¹⁰⁰

⁸⁷ see also *Kvočka et al* (n 83 above) para. 144; see also *Kunarac, Kovac and Vokovic* (n 83 above) para. 149 - 151; see also *Prosecutor v. Mucic et al.* (n 84 above) para. 145, 494 - 496; see also *Furundzija* (n 77 above) para. 163-164, 172 - 173; see also *Aleksovski* (n 85 above) para. 229; see also *Kvočka et al.* (n 77 above) para. 173.

⁸⁸ GC, I (n 80 above); see also GC II (n 80 above); see also GC III (n 80 above); see also GC IV (n 3 above).

⁸⁹ GC, I (n 71 above); see also GC II (n 71 above); see also GC III (n 71 above); see also GC IV (n 3 above).

⁹⁰ AP 1 (n 11 above).

⁹¹ AP 1 (n 11 above).

⁹² AP 1 (n 11 above).

⁹³ AP 1 (n 11 above).

⁹⁴ International Committee of the Red Cross (ICRC), Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

⁹⁵ As above.

⁹⁶ UN General Assembly, Rome Statute of the International Criminal Court (Rome statute) 17 July 1998, United Nations, Treaty Series, volume 2187, 3.

⁹⁷ Rome statute (n 96 above).

⁹⁸ Rome statute (n 96 above).

⁹⁹ Rome statute (n 96 above).

¹⁰⁰ UN General Assembly, Convention on the Rights of the Child (CRC) 20 November 1989, United Nations, Treaty Series, vol. 1577, 3.

Resolution 1820 of 2008 expressly addresses sexual violence against the civilian population and is a clarion call to states to criminalise and put an end to SV.¹⁰¹ The resolution condemns sexual violence as a threat to international peace and security¹⁰² and instructs all belligerents to cease from all forms of sexual violence against the civilian population, especially women and girls.¹⁰³ It demands that all parties to a conflict should protect civilian populations against SV.¹⁰⁴

Article 4 of the resolution¹⁰⁵ enjoins nations to consider ‘rape and other types of sexual’ violence as ‘war crimes, crime[s] against humanity, or a constitutive act with respect to genocide’ and emphasises that the perpetrators of the crime of sexual violence in armed conflicts should not be granted amnesty.¹⁰⁶ State parties are ordered to fulfill their responsibility of holding perpetrators accountable through the prosecution of offenders and guarantee the equal legal protection of victims, especially female victims of sexual violence.¹⁰⁷ The resolution calls on contracting states to develop an effective mechanism for protecting women and girls against these acts.¹⁰⁸

Although the CRPD¹⁰⁹ does not explicitly outlaw sexual violence, in article 15 it emphasises the requirement of freedom from ‘torture or cruel, inhuman, or degrading treatment or punishment’.¹¹⁰ It is submitted that sexual violence encompasses acts that amount to torment, and are painful and humiliating; thus people living with a disability who are refugees should be protected. State parties are to legislate and to establish mechanisms to protect against, prohibit and punish without discrimination any of the acts enumerated in paragraph 1 of article 15 that are perpetrated against PLD.¹¹¹

¹⁰¹ UN Security Council, Security Council Resolution 1820 (2008) on Acts of sexual violence against civilians in Armed Conflicts, 19 June 2008 (RES/1820 2008) S/RES/1820, <http://www.refworld.org/docid/485bbca72.html> (accessed 4 November 2016).

¹⁰² As above, article 1.

¹⁰³ RES/1820 (2008) (n 101 above) art 2.

¹⁰⁴ RES/1820 (2008) (n 101 above) art 3.

¹⁰⁵ RES/1820 (2008) (n 101 above) art 4.

¹⁰⁶ RES/1820 (2008) (n 101 above) art 4.

¹⁰⁷ RES/1820 (2008) (n 101 above) art 4.

¹⁰⁸ RES/1820 (2008) (n 101 above) art 10.

¹⁰⁹ CRPD (n 27 above).

¹¹⁰ CRPD (n 27 above) 15(1).

¹¹¹ CRPD (n 27 above) 15(2).

Article 16 criminalises the exploitation, violence, and abuse of PLD and instructs state parties to enact laws and establish relevant ‘administrative, social, educational and extra measures to safeguard people with disabilities, both within and outside the home’ from all forms of mistreatment, viciousness and misuse, including gender-based aspects.¹¹² Subsection 5 of article 16 urges states to enact laws and issue guidelines focused on females and children and ascertain that perpetrators of exploitation, violence, and abuse against people with disability are identified, investigated and, if necessary, prosecuted.¹¹³

The Convention on the Rights of the Child outlaws sexual violation,¹¹⁴ article 19 affirms that state parties are to enact laws and establish administrative and social mechanisms to safeguard the child against all types of ‘physical or mental violence, injury or abuse, neglect or negligent treatment, ill-treatment or exploitation, with sexual abuse, while in the care of parent(s), legal guardian(s) or any other person in *loco parentis* to the child’.¹¹⁵ These measures include processes for the establishment of social programmes for the support of the child, mechanisms for identification, for reporting referral, inquiry, treatment or follow up and where it is indispensable judicial participation in incidences of violation.¹¹⁶

Article 34 provides that state parties are to protect children against all forms of ‘sexual exploitation and sexual abuse’.¹¹⁷ In order to achieve this goal state parties shall ensure that applicable national, bilateral and multilateral processes are established to avoid the ‘inducement or coercion of a child to engage in any unlawful sexual activity; all exploitative use of children in prostitution or other unlawful sexual practices and in pornographic performances and materials’.¹¹⁸

¹¹² CRPD (n 27 above) 16 (1).

¹¹³ CRPD (n 27 above) 16 (5).

¹¹⁴ CRC (n 100 above).

¹¹⁵ CRC (n 100 above) 19 (1).

¹¹⁶ CRC (n 100 above) 19 (2).

¹¹⁷ CRC (n 100 above).

¹¹⁸ CRC (n 94 above).

The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography¹¹⁹ protects children generally against all forms of sexual violation and orders state parties to issue laws protecting children, proscribing actions against the convention and prosecuting and punishing offenders.¹²⁰ Article 3 forbids all forms of sexual exploitation as defined in article 2.¹²¹

Article 17 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, criminalises sexual exploitation in the form of prostitution.¹²² The convention calls on contracting states to enact laws that prohibit the act of human trafficking for sexual purposes and undertake the security of their borders to prevent the procuring of women and girls for such purposes.¹²³ States are also to undertake the apprehension and prosecution of offenders and the protection of victims.¹²⁴ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women, and Children, supplementing the United Nations Convention Against Transnational Organised Crime¹²⁵ bans the trafficking of women and children for the purpose of sexual exploitation and provides that states are to enact laws that makes these acts an offence and prescribes punishment.¹²⁶

The UN refugee convention does not protect or prohibit sexual violence against refugees in camps. However, the provisions of The Hague Convention, the four Geneva Conventions of the 1949 and Protocol I and II Additional to the Geneva Conventions and case law reveals that the international community condemns sexual violence during armed conflict. Resolution 1820 of 2008 and the Rome Statute of the International Criminal Court specifically prohibit all species of sexual violence. The CRC and its optional protocol also prohibit all forms of sexual

¹¹⁹ UN Committee on the Rights of the Child (CRC), Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography: list of issues to be taken up in connection with the consideration of the initial report of Belgium (CRC/C/OPSC/BEL/1), 8 March 2010, CRC/C/OPSC/BEL/Q/1, (CRC Sale).

¹²⁰ As above.

¹²¹ CRC Sale (n119 above).

¹²² General Assembly, Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (UN Anti trafficking convention) approved by General Assembly resolution 317 (IV) of 2 December 1949 Entry into force: 25 July 1951.

¹²³ As above, art 17, 18.

¹²⁴ UN Anti trafficking convention (n 117 above) art 19.

¹²⁵ UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, 15 November 2000.

¹²⁶ As above article 5.

violence against children. The CRPD explicitly proscribes sexual violence against persons living with disabilities. Lastly, enquiry discloses that the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, forbids the trafficking of persons for the purposes of sexual exploitation. It is trite to state that the international community has dealt with sexual violence in times of armed conflict.

However, it is submitted that legislation is inadequate and does not protect or meet the needs of refugees who are victims of sexual violence in refugee camps. Therefore, it is suggested that the current refugee convention should be amended to address the various human rights violations, especially sexual violence against refugees.

3.2 Regional

This section investigates whether female refugees are protected against sexual violence in camps under legislation in the Africa Union, the European Union and the Organisation of American States, by analysing various legislative instruments governing these regions.

Africa Union

The African Charter does not expressly prohibit SV but article 4 declares:¹²⁷ ‘Human beings are inviolable and that every human being shall be entitled to respect for his life and the integrity of his person’ and no one may be ‘arbitrarily deprived of this right’.¹²⁸ This declaration denotes that all humans are to be protected against any type of violation. Article 5¹²⁹ ‘protects the dignity of all humans and recognises their legal status’, and prohibits all forms of ‘exploitation and degradation of man particularly ...torture, cruel, inhuman or degrading punishment and treatment’.¹³⁰

¹²⁷ The African Charter (n 28 above).

¹²⁸ The African Charter (n 28 above).

¹²⁹ The African Charter (n 28 above).

¹³⁰ The African Charter (n 28 above).

Article 3 (3) (4) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa¹³¹ provides that state parties should adopt and implement suitable procedures 'to disallow any exploitation or degradation of women and to guarantee the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual violence'.¹³² State parties also are to stop and to penalise the 'trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk'.¹³³

Article 27 of the African Charter on the Rights and Welfare of the Child¹³⁴ in article 27 prohibits all forms of sexual exploitation and abuse, prostitution, and child pornography.¹³⁵ Article 29 request States to establish mechanisms to stop the kidnapping, sale and trafficking of children¹³⁶ for unlawful purposes, including sexual exploitation. Article 21 (2) prohibits child marriage.

Article 23 (1) (m) of the African Youth Charter¹³⁷ enjoins state parties to enact laws to protect girls and young women against all forms of violence including sexual violence.¹³⁸ More explicitly, the AYC orders states to establish laws that protect girls and young women against all species of 'violence, genital mutilation, incest, rape, sexual abuse, sexual exploitation, trafficking, prostitution, and pornography'.¹³⁹

European Union

Article I of the EU Charter recognises that 'human dignity is inviolable and must be respected and protected',¹⁴⁰ this recognition mandates that human dignity, which includes the right of a

¹³¹ Maputo Protocol (n 37 above).

¹³² Maputo Protocol (n 37 above).

¹³³ Maputo Protocol (n 37 above) art 4(2) (g).

¹³⁴ African Charter on the Rights and Welfare of the Child (ACRWC) (1990) entered into force on 29 November 1999.

¹³⁵ As above.

¹³⁶ ACRWC (n133 above).

¹³⁷ AYC (n 41 above).

¹³⁸ AYC (n 41 above).

¹³⁹ AYC (n 41 above) art. 23 (1) (l).

¹⁴⁰ European Union, The Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.

person to share her sexual life with whom she elects to share it, is respected and protected. Article 3 of the European Convention on Human Rights (ECHR)¹⁴¹ prohibits acts of ‘torture, inhuman and degrading treatment or punishment’¹⁴² and would cover SV. In *ES and Others v Slovakia*¹⁴³ the failure of the government of Slovakia to protect the applicant and her children against the violence and sexual abuse of the children perpetrated by her husband, was held to be a contravention of article 3 of the ECHR.¹⁴⁴

In support of the principles of article 3 of the ECHR against SV is the case of *Maslova and Nalbandov v. Russia*.¹⁴⁵ The applicant was invited to a police station for questioning in a murder case. As part of coercing the applicant into admitting the crime,¹⁴⁶ she was beaten by a police officer, raped and forced to engage in oral sex. The police also tried to asphyxiate her with a gas mask and shocked her. After she was cross-examined by three prosecutors, they became drunk and raped and tortured the victim.¹⁴⁷

On investigation, a used condom discovered at the police station had the 99.99% possibility of containing traces of vaginal epithelial cells and non-reusable wipes contained traces of sperm, as did items of clothing, and of vaginal epithelial tissue which matched the antigen of the complainant.¹⁴⁸ The trial court held that the exhibits were inadmissible because the protocol for filing an action against a prosecutor was not followed, thus the case was dismissed for want of evidence.¹⁴⁹ On appeal to EctHR the court held that the evidence in support of the applicant was overwhelming and that the predators capitalised on the defencelessness and weak struggles of the victim to continue. They were held liable and in breach of article 3.¹⁵⁰

¹⁴¹ Council of Europe, European Convention for the Protection of Human Rights, and Fundamental Freedoms (European Convention for the Protection of Human Rights, and Fundamental Freedoms) as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

¹⁴² As above.

¹⁴³ *E S and Others v Slovakia* (no. 8227/04) 15 September 2009.

¹⁴⁴ As above

¹⁴⁵ *Maslova and Nalbandov v Russia* (Application no. 839/02) 24 January 2008.

¹⁴⁶ As above.

¹⁴⁷ *Maslova and Nalbandov v Russia* (n145 above).

¹⁴⁸ *Maslova and Nalbandov v Russia* (n145 above).

¹⁴⁹ *Maslova and Nalbandov v Russia* (n145 above).

¹⁵⁰ *Maslova and Nalbandov v Russia* (n145 above).

Another case which affirms sexual violence contravenes article 3 of ECHR¹⁵¹ is *MC v Bulgaria*¹⁵² the facts of which are that a 14 year and 10 months-old victim, the age of consent for sexual intercourse in Bulgari, was raped by two men.¹⁵³ On examination at a health facility her hymen was found to be ruptured. The case was discontinued for insufficient evidence.¹⁵⁴ On appeal to the ECtHR it was held Bulgaria was in breach by failing to protect her against degrading treatment as affirmed by article 3 and the right to respect her privacy as indicated by article 8.¹⁵⁵

In *Aydın v Turkey*¹⁵⁶ a 17-year-old Turkish girl was arrested without the disclosure of the reason for the arrest along with two of her relatives. The applicant was blindfolded, flogged, stripped nude, put on a tire and sprayed ‘with pressurized water before the rape by the security officers’.¹⁵⁷ The medical examination revealed a ragged hymen with extensive bruises on her thighs.¹⁵⁸ The ECtHR declared that the sexual assault of a prisoner by state officials was ‘an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened the resistance of his victim’.¹⁵⁹

Further, the court held that rape plants subterranean ‘psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence’.¹⁶⁰ Moreover, the desecration left an indelible feeling of debasement and because of the physical and emotional violation the court held the acts to be an infringement of article 3 that prohibits torture and degrading treatment and article 13 which provides for a right to effective remedy.¹⁶¹

¹⁵¹ ECHR (n 137 above)

¹⁵² *MC v Bulgaria* (no. 39272/98) 4 December 2003.

¹⁵³ As above.

¹⁵⁴ *MC v Bulgaria* (n152 above).

¹⁵⁵ *MC v Bulgaria* (n152 above).

¹⁵⁶ *Aydın v Turkey* (no. 23178/94) 25 September 1997.

¹⁵⁷ As above.

¹⁵⁸ *Aydın v Turkey* (n156 above).

¹⁵⁹ *Aydın v Turkey* (n156 above).

¹⁶⁰ *Aydın v Turkey* (n156 above).

¹⁶¹ *Aydın v Turkey* (n156 above).

*PM v Bulgaria*¹⁶² dealt with the rape of a thirteen-year old. It took the Bulgarian government fifteen years to complete the investigation, and the trial court did not award her any remedy or hold the Bulgarian prosecuting authorities accountable for the inept prosecution of her predator.¹⁶³ In a petition to EctHR the court held that the delay and the futile investigation despite overwhelming evidence were in contravention of article 3 of the Convention.¹⁶⁴ In the same vein the ECtHR held the failure to investigate rape and sexual abuse in a complaint by a fourteen year-old sexually violated by a twenty three year-old man a breach of article 3 of the Convention¹⁶⁵ in *IG v the Republic of Moldova*.¹⁶⁶

Article 5 (1) of the Convention on preventing and combating violence against women and domestic violence specifically protects females against sexual violence under the European human rights system, where it provides that parties should not participate in any act of violence against women and ensures that state authorities, officials, agents, institutions and other actors representing the state act in accordance with this responsibility.¹⁶⁷ Article 36¹⁶⁸ enjoins parties to enact laws or put in place mechanisms that outlaw the engagement ‘in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any body part or object’.¹⁶⁹ Convention on preventing and combating violence against women and domestic violence disallows involvement in any form of acts of a sexual nature against the will of the woman and the procurement of sexual violence against a third party.¹⁷⁰ It is of note that this protection is extended to women who are refugees.

¹⁶² *P M v Bulgaria* (no. 49669/07) 24 January 2012.

¹⁶³ As above.

¹⁶⁴ ECHR (n 137 above).

¹⁶⁵ ECHR (n 137 above).

¹⁶⁶ *IG v the Republic of Moldova* (no. 53519/07) 15 May 2012.

¹⁶⁷ EU, Convention on Preventing and Combating Violence against Women and Domestic Violence (n 57 above).

¹⁶⁸ EU, Convention on Preventing and Combating Violence against Women and Domestic Violence (n 57 above).

¹⁶⁹ EU, Convention on Preventing and Combating Violence against Women and Domestic Violence (n 57 above).

¹⁷⁰ EU, Convention on Preventing and Combating Violence against Women and Domestic Violence (n 57 above) art 36 (1) (a)(b) (c).

The Convention on Action against Trafficking in Human Beings criminalises sexual violence.¹⁷¹ Article (4) (a) defines trafficking in human beings as the, ‘recruitment, transportation, transfer, harbouring or receipt of persons, by threat or use of force or all forms of coercion’.¹⁷² Trafficking entails the kidnap of an individual, ‘through fraud, deception, abuse of power or position of vulnerability’, as well as bribery so as to realise the ‘consent of a person having control over another person for exploitation’.¹⁷³ ‘Exploitation shall include, at a minimum, the exploitation for the prostitution of others or other forms of sexual exploitation’.¹⁷⁴

Parties to the EU anti-trafficking convention are instructed to inaugurate or toughen national supervision between various organs of the state charged with the duty to frustrate human trafficking.¹⁷⁵ State parties are encouraged to engage in research and campaigns, to develop a human-rights based-approach, organise public enlightenment programmes, adopt a mechanism to reduce the susceptibility of children and include civil society in policy making.¹⁷⁶ Moreover, states are instructed to adopt measures that will discourage these practices¹⁷⁷ and promulgate laws that criminalise the practices that facilitate the trafficking of humans and implement the creation of sanctions.¹⁷⁸ On the basis of this analysis of European Union legislation it is submitted that female refugees in Europe are protected against SV. However, it is doubtful if refugee women enjoy such protection in practice.¹⁷⁹

Organisation of American States (Inter - America)

¹⁷¹ Council of Europe, Convention on Action against Trafficking in Human Beings (EU, Convention on Action against Trafficking in Human Beings) Council of Europe Treaty Series - No. 197. Warsaw, 16. V.2005.

¹⁷² As above, article (4) (a).

¹⁷³ EU, Convention on Action against Trafficking in Human Beings (n 171 above) art (4) (a).

¹⁷⁴ EU, Convention on Action against Trafficking in Human Beings (n 171 above) art (4) (a).

¹⁷⁵ EU, Convention on Action against Trafficking in Human Beings (n 171 above) art 5.

¹⁷⁶ EU, Convention on Action against Trafficking in Human Beings (n 171 above) art 5.

¹⁷⁷ EU, Convention on Action against Trafficking in Human Beings (n 171 above) art 6.

¹⁷⁸ EU, Convention on Action against Trafficking in Human Beings (n 171 above) art 18 - 23.

¹⁷⁹ K Lister “‘It Was Disgusting’: Female refugees face trauma and sexual violence on the road’ Amnesty International (2016) https://broadly.vice.com/en_us/article/9ae4e5/it-was-disgusting-female-refugees-face-trauma-and-sexual-violence-on-the-road (accessed 25 March 2018); see also The New Arab ‘Europe: Female migrants, refugees “face violence and sexual harassment”’ The New Arab and Agencies (2016) <https://www.alaraby.co.uk/english/society/2016/1/18/europe-female-migrants-refugees-face-violence-and-sexual-harassment> <https://www.alaraby.co.uk/english/society/2016/1/18/europe-female-migrants-refugees-face-violence-and-sexual-harassment> (accessed 25 March 2018).

The prohibition of sexual violence under the Organisation of American States can be gleaned from article V of the American declaration of the rights and duties of man¹⁸⁰ which declares that ‘every person has the right to the protection of the law against abusive attacks upon his honour, his reputation, and his private and family life’.¹⁸¹ The phrase ‘abusive attacks upon honour’ can be interpreted to include the prohibition of sexual violence. Article IX asserts that every person has the right to the inviolability of his home.¹⁸² The word ‘every person’ signifies that refugees are included, therefore, violence against refugees is a violation of article IX.

These provisions were upheld in the Inter-American court in the case of *Raquel Martí de Mejía v. Perú*,¹⁸³ Dr. Mejía Egocheaga, a lawyer, journalist and political activist, and his wife Mrs. Mejía were accused of membership of a dissident group. His wife was kidnapped by the military, he was later killed and his wife was raped several times on the same night. On laying a complaint at the police station about her rape and her missing husband, she was told she needed to wait four days to file a missing person report.¹⁸⁴ When her husband’s body was found she was maltreated and she sought asylum in Sweden. The Peruvian government requested her extradition. She filed a case in the Inter-American Court which ruled that the Peruvian government violated the rights to ‘humane treatment’¹⁸⁵ and ‘the protection of honour and dignity’¹⁸⁶ and of ‘their general obligation to respect and guarantee the exercise of the rights contained in the Convention’.¹⁸⁷

Article 2 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (‘Convention of Belem Do Para’) defines and prohibits violence against women to include ‘physical, sexual and psychological’ forms.¹⁸⁸ It asserts that the forms of violence include acts perpetrated by predators who reside within a family or domestic settings or by a non-relative who shares or has a communal apartment with the victim, and

¹⁸⁰ American declaration of the rights and duties of man (n 65 above) art V.

¹⁸¹ American declaration of the rights and duties of man (n 65 above) art V.

¹⁸² American declaration of the rights and duties of man (n 56 above).

¹⁸³ *RM de Mejía v Perú*, Case 10.970, Report No. 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 157 (1996).

¹⁸⁴ As Above.

¹⁸⁵ American Convention on Human Rights (n 67 above) art 5.

¹⁸⁶ American Convention on Human Rights (n 67 above) art 11.

¹⁸⁷ American Convention on Human Rights (n 67 above) art 1 (1).

¹⁸⁸ Organization of American States (OAS), Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (‘Convention of Belem Do Para’) 9 June 1994.

acts which embrace ‘rape, battery and sexual abuse’.¹⁸⁹ Violence perpetrated in public comprises ‘rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in offices, schools, health facilities or any other place’,¹⁹⁰ or acts committed or disregarded by the state or its representatives notwithstanding the scene of the crime.¹⁹¹

Similarly prohibiting sexual violence is the Inter-American Convention on International Traffic in Minors.¹⁹² This act bans the trafficking of children for unlawful purposes such as sexual exploitation¹⁹³ and states must enact laws for the protection of children and the punishment of offenders.¹⁹⁴ From the examination of the Inter-American legislations and case law it is submitted that women under the OAS are protected protected against SV.

4 Legal Mechanism for accessing Justice

The legal instruments for the protection of refugees against sexual violence have been discussed. This section presents an analysis of the international and regional frameworks protecting refugees with regard to providing access to justice for victims of sexual violence in refugee camps.

4.1 International Refugee Convention

The main provision for accessing the justice system by a refugee in a host state under the international refugee regime is article 16 of the UN Refugee Convention 1951. It provides that:¹⁹⁵

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

¹⁸⁹ As above art 2(a).

¹⁹⁰ Convention of Belem Do Para (n 188 above) art 2 (b).

¹⁹¹ Convention of Belem Do Para (n 188 above) art 2 (c).

¹⁹² Organization of American States, Inter-American Convention on International Traffic in Minors (Inter - American Convention on International Traffic in Minors) 18 March 1994, OAS, Treaty Series, No. 79.

¹⁹³ As above, art 2(c).

¹⁹⁴ Inter - American Convention on International Traffic in Minors (n 192 above) 4.

¹⁹⁵ UN Refugee Convention (1951) (n 14 above) art16.

2. A refugee shall enjoy in the Contracting State in which he has his 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 has his habitual residence the treatment granted to a national of the country of his habitual residence;¹⁹⁶

As stated in article 16 of the UN Refugee Convention the jurisdiction for dealing with legal issues relating to refugees is the domestic courts of host states; a legal dispute affecting refugees must be dealt with in the domestic courts of host states. This provision is general to all refugees who require access to court and is not specific to female victims of SV in refugee camps. It is necessary to discover if female refugees who are victims of SV enjoy the full benefit of this provision.

In determining the scope, reality and applicability of article 16 the work of Professor Atle Grahl-Madsen is instructive, and has been published under the auspices of the United Nations High Commissioner for Refugee (UNHCR).¹⁹⁷ The commentary begins by setting out the actual practice and limitations for accessing courts in some host states. In the first paragraph it elucidates that ¹⁹⁸ individuals access the courts only if they are citizens of that nation or if there is a mutual agreement between their state and another country.¹⁹⁹ In some countries immigrants whose countries do not have an exchange covenant are granted access to judicial institutions, but they are demanded by the court of law to deposit a certain amount of money fixed by the judge that is enough to offset the fine that may have to be paid to the other party to the litigation, peradventure the plaintiff is unsuccessful in his claims.²⁰⁰ Legal assistance is also restricted in similar ways to foreigners where it is available.²⁰¹

Grahl-Madsen, in appraising the situation of refugees with regards to the aims in article 16 avows that²⁰² the objective of article 16 is to resolve the problem of access to court for refugees,

¹⁹⁶ UN Refugee Convention (1951) (n 14 above) art16.

¹⁹⁷ UN High Commissioner for Refugees (UNHCR) (1997) Commentary on the Refugee Convention 1951 art 2-11, 13-37, <http://www.refworld.org/docid/4785ee9d2.html> (accessed 16 September 2016).

¹⁹⁸ As above.

¹⁹⁹ Commentary on the UN Refugee Convention (n 197 above).

²⁰⁰ Commentary on the UN Refugee Convention (n 197 above).

²⁰¹ Commentary on the UN Refugee Convention (n 197 above).

²⁰² Commentary on the UN Refugee Convention (n 197 above) para1.

since ‘they do not have operative nationality’, and may not be eligible to enjoy ‘reciprocity arrangements’, and that access to courts may be available to everyone but the prerequisite of ‘*cautio judicatum solvi*’ without legal aid may well affect the enforcement of their legal rights.²⁰³

The main aim of article 16 of the UN Convention is to fill the gap that exists in the practices of host states as a precursor to the arrival of refugees, but the research queries whether it has filled that gap. Grahl-Madsen²⁰⁴ states that paragraph 1 of article 16, applies to all refugees whether their usual abode is in a contracting or a non-contracting state, ‘subject only to the rule underlying the convention that each contracting state must determine for its own purposes whether a person is to be considered as a refugee or not’.²⁰⁵ Paragraph 2 of article 16 confers responsibility on a contracting state only in respect of refugees who have their habitual residence within its territory.²⁰⁶

Grahl-Madsen avers that paragraph 3 of article 16 is applicable to refugees who are in either contracting and in non-contracting states.²⁰⁷ In paragraph III of the commentary he reiterates that no reservation may be made to paragraph 1 of article 16 as stated in 42 (1)²⁰⁸: ‘at the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 33, 36 - 46 inclusive’.²⁰⁹ Reservations may be made to paragraphs 2 and 3.²¹⁰

In relation to the treatment of refugees Grahl-Madsen adds that article 16 should be read concurrently with article 29,²¹¹ which provides that ‘the contracting states shall not impose upon refugees duties charges or taxes of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations’.²¹² In addition, refugees shall not

²⁰³ Commentary on the UN Refugee Convention (n197 above).

²⁰⁴ Commentary on the UN Refugee Convention (n 197 above) para 2.

²⁰⁵ Commentary on the UN Refugee Convention (n 197 above) para 2.

²⁰⁶ Commentary on the UN Refugee Convention (n 197 above) para 2.

²⁰⁷ Commentary on the UN Refugee Convention (n 197 above) para 2.

²⁰⁸ UN Refugee Convention (1951) (n14 above).

²⁰⁹ UN Refugee Convention (1951) (n14 above).

²¹⁰ Commentary on the UN Refugee Convention (n 197 above) para 2.

²¹¹ Commentary on the UN Refugee Convention (n 197 above) para 2.

²¹² Commentary on the UN Refugee Convention (n 197 above) para 2.

be compelled to pay higher or other charges²¹³ and those refugees who reside in a contracting state should be accorded the same treatment as enjoyed by the nationals of contracting states.²¹⁴ Refugees who have not established habitual residence in any country will not benefit from the provisions of paragraphs 2 and 3.²¹⁵

With regard to refugees who have their customary abode in another country different from where they are initiating the legal action they will have their rights determined by any reciprocity or another arrangement in force in the latter country, as applicable to citizens of the country of refuge.²¹⁶ This provision implies that the way the citizens of contracting countries are treated will have a direct bearing on refugees in respect of access to court.²¹⁷ For instance, if the citizens of a state do not have access to court then the refugees also will not have access to courts. Regardless of the rights of a refugee within the scope of article 16, her rights will be determined by the rules in force in the country of refuge as they are relevant to the inhabitants of the country of refuge.²¹⁸

4.2 Analysis of Article 16 of the UN convention 1951

This section analyses these provisions in relation to the rights of victims of sexual violence in refugee camps.

Article 16 (1)

Article 16 (1) of the UN Convention, 1951 provides that a ‘refugee shall have free access to the courts of law on the territory of all contracting states’,²¹⁹ but it is unclear what the phrase determines.

²¹³ Commentary on the UN Refugee Convention (n 197 above) para 2

²¹⁴ Commentary on the UN Refugee Convention (n 197 above) para 2

²¹⁵ Commentary on the UN Refugee Convention (n 197 above) para 2

²¹⁶ Commentary on the UN Refugee Convention (n 197 above) para 2.

²¹⁷ Commentary on the UN Refugee Convention (n 197 above) para 2.

²¹⁸ Commentary on the UN Refugee Convention (n 197 above) para 2.

²¹⁹ Commentary on the UN Refugee Convention (n 197 above) para 2.

Free

The word ‘free’ has numerous possible meanings depending on the context in which it is employed. Basically, it 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’;²²⁰ alternatively, it symbolises ‘an individual of a noble, honourable, gentle birth and breeding’²²¹ ‘Free’ also 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’.²²² 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’.²²³

Black’s law dictionary describes the word ‘free’ as ‘the possession of 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’.²²⁴ Can it be said that these literal meanings of the word ‘free’ as enumerated in this section are what the UN convention conveys and asserts should be accorded refugees? If the answer is in the affirmative, then refugees should have free access to courts in accordance with all the meanings of the word ‘free’. It is submitted that a refugee should have free access to court according to the meanings of the word ‘free’.

In effect this provision may not be practicable for victims of SV in a host state in the current domestic criminal regime. Victims of sexual violence are restricted from approaching a domestic court to enforce their rights as individuals because such the crime is seen as being against the state and not against them as individuals. Therefore, they lack standing in a criminal proceeding, but are used as prosecution witnesses in criminal proceedings in order to promote the interests of the public and that of the rule of law, as discussed in chapter five. A person who is used to serve the purpose of another is not a free person and that individual represents the

²²⁰ L Brown (ed.) ‘Free’ in *New Shorter Oxford English Dictionary on historical principles* (1993) 1022.

²²¹ As above.

²²² Brown (n 220 above).

²²³ Brown (n 220 above).

²²⁴ BA Garner ‘Free’ in *Black Laws Dictionary* (2004) 688.

interest only of the master. Most cases affecting refugees may never reach the courts allowing victims to have the opportunity to state their case before the court. It is submitted that the criminal justice legal system should be reformed to incorporate the interests of the victim .

Access to court

The concept of access to court as a fundamental right is enshrined in most constitutions, 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’.²²⁵ In the Constitution of the United Republic of Tanzania this phrase is referred to in section 13 (6) (a) as a measure to ensure equality.²²⁶ The word ‘equality’ indicates a state of enjoying the same rights and opportunity. The right to litigate is considered an indispensable civil right of a citizen and of necessity must be conferred on each citizen by states and to other nationals in a similar manner as is enjoyed by their people in this respect.²²⁷

‘Access to court’ is a broad term and for the sake of clarity the phrase will be discussed by dealing with each term separately. Access to court has been defined in a variety of ways and may refer to physical or procedural access.

Physical access

Physical access is ‘an opportunity or ability to enter, approach, pass to and from and communicate with’, for instance, accessing the court.²²⁸ ‘Access’ has also been 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’.²²⁹ The word ‘court’ demarcates ‘a governmental institution consisting of one or

²²⁵ The Constitution of the Republic of South African 1996

²²⁶ The Constitution of the United Republic of Tanzania, 1977.

²²⁷ *Chambers v Baltimore & O.R.R.*, 207 U.S. 142, 148 (1907); see also *McKnight v St. Louis & S.F. Ry.*, 292 U.S. 230, 233 (1934).

²²⁸ BA Garner ‘Access’ in *Black’s Law Dictionary* (2004) 14.

²²⁹ Cambridge University Press, ‘Access’ in the English Dictionary, <http://dictionary.cambridge.org/dictionary/English/access> (accessed 3 April 2017).

more judges who sit to decide disputes and administer justice'.²³⁰ 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'.²³¹ In addition, a court denotes a place of litigation.²³²

In summary physical access to court means 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 to communicate with, approach, enter, pass to and from a locale for a legal proceeding.

Procedural access

In the case of *Oerlemans v The Netherlands*,²³³ the European Court of Human Rights (ECtHR) designate access to court as giving an applicant an opportunity to challenge the lawfulness of an order.²³⁴ In that case the government of Netherlands declared some areas as protected locations, comprising also property belonging to the applicant.²³⁵ The order required that certain agricultural activity required permission before it could be undertaken. The ECtHR had to determine whether the applicant had a right and whether the right is of a civil character. The court agreed that there was a dispute because the applicant's right to use his property has been restricted.²³⁶

An additional issue the court had to resolve is whether the government of the Netherlands gave the applicant the opportunity to challenge the lawfulness of the order pursuant to the European

²³⁰ BA Garner 'Court' in Black's Law Dictionary, 378.

²³¹ W J Hughes, Federal practice, jurisdiction & procedure, civil and criminal with forms 7 (1931) 8; see also Garner (n 230 above) 378.

²³² Garner (n 230 above)

²³³ *Oerlemans v The Netherlands* 15 EHRR 561 1991.

²³⁴ As above.

²³⁵ *Oerlemans v The Netherlands* (n 233 above).

²³⁶ *Oerlemans v The Netherlands* (n 233 above).

Convention in article 6 (1)²³⁷ which provides for ‘fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’.²³⁸ The court specified that under Netherlands case law, where an administrative appeal to a higher authority does not guarantee fair procedure, it is possible to have recourse to the civil courts for a full review of the lawfulness of the administrative decision.²³⁹

In *Oerlemans v The Netherlands*, the ECtHR resolved the issue of giving an aggrieved person an opportunity to challenge an injustice. It is submitted that refugees who are victims of SV also should have the opportunity not only to testify for the state as witnesses, but also to challenge the unlawful act perpetrated against them as part of the right to have access to court in accordance with the provision of article 16 of the UN Refugee Convention, 1951.

In the case of *JJ v The Netherlands*²⁴⁰ the plaintiff in a taxation proceeding in the Supreme Court could not reply to the advisory opinion of the Advocate General’s appeal against a fiscal penalty because he lacked the funds to pay the court’s registration fee, which was held to be an infringement of the applicants rights to adversarial proceedings and tantamount to the violation of access to court.²⁴¹ It is argued that access to the court includes a right to reply to a court opinion and to an adversarial proceeding.

Affirming the right of access to court is *Golder v The United Kingdom*²⁴² where a prisoner, who was falsely accused of instigating a prison riot and craved a civil action for defamation against a prison guard, had his letters to both a solicitor and the European Commission of Human Rights censored and withheld by the prison authorities.²⁴³ The European Court of Human Rights affirmed that censoring and withholding the letters was a violation both of his right to

²³⁷ Council of Europe, European Convention for the Protection of Human Rights, and Fundamental Freedoms (European Convention for the Protection of Human Rights, and Fundamental Freedoms) as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

²³⁸ As above.

²³⁹ *Oerlemans v The Netherlands* (n 233 above).

²⁴⁰ *JJ v The Netherlands* (9/1997/793/994) 27 March 1998,

²⁴¹ As above.

²⁴² *Golder v The United Kingdom*, Application No. 4451/70, Judgement of 21 February 1975.

²⁴³ As above.

the communication under article 8 and his right of access to court under Article 6 (1).²⁴⁴ The denial of access to communication with a lawyer or a court is a denial of access to court.

The prevention of prisoners from hiring the services of a legal practitioner to defend themselves is a violation of the right of access to court. In *Campbell and Fell v The United Kingdom*²⁴⁵ the European Court of Human Rights held that the absence of privileged contact between lawyer and client amounted to an interference with the right of access to court and is a contravention of article 6 (1) of the Convention.²⁴⁶ The accused were prisoners charged with punitive offences for partaking in a protest and were prevented from hiring the services of a legal practitioner to defend them. When eventually they were granted access to a lawyer, the prisoners were not given privacy in consulting with their legal counsel, instead the consultation was in the hearing of a prison officer.²⁴⁷

The expression ‘free access to court’ in article 16 of the UN refugee convention is ambiguous in principle because it does not specify the issues or the subject matters that refugees freely can ask the domestic court in host states to address, that is, the issues the court has jurisdiction over. If the victims of crime have free access to court under the ICC or the domestic courts of a state remains doubtful,²⁴⁸ as is the role of victims in a criminal proceeding. The next subsection examines the role of victims in criminal proceedings in the ICC.

Victims involvement in criminal proceedings under the ICC

The aim in this subsection is to examine the extent to which victims of crime have access to court under the ICC. For victims to obtain justice for harm suffered in the courts there is a need for victims to participate fully in the criminal proceeding. This section investigates victims’ participation under the International Criminal Court (ICC) in criminal proceedings. Under the ICC article 68 (3) of the Rome Statute²⁴⁹ provides that;

²⁴⁴ European Convention for the Protection of Human Rights, and Fundamental Freedoms (n 237 above).

²⁴⁵ *Campbell and Fell v The United Kingdom* (Application No. 8342/95, Judgement of 28 June 1984),

²⁴⁶ European Convention for the Protection of Human Rights, and Fundamental Freedoms (n 237 above).

²⁴⁷ European Convention for the Protection of Human Rights, and Fundamental Freedoms (n 237 above).

²⁴⁸ Note that the issue of victim’s involvement in domestic courts will be examined in chapter 5.

²⁴⁹ Rome Statute (n 96 above).

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.²⁵⁰

The court may authorise any victim, which includes a natural organisation or institution,²⁵¹ whose personal rights have been violated or whose property has been damaged, to express their opinion through a legal practitioner.²⁵² The court is to decide whether or not to investigate or prosecute the case, through a challenge to the court's jurisdiction or the admissibility of the evidence.²⁵³ In addition, victims can express their views during the hearing to confirm the charges against the suspect or to prove their guiltlessness.²⁵⁴ Victims can also participate in the investigation stage where the prosecutor is still trying to identify the perpetrator and the nature of the crime committed before the onset of the legal proceeding.²⁵⁵ This provision provides an opportunity to clarify facts, punish offenders and seek reparation for the injury suffered.²⁵⁶

In the *Prosecutor v Thomas Lubanga Dyilo*²⁵⁷ victims were required to attest to the nexus between the crime and the harm suffered before they could participate in the criminal proceeding and it was decided that their personal interest must be linked to the charges.²⁵⁸ This role for the victim is said to be the practice in some 'legal systems of the world, where victim can join

²⁵⁰ Rome Statute (n 96 above).

²⁵¹ ICC The Rules of Procedure and Evidence (ICC Rules of Procedure and Evidence) ICC-ASP/1/3, at 10, and Corr. 1 (2002), U.N. Doc. PCNICC/2000/1/Add.1 (2000) rule 85.

²⁵² As above.

²⁵³ Rome Statute, (n 96 above) arts. 15 (3) and 19(3); see also ICC, Rules of Procedure and Evidence (n 250 above) rule 92; see also F Mc Kay 'Victim Participation in Proceedings before the International Criminal Court' Human Rights Brief (2008) 15 (3) 2-5.

²⁵⁴ As above.

²⁵⁵ Situation in the Democratic Republic of the Congo, in the case of the *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, International Criminal Court (ICC), 14 March 2012; see also Situation in The Democratic Republic of The Congo in the cases of the *Prosecutor v. Thomas Lubanga Dyilo*, No.: ICC-01/04 OA4 OA5 OA6 19th day of December 2008 (Appeal Chamber) 59.

²⁵⁶ As above.

²⁵⁷ Situation in the Democratic Republic of the Congo, Decision on Victims' Participation, in The Democratic Republic of The Congo in the cases of the *Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06-1119, para. 92 (Trial Chamber I, 18 January 2008) (Decision on Victims' Participation) para 81, 93 - 98.

²⁵⁸ As above.

criminal proceedings as civil parties'.²⁵⁹ This limited participation by victims gives the court an opportunity to consider all the rights of victims of crimes, including the right to reparations under the principles of international law, when the accused has been convicted and in the award of a remedy.²⁶⁰

The closest to the procedure to the ICC definition of victim participation, is the victims' impact statement practiced in United States, as well as in South African criminal proceedings and in Uganda.²⁶¹ This procedure was included to resolve the exclusion of victim's rights in the tribunals of the Former Yugoslavia and Rwanda.²⁶² In order to address the needs of victims by the ICC a Victims Participation and Reparations Section (VPRS)²⁶³ and Victims witness Unit²⁶⁴ were established in the ICC Registry.²⁶⁵ There is also the Office of the Public Counsel for victims and a trust fund for victims of crimes and their families.²⁶⁶

Participation, as opposed to testifying as a witness for a party to adduce evidence to the guilt or the guiltlessness of the suspect, is when a victim voluntarily appears as a contestant in the proceedings in pursuit of their own interest independent of the parties in a trial proceeding.²⁶⁷ The issue of victim participation was addressed in the Pre-Trial Chamber in *The Prosecutor v Thomas Lubanga Dyilo*²⁶⁸ in dealing with war crimes in the Democratic Republic of the Congo (DRC) where the court stated that the 'Rome Statute grants victims an independent voice and role in the proceedings and that it should not be assumed that victims would be an ally of the

²⁵⁹ Mc Kay (n253 above) 2-5; see also E Hoven, 'Civil Party participation in trials of mass crimes; A qualitative study at the Extraordinary Chambers in the Courts of Cambodia' (2014) 12 *Journal of International Criminal Justice* 81 - 107.

²⁶⁰ G.A. Res. 40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, U.N. Doc. A/RES/40/34 (Nov. 29, 1985); see also, GA Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights law and serious violations of international humanitarian law, U.N Doc. A/RES/60/147 (16 December 2005); see also Mc Kay (n 253 above) 1.

²⁶¹ Mc Kay (n 253 above) 1; see also *S v Dlangamandla* 2017 JDR 0605 (GP); see also *S v Moss* 2015 JDR 0846 (ECG).

²⁶² Mc Kay (n 253 above) 1.

²⁶³ Mc Kay (n 253 above) 1.

²⁶⁴ ICC, The Rules of Procedure and Evidence (n 250 above) rules 15 - 19; see also Rome Statute (n 96 above) art 68 (4).

²⁶⁵ ICC, The Rules of Procedure and Evidence (n 250 above) rules 15 - 19; see also Rome Statute art 68 (4; see also Mc Kay (n 253 above) 1.

²⁶⁶ Mc Kay (n 253 above) 1.

²⁶⁷ Mc Kay (n 253 above) 1.

²⁶⁸ Situation in the Democratic Republic of the Congo, in the case of the *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, International Criminal Court (ICC), 14 March 2012.

Prosecutor'.²⁶⁹ The mode of victim participation will be in form of addressing the court at the beginning and end of the proceeding, the victim's legal counsel may also request permission to cross examine the suspect or its witnesses. For instance, in the *Lubanga case* legal counsel was permitted to question witnesses. Additionally, the court held that the Trial Chamber decided that victim participants may 'introduce and examine evidence if the Chamber finds it will assist in the determination of the truth'.²⁷⁰

The status of victims in the ICC is that victims are not full parties to the proceeding as they are in the traditional civil law suit where their role can be compared to that of a third party to the litigation.²⁷¹ For example, the legal representatives of victims in the ICC do not have full access to documents in the record of proceedings. At this phase of the trial the judge has the duty to ensure that victim participation is managed and that their participation will not raise bias or encumber the rights of the defendant and the effectiveness of the trial.²⁷² Another limitation to victim participation is that where there are many victims the ICC permits a single legal practitioner to represent the victims,²⁷³ which affects the effective representation of the victims in the proceedings. Victim participation in the ICC provides an opportunity to assess the harm suffered by the victims and award reparations proportionate to the injury suffered in accordance with article 75 of the Rome Statute.²⁷⁴ From the analysis it is obvious that victims of crime under the ICC have limited participation in the proceedings and not as third parties.

In criminal proceedings under domestic justice systems victims only testify for the state to prove the guilt or innocence of the suspect as opposed to standing as a third party in the criminal proceeding as discussed in chapter five. It is submitted that victims of sexual violence in refugee camps freely should have access to courts not just as witnesses for the prosecution but to

²⁶⁹ As above, Situation in the Democratic Republic of the Congo, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6, ICC-01/04-101-tEN-Corr, para. 51 (Pre-Trial Chamber I, 17 January 2006) (Decision on Applications for Participation).

²⁷⁰ Decision on Victims' Participation (n 268 above) paras. 108 - 109 (Leave to appeal was granted on February 26, 2008).

²⁷¹ *Mc Kay* (n 253 above) 2.

²⁷² *Mc Kay* (n 253 above) 2.

²⁷³ *Mc Kay* (n 253 above) 2.

²⁷⁴ Rome Statute (n 96 above).

appear as the injured party so as to enjoy the provisions of article 16 of the UN Refugee Convention, 1951. From the analysis of victim's involvement in criminal proceedings under the ICC, it is argued that victims of crime have limited access to courts under the ICC.

The territory of all Contracting States

According to article 16 the jurisdiction for dealing with issues relating to refugees is the courts of the contracting states. A contracting state has been defined as a state which has consented to be bound by the treaty, whether or not the treaty has entered into force.²⁷⁵ A 'party' is a state which has consented to be bound by a treaty and the treaty is in force.²⁷⁶ This provision excludes refugees who are in a third state.²⁷⁷

Paragraph (1) of article 16²⁷⁸ grants jurisdiction for the enforcement of refugee rights to the domestic courts of host states or contracting states. The limiting factor is that the article does not specify the subject matter that is under the jurisdiction of the court or whether victims of SV in refugee camp can go to court freely to enforce their rights.

Article 16(2)

Article 16 (2) asserts that 'a refugee shall enjoy in the contracting state in which he has his 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*'.²⁷⁹ Paragraph 2 confers an obligation on a contracting state only in respect of refugees who have their habitual residence within its territory.²⁸⁰

²⁷⁵ The Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969, art 2(1) (f) <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> (accessed 25 August 2016).

²⁷⁶ As above, art 2(1) (g).

²⁷⁷ 'Third State' means a State not a party to the treaty see Vienna Convention article 2 (1) (h).

²⁷⁸ The UN refugee Convention (1951) (n14 above).

²⁷⁹ The UN refugee Convention (1951) (n14 above).

²⁸⁰ The UN refugee Convention (1951) (n14 above).

Treatment as a national

The destiny of refugees with regard to access to court is tied to the way in which the nationals of the contracting states are treated. It means that if the citizens of a host state are denied access to court, then refugees will be treated similarly, if the nationals of a contracting state have access to courts then refugees should be accorded the same treatment. It is questionable that the contracting parties treat the refugees as they do their citizens.

Legal assistance

Legal assistance can also be referred to as legal aid. The ECtHR in *Airey v. Ireland*²⁸¹ established that a denial to grant legal aid to an indigent woman seeking a judicial separation from her abusive husband violated her right of access to court under Article 6(1).²⁸² The court 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 6.²⁸³ In this case Mrs. Johanna Airey, an Irish citizen born in 1932 and from an underprivileged background, residing in Cork, worked as a shop assistant. She married in 1953 and had four children, with the youngest living with her as a dependent.²⁸⁴ At the time of the acceptance of the Commission's report Mrs Airey was a beneficiary of a social grant for unemployment.²⁸⁵ In 1974 she got a court order against her husband for the payment of upkeep of \$20 per week, which was raised to \$27 in 1977 and \$32 in 1978.²⁸⁶ Mr Airey stopped the payment of the maintenance allowance, because he lost his job as a lorry driver in May 1978.²⁸⁷

Mrs Airey claims that her spouse is a drunkard and prior to 1972 she suffered domestic violence and threats.²⁸⁸ Mr Airey was found guilty by the District Court of Cork City for assault and

²⁸¹ *Airey v Ireland* 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305.

²⁸² European Convention for the Protection of Human Rights, and Fundamental Freedoms (n 237 above).

²⁸³ European Convention for the Protection of Human Rights, and Fundamental Freedoms (n 237 above).

²⁸⁴ *Airey v Ireland* (n 254 above).

²⁸⁵ *Airey v Ireland* (n 254 above).

²⁸⁶ *Airey v Ireland* (n 254 above).

²⁸⁷ *Airey v Ireland* (n 254 above).

²⁸⁸ *Airey v Ireland* (n 254 above).

²⁸⁸ *Airey v Ireland* (n 254 above).

was penalised in January 1972.²⁸⁹ He moved out of the marital home in June.²⁹⁰ Before 1972 Mrs Airey obtained a separation arrangement with her husband.²⁹¹ In her bid to obtain a judicial separation from her husband she consulted various lawyers and because she could not afford the legal fees applied for legal aid which she was denied, but the court attested to her entitlement.²⁹²

It is submitted that if the court upheld her entitlement to legal assistance as a result of threats, physical assault and judicial separation, then victims of sexual violence should be given an opportunity also to enjoy this assistance as provided for in article 16 (2) of the UN refugee convention 1951. It is argued that victims of crime should have the opportunity fully to participate in the prosecution of their assailant and gain the required access to court that is anticipated in the litigation.

Cautio judicatum solvi

The second ambit of subsection two is that refugees should be exempt from *cautio judicatum solvi*, the deposit of a certain amount of money at the discretion of a court by a foreigner that is sufficient to cover the cost of litigation that he might be compelled to pay to the party per-adventure he loses the case.²⁹³ Grahl-Madsen explains that ‘in certain countries, persons have only access to the law courts as plaintiffs if they are nationals of that country or of another country for which there exists a reciprocity arrangement’.²⁹⁴ Other countries admit foreigners to their courts of law but, in the absence of reciprocity, request them to deposit an amount which at the court’s discretion is sufficient to cover the costs he will be compelled to pay the other party if he loses the case.²⁹⁵

²⁸⁹ *Airey v Ireland* (n 254 above).

²⁹⁰ *Airey v Ireland* (n 254 above).

²⁹¹ *Airey v Ireland* (n 254 above).

²⁹² *Airey v Ireland* (n 254 above).

²⁹³ Commentary on the UN Refugee Convention (n197 above) para 2-11, 13-37.

²⁹⁴ Commentary on the UN Refugee Convention (n197 above) para2.

²⁹⁵ Commentary on the UN Refugee Convention (n197 above) para2.

A similar provision of access and exemption from *cautio judicatum solvi* is contained in article 5 of the arrangement relating to the legal status of Russian and Armenian refugees,²⁹⁶ which states: ‘It is recommended that the benefit of legal assistance and if a possible exemption from the *cautio judicatum solvi* shall be granted to Russian and Armenian refugees irrespective of reciprocity’.²⁹⁷

Article 16 (3)

Article 16 (3) states that a refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.²⁹⁸ Whatever benefits accrue to the citizens of a host state with regards to access to court should be made applicable to refugees. Refugees in a host country are to enjoy the same privilege with regards to access to courts; it means that refugees will have better treatment than aliens.

From paragraph 1 it can be inferred that in countries where nationals do not have free access to courts refugees in this respect will be treated more favorably than nationals.²⁹⁹ The rule that refugees should be treated as nationals of the country mostly has bearing on their eligibility for legal assistance and exemption from *cautio judicatum solvi*.³⁰⁰

In respect of legal assistance, the article applies to such welfare as is granted by the national authority under a State supported system.³⁰¹ In countries where legal aid is granted solely by bar associations the article may not be applicable.³⁰² Article 15 (1) CEDAW³⁰³ provides that

²⁹⁶ League of Nations, Arrangement Relating to the Legal Status of Russian and Armenian Refugees, 30 June 1928, League of Nations Treaty Series, Vol. LXXXIX, No. 2005, <http://www.refworld.org/pdfid/3dd8cde56.pdf> (accessed 22 September 2016).

²⁹⁷ As above.

²⁹⁸ UN Refugee Convention (1951) (n 14 above).

²⁹⁹ Commentary on the UN Refugee Convention (n197 above).

³⁰⁰ Commentary on the UN Refugee convention (n197 above) para 2.

³⁰¹ Commentary on the UN Refugee Convention (n197 above) para 2.

³⁰² Commentary on the UN Refugee Convention (n197 above) para 2.

³⁰³ CEDAW (n 26 above).

‘state parties shall accord to women equality with men before the law’³⁰⁴ and denotes that females have the same rights as men to enforce their rights before a legal institution.

The provision of access to court is provided under the convention relating to the International Status of Refugees.³⁰⁵ Article 6 lays down the rule that refugees should be granted free access to court in contracting states where they are hosted, and they should be accorded the same rights and privileges as citizens in this respect and they should benefit from legal assistance and be exempt from *cautio judicatum solvi*.³⁰⁶

Also providing access to justice is article 8 of the Convention relating to the Status of refugees coming from Germany,³⁰⁷ which declares that refugees should have ‘free and ready access to courts of law’ in host states and shall ‘enjoy same rights and privileges as nationals’, and benefit from legal aid and be exempt from *cautio judicatum solvi*.³⁰⁸

Grahl-Madsen asserts that paragraph 1 of article 16 has superceded the 1933 and 1938 Conventions with a variation that the current convention does not refer to ‘immediate’ access.³⁰⁹ He avers the regulation is worthy of note since it is of an absolute character and does not refer to any standard relating to nationals or most favoured aliens or any other group or category of aliens.³¹⁰ However, according to Grahl-Madsen, the reference to free access does not imply that refugees should be freed from paying the normal charges which plaintiffs may have to pay in order to start legal proceedings. It means only that there should not be any additional obstacles refugees face.³¹¹ The researcher disagrees with this position because most female victims of SV in refugee camps are very poor and may not be able to afford any legal fees.

³⁰⁴ As above.

³⁰⁵ League of Nations, Convention Relating to the International Status of Refugees, 28 October 1933, League of Nations, Treaty Series Vol. CLIX No. 3663.

³⁰⁶ As above.

³⁰⁷ League of Nations, Convention concerning the Status of Refugees Coming from Germany, 10 February 1938, League of Nations Treaty Series, Vol. CXCII, No. 4461.

³⁰⁸ As above.

³⁰⁹ Commentary on the UN Refugee Convention (n197 above).

³¹⁰ Commentary on the UN Refugee Convention (n197 above).

³¹¹ Commentary on the UN Refugee Convention (n197 above).

Grahl-Madsen adds that paragraph 1 is limited to courts of law and does not apply to access to administrative authorities and further asserts that in this respect article 16 of the refugee convention has a more limited scope than article 17 of the European Establishment Convention.³¹² Article 16, paragraph 1 applies to any refugee with regard to law courts in the territory of any contracting state, that is, the state in which they are resident as well as any other contracting state. Even if their habitual residence is outside any contracting state it seems that the refugee will have the rights mentioned in paragraph 1 with regard to the domestic law courts in host states.³¹³ RES/1820 (2008) requires states to make justice accessible to the victims and curtail the culture of impunity in quest of ‘justifiable peace, justice, truth, and national reconciliation’.³¹⁴

4.2 Convention on persons with disabilities

In respect of access to courts article 12 of CRPD³¹⁵ provides that PLD should be recognised as juristic persons universally before the law and be accorded legal capacity as other human beings in all area of life.³¹⁶ PLD refugees and victims of sexual violence in camps will not have access to justice because the current criminal procedure does not accord victims legal capacity instead they are used as prosecution witnesses.

States are to make available to PLD all support facility that will enable them to exercise legal capacity.³¹⁷ Article 13 requires state parties to enable PLD to have actual access to justice as do other citizens of the state via ‘the provision of procedural and age-appropriate adjustments’, so as to ease ‘their effective role as direct and indirect participants’, as well as witnesses in the litigation, in all legal proceedings, plus at investigative and other preliminary stages.³¹⁸ States are to train judicial officers, administrative staff, police and prison staff to promote the effective access to justice for PLD.

³¹² Commentary on the UN Refugee Convention (n 197 above).

³¹³ Commentary on the UN Refugee Convention (n 197 above).

³¹⁴ RES/1820 (2008) (n 101 above) art 4.

³¹⁵ CRPD (n 27 above).

³¹⁶ CRPD (n 27 above).

³¹⁷ CRPD (n 27 above) 12 (1) (2) (3).

³¹⁸ CRPD (n 27 above) 13 (1)

4.3 Regional instruments providing for accessing justice

This subsection examines the legal instruments in the African Union, the European Union and Inter- American Organisation in terms of providing access to courts for refugees who are victims of SV in refugee camps.

Africa

With regard to access to courts article 3 (1) (2) of the African Charter³¹⁹ provides for equality before the law and equal protection before the law.³²⁰ Article 19 provides that ‘all peoples shall be equal; they shall enjoy the same respect and shall have the same rights, nothing shall justify the domination of a people by another’.³²¹ The OAU Refugee Convention makes no specific provision for access to courts or access to justice and the enforcement of refugee rights.³²² Instead, it provides for the settlement of the dispute between states in relation to this convention.³²³ However, the Maputo Protocol³²⁴ provides that states should ensure that the rights of women are ‘promoted, protected and realised, so that women can enjoy in full all their human rights’.³²⁵ Article 8 of this protocol declares that every human being is equal before the law and should enjoy equal protection before the law.³²⁶ Article 8 elaborates that state parties should make available to women effective access to judicial and legal services, legal aid, provide adequate education in relation to legal services, sensitise the public on the needs of women, enforce gender equality, encourage women’s representation in the judiciary and law enforcement organs, reform domestic laws in favour of the promotion of women’s rights in Africa.³²⁷

The measures for accessing the courts should be available to female refugees in accordance with the provision of article 16 of the UN refugee convention.

³¹⁹ The African Charter (n 28 above).

³²⁰ The African Charter (n 28 above).

³²¹ The African Charter (n 28 above).

³²² OAU Refugee Convention (n31 above).

³²³ OAU Refugee Convention (n31 above) art IX.

³²⁴ Maputo Protocol (n 37 above).

³²⁵ Maputo Protocol (n 37 above).

³²⁶ Maputo Protocol (n 37 above).

³²⁷ Maputo Protocol (n 37 above) art 8 (a) (b) (c) (d) (e) (f).

Europe

With regard to access to courts article 67 (1) provides that ‘the Union shall constitute an area of freedom, security, and justice with respect for fundamental rights and the different legal systems and traditions of the Member States’.³²⁸ Article 67 (4)³²⁹ states that ‘the Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters’.³³⁰

Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms³³¹ provides that ‘everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law,’ in respect of the determination of his civil rights and obligations or of any criminal charge against him.³³² Paragraph 3(c) asserts that ‘everyone charged with a criminal offence’ shall have the right ‘to defend himself in person or through legal assistance of his own choice or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require’.³³³ Paragraph 3(e) states that a defendant who does not understand the court language of communication should be assisted with an interpreter for free.³³⁴

Section IV of the European Convention on Establishment³³⁵ supports access to court, legal aid and assistance and exemption from *cautio judicatum solvi*.³³⁶ Article 7 provides that nationals of contracting states shall enjoy ‘legal and judicial protection’ of their ‘person, property, rights

³²⁸ European Union, Consolidated version of the Treaty on the Functioning of the European Union, (TFEU) 13 December 2007, 2008/C 115/01, <http://www.refworld.org/docid/4b17a07e2.html> (accessed 1 November 2016); see also The International Association of Refugee Law Judges European Chapter, ‘An Introduction to the Common European Asylum System for Courts and Tribunals A Judicial Analysis’ European Asylum Support Office, (2016) <https://www.easo.europa.eu/sites/default/files/public/BZ0216138ENN.PDF>, (accessed 31 October 2016).

³²⁹ TFEU (n 328 above).

³³⁰ TFEU (n 328 above).

³³¹ European Convention for the Protection of Human Rights, and Fundamental Freedoms (n 237 above).

³³² European Convention for the Protection of Human Rights, and Fundamental Freedoms (n 237 above).

³³³ European Convention for the Protection of Human Rights, and Fundamental Freedoms (n 237 above).

³³⁴ European Convention for the Protection of Human Rights, and Fundamental Freedoms (n 237 above).

³³⁵ The European Convention on Establishment of 13 December 1955 (European Convention on Establishment) European Treaty Series - No. 19, Paris, 13.XII.1955, articles 7.

³³⁶ As above art 8.

and interest’ within the Union and have ‘access to the competent judicial and administrative authorities and the right to obtain the assistance of any person of their choice who is qualified by the laws of the country’.³³⁷ Article 8 asserts that ‘nationals of any contracting party shall be entitled to free legal assistance in any other contracting country on the same footing as nationals of that country’.³³⁸ Article 9 waives court security or deposit for all EU citizens within the Union as is required of foreigners.³³⁹ This waiver includes payments required of ‘plaintiffs or third parties to guarantee legal costs’³⁴⁰ and ‘orders to pay the costs and expenses of a trial imposed upon a plaintiff or third party who is exempted in accordance with paragraphs 1 and 2 or of the law of the country’ where the legal proceeding is taking place.³⁴¹ If a court of any nation within the Union has ordered such payments, the EU citizen shall resolve such issues through a diplomatic relation so as to invoke the enforcement of the provisions of article 9 of the ECE.³⁴²

Similar in scope to article 9 of European Convention on Establishment is article 17 of The Hague Convention on Civil Procedure³⁴³ which exempts citizens of member states from payment of ‘security, bond or deposit of any kind’ as may be imposed on foreigners who reside in the country or ‘payment required of plaintiffs or intervening parties as security for court fees’ if they have agreed to waive such payment for all citizens irrespective of the state of their residence.³⁴⁴

With regard access to courts or to justice, although the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence³⁴⁵ did not explicitly provide for access it instructs states to legislate and establish mechanisms with ‘due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope

³³⁷ European Convention on Establishment (n 335 above) art 7.

³³⁸ European Convention on Establishment (n 335 above) art 8.

³³⁹ European Convention on Establishment (n 335 above) art 9 (1).

³⁴⁰ European Convention on Establishment (n 335 above) art 9 (2).

³⁴¹ European Convention on Establishment (n 335 above) art 9 (3).

³⁴² European Convention on Establishment (n 335 above) art 9 (3).

³⁴³ The Hague Convention of 1 March 1954 on civil procedure, <https://assets.hcch.net/docs/30f6092f-2a79-45f6-85a9-4f13c7c783c2.pdf> (accessed 22 September 2016).

³⁴⁴ As above.

³⁴⁵ EU, Convention on Preventing and Combating Violence against Women and Domestic Violence (n 57 above).

of this convention that is committed by non-State actors'.³⁴⁶

Organisation of American States

Article II the OAS³⁴⁷ declares that 'all persons are equal before the law and have the rights and duties established in this declaration, without distinction as to race, sex, language, creed or any other factor'.³⁴⁸ Article XVII states that 'every person has the right to be recognised everywhere as a person having rights and obligations, and to enjoy the basic civil rights'.³⁴⁹ These articles recognise an individual as a juristic person before the court of law.

Article XVIII³⁵⁰ affirms that any person can approach the court for the enforcement of their rights and be enlightened on the proceedings available to him with the aim of instituting an action against any act that violates his fundamental constitutional rights.³⁵¹ In *Bounds v Smith*³⁵² access to court as a fundamental constitutional rights was held to include the assistance of prisoners by prison staff to prepare and file expressive legal documents, including their having access to legal libraries and lawyers.³⁵³

Article 3³⁵⁴ asserts that 'every person has the right to recognition as a person before the law', which signifies that every individual should possess standing before a court of law. Article 24 provides the right to equal protection void of discrimination before the law.³⁵⁵ Article 25 empowers victims with the right to litigate in relevant courts or tribunals crimes perpetrated against their fundamental constitutional rights thereby holding the government and their representatives accountable.³⁵⁶ In addition, it provides that state parties create mechanisms for the

³⁴⁶ EU, Convention on Preventing and Combating Violence against Women and Domestic Violence (n 57 above) article 5 (2).

³⁴⁷ American declaration of the rights and duties of man (n 65 above).

³⁴⁸ American declaration of the rights and duties of man (n 65 above).

³⁴⁹ American declaration of the rights and duties of man (n 65 above).

³⁵⁰ American declaration of the rights and duties of man (n 65 above).

³⁵¹ American declaration of the rights and duties of man (n 65 above).

³⁵² *Bounds v Smith*, 430 U.S. 817 (1977).

³⁵³ As above; see also *Younger v Gilmore*, 404 US 15 (1971) 430 U. S. 821 - 833.

³⁵⁴ American Convention on Human Rights (n 67 above).

³⁵⁵ American Convention on Human Rights (n 67 above) 25 (1).

³⁵⁶ American Convention on Human Rights (n 67 above) 25 (1).

receipt of a remedy.³⁵⁷ Although these instruments provides for equal access to court to all as juristic individuals yet victims of crime do not possess the requisite legal standing in criminal proceedings before the courts.

5 Jurisdiction for addressing the legal needs of Refugees

The analysis of article 16 of the UN Refugee convention, 1951 above reveals that the current jurisdiction in seeking redress for refugees is in the courts of law on the territory of contracting states.³⁵⁸ This situation is problematic and ambiguous due to the fact that the UN Convention does not specify the subject matter with regard to jurisdiction; that is, which crimes are to be prosecuted in those courts. Secondly, the domestic courts of host states have no jurisdiction over crimes committed by a perpetrator who is covered by the Convention on Privileges and Immunities of the United Nations,³⁵⁹ such as peacekeepers and aid workers.³⁶⁰

In the light of ineffective and problematic domestic jurisdiction, the researcher contends that for there to be free access to courts, equality and equal protection before the law as provided for under the UN Refugee Convention, 1951 and under the Universal Declaration of Human Rights the jurisdiction for the prosecution of offences committed by perpetrators covered by the Convention on Privileges and Immunities of the United Nations should be taken away from the domestic courts of troop-contributing states, in the case of perpetrators who are peacekeepers, as well as aid workers, and given to the domestic courts of the territory where the crime was committed.

This measure would transfer the jurisdiction for prosecuting sexual violence against refugees committed by all categories of perpetrators to the contracting states where the crime was committed. It is argued that the sexual violation of a refugee by a humanitarian worker should be equated to a waiver of the immunity of that individual, whether the result of transactional sex or otherwise, since the subject matter of sexual violence has been criminalised by the domestic

³⁵⁷ American Convention on Human Rights (n 67 above) 25(2) (a) (b) (c).

³⁵⁸ UN Refugee Convention 1951 (n 14 above) art.16 (1).

³⁵⁹ The Conventions on the Privileges and Immunities of the United Nations, G. A, 1946.

³⁶⁰ As above.

laws of contracting states. To do this will facilitate access to justice for the victims. All contracting states will be empowered to prosecute all categories of offenders for crimes of sexual violence in refugee camps in their domestic courts.

6 Conclusion

This chapter investigates whether refugees generally are protected under the international and the regional legal regimes of the African Union, the European Union and the Inter-American Organisation. It appraises various provisions of the international and regional legal instruments that prohibit sexual violence, whether or not they specifically protect female refugees. Finally, it investigates the international and regional instruments of the African Union, the European Union, and the Organisation of American States to discover whether they have provisions for accessing justice for victims of sexual violence in refugee camps.

The findings are that Universal Declaration of Human Rights of 1948 provides for access to asylum for refugees in any state of their choice. Protecting refugees in time of conflict are the four Geneva Conventions of 1949 and Protocol I and II Additional to the Geneva Conventions. Refugees are fully protected under the UN refugee convention, 1951 and its Protocol of 1967. Refugees have the right to seek asylum in any country of their choice and are not to be rejected at the frontier of any country. They can live in the country and enjoy the rights and privileges as provided for under the constitution of the host state, except for rights reserved for citizens alone. The UN Refugee Convention does not specifically provide for the protection of refugees who are living with disability. Neither does the CRPD specifically provide for the right of asylum for PLD, instead the CRPD declares that PLD should not be turned back from any country on account of their disability.

The African Charter on Human and Peoples' Rights provides for access to asylum. Generally, protecting refugees is dealt with by the OAU refugee convention which supports access to asylum and the principle of non-refouler which has been affirmed by case law. The EU Charter guarantees the right to asylum and prohibits the joint eviction of refugees. The TEEC calls on state parties to establish mechanisms for the reception of refugees. Under the EU system the

Convention on preventing and combating violence against women and domestic violence affirms that women should be granted asylum status based on gender-based violence and supports the principle of non-refouler.

With regard to protection against SV the Hague Convention IV of 1907 condemns SV. The four Geneva Conventions and AP I and AP II prohibit all forms of sexual violence in times of conflict. Specifically prohibiting SV there is the Rome Statute of the ICC and Resolution 1820 (2008). Additionally, the CRPD criminalises sexual violations under gender-based violence against PLD. CRC and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography prohibit all forms of sexual violence against children. The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others outlaws all forms of trafficking for the purposes of sexual exploitation as sexual violation.

In the African region the African Charter explicitly prohibits the violation of human beings and provides for the integrity of persons and the preservation of human dignity. Similarly, the African Charter on Human and Peoples' Rights on the Rights of Women in Africa explicitly bans all form of SV against women. The African Youth charter protects girls and young women against all forms of violence.

The EU Charter provides for the protection and preservation of human dignity against any violation. The ECHR bans any act that amounts to sexual violence and this measure is upheld by case law. Specifically protecting women, including refugees, against all forms of SV is the Convention on preventing and combating violence against women and domestic violence, which orders state parties to ensure that women are protected and that perpetrators account for an unlawful act. The Convention on Action against Trafficking in Human Beings criminalises sexual violence in the form of trafficking for sexual purposes.

American declaration of the rights and duties of man, condemns all forms of abusive attack on the honour of persons. In the OAS the Convention of *Belem Do Para* protects women against sexual violence and criminalises all shades of SV against women. In addition, the Inter-American Convention on International Traffic in Minors outlaws all forms of trafficking of children for sexual purposes.

With reference to access to justice, it was found that article 16 of the UN Refugee Convention of 1951 provides for access to court in host countries. The jurisdiction for addressing any violation against refugees is the domestic courts of the contracting states. In trying to assess whether victims of crimes under international law have free access to court, the investigation examined the extent of victim's participation in the ICC. The analysis reveals that under the ICC victims of crimes do not have free access to courts in criminal proceedings. Instead, they are granted limited participation in their own rights as injured parties in the criminal proceedings but they are not full parties to the proceedings.

It is argued that the UN Refugee Convention of 1951 was not conceptualised as reflecting upon human rights violations against refugees in camps and the need of victims to access justice. The UN refugee convention does not protect female refugees against SV and does not contain specific provisions for accessing justice by female refugees who are victims of sexual violence in refugee camps. Although it provides for access to court, this provision does not amount to access to justice. This provision is vague and clouded by several limitations. It states that refugees should be accorded the same treatment as nationals of the contracting state, which means if the nationals of host states pay for legal services then refugees also have to pay.

This issue of legal fees constitutes an obstacle for refugees who need to access the justice system. It is common knowledge that female refugees are the major victims of sexual violence in refugee camps and they may not have the means to pay for legal services. Refugees accessing a court will be dependent on whether the citizens of the host state have access to legal aid. Frequently, accused persons in criminal proceeding are granted legal aid services, whereas victims do not enjoy such services in the current criminal justice systems of most countries of the world. Victims of sexual violence also will not enjoy the services of legal aid.

The CRPD provides for effective access to justice for PLD and for them to be bestowed with legal capacity as is every other citizen. It is submitted that although the CRPD provides for effective access to justice for PLD and with legal capacity, those who are victims of sexual violence are not conferred with having legal standing because states do not accord citizens with legal standing in criminal proceedings. Since PLD and other victims of sexual violence do not

have legal capacity, PLDs who are refugees and are sexually violated also will not have legal capacity in criminal proceedings.

The OAU Refugee Convention neither provides for access to courts nor to justice for refugees but provides for alternative dispute resolution in resolving disputes amongst states with respect to this convention refugees. The European convention has a similar provision to the UN Convention. The chapter identified the jurisdiction for addressing the legal needs of refugees in camps as being the domestic courts of host states. This provision becomes problematic because the jurisdiction for prosecuting certain categories of the offence of SV against refugees is the domestic courts of their home countries. Victims of sexual violence do not benefit from this provision because it is not victim oriented.

On the basis of the above discussion it is argued that there are no mechanisms for addressing access to justice for victims of sexual violence in refugee camps under UN Refugee Convention 1951. Although article 16 of the UN refugee convention supports access to court, this provision cannot be equated to access to justice. In the first instance, the provision is ambiguous and was not specifically conceived to address the rights of female refugees who are victims of crime because there is no specific provision for accessing justice for victims of sexual violence in refugee camps. The victims of crime do not have legal standing thus they cannot access courts or justice.

The regional counterparts similarly are lacking in dealing with the problem of sexual violence in refugee camps and with providing these victims with access to justice. Consequently, the enormity of the problem of SV in refugee camps demands this lacuna is filled. Article 16 of the UN Refugee Convention supports free access to courts in contracting states and holds that refugees should be accorded the same treatment as citizens of a state in this respect. Article 16 also states that refugees should be exempt from *cautio judicatum solvi* and be given access to legal aid.

Under the regional instruments the African region offers access neither to courts nor to justice. Victims of sexual violence are treated as a prosecution witness, so refugees who are victims will also be treated as such. The advantage refugees enjoy is exemption from the payment of security for the litigation. Legal aid mostly is given to perpetrators at the expense of victims, probably because victims are not parties to the litigation.

It is recommended that since victims do not have *locus standi* before a court in a criminal proceeding, article 16 of the UN refugee convention should be amended to reflect the rights of victims of sexual violence in refugee camps through the inclusion of a *locus standi* clause, in order for victims to have the requisite access to court as co-prosecutor of their offenders. This is a paradigm shift from the current practice of the states. It means whereas the state prosecutor argues on behalf of the state and the rule of law, the victim will have an equal opportunity to be heard by the court and argue for a remedy. Also, victims should enjoy the benefit of legal assistance.

There is a need for the harmonisation of all the legal instruments that support access to justice outside the refugee conventions and to produce a specific legal instrument that supports access to justice for these victims. This research hopes to offer some suggestions.

Chapter 5: Domestic mechanisms addressing sexual violence in host states

1 Introduction

Chapter 4 interrogated international and regional mechanisms of the African Union, the European Union and the Organisation of American States to determine whether there is provision for access to justice for victims of sexual violence in refugee camps. It established that the UN Refugee Convention 1951 provided access to court in article 16.¹ The objective in this chapter is to investigate whether host states are in compliance with the provisions of article 16 of the UN Refugee Convention 1951.

The analysis in this chapter is premised on the theory of rule of law, the concept of access, as well as theories of rights, justice, and deterrence. This chapter aims to answer the question: What are typical legislative mechanisms for addressing sexual violence against refugees in a host state? This chapter examines the status of international law in domestic legal systems, legislation for the protection of the citizens of host states against sexual violence, the manner in which cases are addressed and whether victims have access to courts, using South Africa, Tanzania and Uganda as case studies. It discusses the role of victims in domestic criminal proceedings. The chapter investigates whether refugees who are victims of sexual violence in host countries are accorded the same treatment as citizens, against the backdrop of article 16 of the UN Refugee Convention 1951.²

2 The status of international law in domestic legal systems

International laws are a body of rules created by custom or treaties that is accepted by nations as obligatory in their relationship with one another. Municipal laws are rules that govern the domestic behaviour of states. For an international law to bind a state it will have to ratify, sign,

¹ UN General Assembly, Convention Relating to the Status of Refugees, 2 (UN Refugee Convention 1951) 8 July 1951, United Nations, Treaty Series, vol. 189, 137.

² As above.

deposit and implement the treaty in that country. Nations vary in their approach to the implementation of international law in domestic courts. The approaches are categorised as monism or dualism³ or both.

In the monist approach international and domestic laws are part of the same legal structure, that is, international law is part of domestic law.⁴ International law is law in that state and enforceable in a national court without the enactment of the international law into municipal law.⁵ Conversely, in a dualist system international and domestic laws are part of different legal systems;⁶ international law will not be part of domestic law except if the international law is enacted into the law of the state before it is enforceable in national courts.⁷ The United Kingdom employs both systems, for instance, in the United Kingdom treaties do not become part of domestic law unless passed into law by parliament, but courts may directly apply international custom.⁸

With regard to the status of international law in the countries of study these features are taken into account. Section 231(2) of the South African Constitution⁹ provides that ‘an international agreement binds the republic only after it has been approved by a resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3)’. A treaty cannot become law in South Africa unless it has been approved at the national and provincial level; this is a dualist approach. The exceptions to the rule are ‘international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic’.¹⁰

³ R Jennings and A Watts (eds.) *Oppenheim's International Law*, 9th Ed., vol.1, Part 1, Longman (1993) 53.

⁴ As above 54.

⁵ G Ferreira and A Ferreira - Snyman, ‘The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism’ (2014) (17) 4 PER / PELJ 1471.

⁶ Jennings and A Watts (eds.) (n 3 above) 54.

⁷ Ferreira and Ferreira- Snyman (n 5 above) 1472.

⁸ P-H Verdier and M Versteeg, ‘International law in national legal systems: An empirical investigation’ (2015) 109 (514) *The American Journal of International Law* 516.

⁹ The Constitution of the Republic of South Africa 1996 (South African Constitution).

¹⁰ As above, sec 231 (3).

The agreement set out in section 231 (3)¹¹ applies directly, without the requirement of a legislation fiat from parliament; this is a monist approach. Section 231(4)¹² insists that any international agreement becomes law in the republic when it has been domesticated into law by legislation; this is a dualist approach.¹³ Additionally, article 231(5) declares that South Africa is bound by all international covenants that were binding before the advent of the constitution,¹⁴ which applies to all agreements in force before the advent of the current constitution. The South African constitution adopts a monist approach in section 232¹⁵ in declaring: ‘Customary international law is law in the republic unless it is inconsistent with the Constitution or an Act of Parliament’.¹⁶ Thus, customary international law is directly enforceable in South Africa.¹⁷

Section 39 (1) (b) of the South African constitution provides that ‘when interpreting the bill of rights, a court, tribunal or forum... must consider international law’.¹⁸ This provision was confirmed by the Constitutional Court in *S v Makwanyane*¹⁹ where the court held a death sentence as contrary to the tenets of human rights. In arriving at its decision, the court consulted international, regional, and foreign laws. In interpreting the bill of right in compliance with section 39 (1) (b),²⁰ the decision of the court in *Glenister v President of the Republic of South Africa*²¹ also is illustrative of the status of international law in the domestic legal system, where the court enumerated the conditions under which international law is law in South Africa.²² South Africa adopts monist and dualist approaches in the application of international law in national law. Any international law passed by parliament or of a customary nature is law in South Africa. International law that has been domesticated in South Africa, agreements in relation to section 231 (1) and customary international law are all law in South Africa and are binding.

¹¹ South African Constitution (n 9 above).

¹² South African Constitution (n 9 above).

¹³ South African Constitution (n 9 above).

¹⁴ South African Constitution (n 9 above).

¹⁵ South African Constitution (n 9 above).

¹⁶ South African Constitution (n 9 above).

¹⁷ Ferreira and Ferreira-Snyman (n 3 above) 1473.

¹⁸ South African Constitution (n 9 above).

¹⁹ *S v Makwanyane* 1995 3 SA 391 (CC) para [35]; see also Ferreira and Ferreira-Snyman (n 3 above) 1477; see also *Glenister v President of the Republic of South Africa* [2011] ZACC.

²⁰ South African Constitution (n9 above); see also *S v Makwanyane* (n19 above) para 33 - 38.

²¹ *Glenister v President of the Republic of South Africa* (n 19 above) para 88.

²² *Glenister v President of the Republic of South Africa* (n 19 above) para 88.

In respect of the status of international law in Tanzania the Tanzania Constitution empowers parliament to ‘enact laws where implementation is required’.²³ The parliament of Tanzania is conferred with a duty to enact laws for the implementation of any agreement. In addition, section 63(3) (e) provides that the Tanzania parliament is to ‘deliberate upon and ratify all treaties and agreements to which the United Republic is a party and the provisions of which require ratification’.²⁴ This is the dualist approach and signifies that for an international law to take effect in Tanzania there has to be approval and enactment of that treaty into law.

The Ugandan foreign policy objective as enshrined in their Constitution²⁵ is to promote the national interest and respect international law and treaty obligations, to ‘actively participate in international and regional organizations that stand for peace and for the well-being and progress of humanity’,²⁶ to ‘promote regional and pan-African cultural, economic and political cooperation and integration’.²⁷ In Uganda the ratification of treaties is governed by the Ratification of treaties Act²⁸ which provides the procedures for the ratification of all treaties. Article 123 (1) empowers the Ugandan parliament to enact laws governing the ratification of treaties and agreements.²⁹ Respect for international law and treaty obligations is said to override municipal law.³⁰ In *Concorp International Ltd v East and Southern Development Bank*, the court stated that where there is conflict between domestic legislation and international or regional law, international law overrides municipal law.³¹

The Ugandan constitution empowers the Ugandan Human Rights Commission ‘to monitor the government’s compliance with international treaty and convention obligations on human rights’.³² The Ugandan constitution also provides that treaties in force before the constitution came into force are valid and therefore binding.³³

²³ The Constitution of the United Republic of Tanzania 1997 (Tanzania Constitution) art 63 (3) (c).

²⁴ As above.

²⁵ The Constitution of the Republic of Uganda, 1995 (Ugandan Constitution).

²⁶ As above art XXVIII (i) (a) (b).

²⁷ Uganda Constitution (n 25 above).

²⁸ The Ratification of Treaties Act, 1998.

²⁹ Ugandan Constitution (n 25 above); see also *Wethered v Calcutt* (1842) Man & G 566.

³⁰ *Concorp International Ltd v East and Southern Development Bank* [2010] UGSC 19.

³¹ As above.

³² Ugandan Constitution (n 25 above) art 52 (h).

³³ Ugandan Constitution (n 25 above) art 287 (a) (b).

However, the status of international law in Uganda is not clear either under the Ugandan Constitution or the Ratification of Treaty Act. Obitre-Gama³⁴ believes Uganda maintains a dualist system in the implementation of international law. The court took a dualist approach when it relied on the Indian case of *Wethered v Calcutt*.³⁵ Also, in *Concorp International Ltd v East and Southern Development Bank*,³⁶ in the statement that ‘to my mind that Act of Parliament incorporated the provisions of the Charter into the laws of Uganda and gave it the force of law’.³⁷ A dualist approach is manifest in the domestication of various treaties such as The Wetlands Convention, 1971 into the National environmental Act 1995, the UN Refugee Convention of 1951 and its Protocol of 1967 into the Refugee Act 2006 and others.

The status of international law in South Africa, Tanzania and Uganda is that these countries are bound by international law. Since they have ratified and domesticated the refugee convention, they are bound to fulfil their obligations to refugees in their territories under international law.

3 Legislative instruments addressing sexual violence in South Africa

This section investigates how sexual violence is addressed in South Africa and whether these services are extended to refugees who are victims of SV in the territory. The section analyses the relevant provisions of the Constitution of the Republic of South Africa, the Refugee Act of South Africa, and the criminal justice system which includes the procedures for addressing sexual offences. Legislative instruments outlawing SV which will be discussed in this section are the Criminal law (sexual offenses and related matters) Amendment Act and the Prevention and Combating of Trafficking in Persons Act and Legal assistance in South Africa.

³⁴ J Obitre - Gama, ‘The application of international law into national law, policy and practice’, this paper is commissioned by and produced for the World Health Organization, Geneva (2000) 11, (accessed 28 February 2018).

³⁵ *Wethered v Calcutt* (1842) Man & G 566

³⁶ *Concorp International Ltd v East and Southern Development Bank* (above n 30).

³⁷ *Wethered v Calcutt* (n 35 above); see also *Concorp International Ltd v East and Southern Development Bank* (above n 30).

The South African government in their commitment to dealing with SV established several initiatives addressing the endemic problem of SV, such as the National Policy Guidelines for Victims of Sexual Offences.³⁸ The National Prosecuting Authority (NPA) has a designated Sexual Offences and Community Affairs (SOCA) Unit, with prosecutors who specialise in handling sexual offences.

3.1 Introduction

South Africa is situated at the southern tip of the African continent.³⁹ On 31 May 1910 the Union of South Africa was formed from four British colonies of Cape Colony, Natal, Transvaal and Orange Free State. It was declared a Republic on 31 May 1961, and majority rule began on 27 April 1994.⁴⁰ South Africa has a ‘mixed legal system of Roman Dutch civil law, English Common law, and customary law’.⁴¹

The establishment of courts and the administration of justice are provided for under chapter eight of the Constitution. The courts include the: Constitutional Court, the Supreme Court of Appeal, High Courts and any High court of appeal that may be established by an Act of Parliament to hear appeals from High Courts.⁴² Other courts established by the constitution include Magistrates’ courts and all other courts created or recognised in relation to an Act of Parliament, including any court of a status similar to either the High Court or the Magistrates courts.⁴³

South Africa is a party to international treaties and is bound by them. The treaties of interest to this study are the UN Refugee Convention 1951 and its Protocol 1967 which the Republic of

³⁸ Department of Justice and Constitutional Development, Republic of South Africa, ‘National Policy Guidelines for Victims of sexual Offences’ (1998) http://www.justice.gov.za/policy/guidesexoff/sexoff_guidelines1998.htm (accessed 26 May 2018).

³⁹ Central Intelligence Agency (CIA) World Fact Book ‘South Africa Physical Setting’ in World Factbook, the Library of Congress Country Studies, (2016) http://www.photius.com/countries/south_africa/geography/south_africa_geography_physical_setting.html (accessed 18 November 2016).

⁴⁰ CIA World fact book, ‘South Africa Government 2016’, CIA World Fact book, http://www.theodora.com/wfbcurrent/south_africa/south_africa_government.html, (accessed 18 November 2016).

⁴¹ CIA World Facebook, ‘South Africa Government ‘2016, CIA World Facebook, http://www.theodora.com/wfbcurrent/south_africa/south_africa_government.html (accessed 18 November 2016).

⁴² South African Constitution (n 9 above).

⁴³ South African Constitution (n 9 above).

South Africa ratified on 12 January 1996⁴⁴ and the OAU Refugee Convention which it also ratified and deposited on the 15 December 1995 and 15 January 1996 respectively.⁴⁵

3.2 The Constitution of the Republic of South Africa

The Constitution of the Republic of South Africa, 1996⁴⁶ is the main legal instrument which forms the foundation for the protection of all persons in the territory. It is founded on the principles of ‘human dignity, the achievement of equality and the advancement of human rights and freedoms’; ‘non-racialism and non-sexism, the supremacy of the Constitution and the rule of law’.⁴⁷ Section 2 asserts that the ‘Constitution is the supreme law of the republic’ and that ‘any law or conduct that is inconsistent with it is invalid, and the obligations imposed by it must be fulfilled’.⁴⁸ Chapter 2⁴⁹ of the South African Constitution embodies the Bill of Rights as the cornerstone of democracy.⁵⁰ It enshrines all rights that accrue to the people in the country⁵¹ and ‘affirms the democratic values of human dignity, equality, and freedom. Section 7 (2) provides that ‘the state must respect, protect, promote and fulfil the rights in the Bill of Rights’⁵²

In addition, section 8 asserts that the Bill of Rights applies to ‘all laws, and binds the legislature, the executive, the judiciary and all organs of state’, and similarly, both natural and juristic persons.⁵³ Section 10 affirms that ‘everyone has inherent dignity and the right to have their dignity respected and protected’.⁵⁴ These relevant provisions of the South African Constitution are a

⁴⁴ UN Treaty collections, Convention relating to the Status of Refugees, Geneva, 28 July 1951, status as at: 18 October 2016 07:31:04 EDT, https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtagsno=V-2&chapter=5&Temp=mtdsg2&clang=_end (accessed 19/10/2016): see also United Nations High Commissioner for Refugees, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol.

⁴⁵ African Commission on Human and Peoples, ‘Rights, Ratification Table: AU Convention Governing Specific Aspects of Refugee Problem in Africa’. <http://www.achpr.org/instruments/refugee-convention/ratification/> (accessed 19 October 2016).

⁴⁶ South African Constitution (n 9 above).

⁴⁷ South African Constitution (n 9 above) sec 1 (a) (b) (c).

⁴⁸ South African Constitution (n 9 above) sec 2.

⁴⁹ South African Constitution (n 9 above) sec 2.

⁵⁰ South African Constitution (n 9 above) sec 2.

⁵¹ South African Constitution (n 9 above) sec 7.

⁵² South African Constitution (n 9 above) sec 7.

⁵³ South African Constitution (n 9 above) sec 8.

⁵⁴ South African Constitution (n 9 above) sec 8.

guarantee for protection against the violation of people's rights and the enforcement of all the rights enshrined in the constitution.

In *Kiliko and Others v Minister of Home Affairs and Others*⁵⁵ the court held 'that foreigners were entitled to all the fundamental rights entrenched in the Bill of Rights, save those specifically reserved for South African citizens'.⁵⁶ The applicants were Congolese citizens who were in South Africa as asylum seekers.⁵⁷ The suit was brought in their own interest and that of the public.⁵⁸ They claimed that the Western Cape refugee reception centre adopted unreasonable and unlawful methods of denying an opportunity for applying for the necessary permit in South Africa. The practice was that only 20 asylum applications were accepted daily and on any flimsy excuse denied.⁵⁹ They added that the practice was in breach of sections 2 and 22 of the Refugees Act 130 of 1998 and contrary to sections 9, 10, 12 and 33 of the Constitution of the Republic of South Africa and in violation of South Africa's international agreements.⁶⁰

The applicants requested the court to declare this mode of acceptance of application for asylum invalid and unconstitutional and to order the respondents to issue the permits in accordance with section 22 of the Refugees Act.⁶¹ In addition, the applicant asked the court to direct 'the respondent to accept applications by asylum seekers upon, or within a reasonable time of, such applications being made'.⁶² The respondents requested the dismissal of the application because the permits had been issued to them, but the court supported the application on the grounds of public interest.⁶³

3.3 The Refugee Act of South Africa

South African refugee law⁶⁴ is based on South Africa's foreign policy as stated in the

⁵⁵ *Kiliko and Others v Minister of Home Affairs and Others*, 2006, (4) SA 114 (C) 2006 (4) SA 114.

⁵⁶ As above.

⁵⁷ *Kiliko and Others v Minister of Home Affairs and Others* (n 55 above).

⁵⁸ *Kiliko and Others v Minister of Home Affairs and Others* (n 55 above).

⁵⁹ *Kiliko and Others v Minister of Home Affairs and Others* (n 55 above).

⁶⁰ *Kiliko and Others v Minister of Home Affairs and Others* (n 55 above).

⁶¹ Refugees Act, 1998 (Act No. 130, 1998).

⁶² *Kiliko and Others v Minister of Home Affairs and Others* (n 55 above).

⁶³ *Kiliko and Others v Minister of Home Affairs and Others* (n 55 above).

⁶⁴ Refugees Act, 1998 (Act No. 130, 1998).

constitution and accentuates the international refugee convention. Current refugee law is under review, but the status at present is that there is no provision for housing refugees in camps, rather there are reception centres and refugees can live in any city of choice. Refugees can work and sustain themselves and their families. The basis for refugee reception and protection in South Africa is section 2 (a) (b)⁶⁵ which declares that on no account should any person be prevented from entry into the country, excluded or ‘extradited’ or returned to any other nation or be subjected to any analogous treatment.⁶⁶ If the rejection, expulsion, extradition, return or additional measure, will force such person to return to or remain in a country where they will be exposed to persecution because of their ‘race, religion, nationality, political opinion or membership of a particular social group’.⁶⁷

Additionally, ‘if their life and freedom will be physically endangered because of external hostility, take over, extraneous control or other crises seriously disturbing or unsettling communal order in some parts or the whole of that nation’. An individual is not disallowed asylum if life or rights will be at risk. However, rejection can be in the form of the denial of asylum permits, also there is detention for illegal entry into the country and for those tagged as illegal migrants, xenophobic attacks and the criminalising of refugees.

The provision in section 2 (a) (b) of the South African Refugee Act was upheld in the case of *Kiliko and Others v Minister of Home Affairs and Others* where the court ordered that the asylum seekers should be issued permits.⁶⁸ The technical denial of an asylum permit amounts to the rejection of asylum and the applicant automatically is regarded as an illegal immigrant, and can be arrested and detained for repatriation.⁶⁹

Because of the value attached to an identity document in South Africa, without which the rights and protection of refugees in the territory cannot be guaranteed, section 27 of the South African Refugee Act provides that a refugee should be issued with an official written recognition of

⁶⁵ As above.

⁶⁶ Act No. 130, 1998 (n 64 above) 2.

⁶⁷ Act No. 130, 1998 (n 64 above) art 2 (b).

⁶⁸ *Kiliko and others v Minister of Home Affairs and others* (n 55 above).

⁶⁹ Immigration Act 13 of 2002, sec34 (1); see also *Rahim v The Minister of Home Affairs* (965/2013) [2015] ZASCA 92 (29 May 2015).

refugee status in a prescribed form.⁷⁰ The refugee act also provides that refugees are to enjoy ‘full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of this Act.’⁷¹ Section 27 (c) states that refugees are entitled to apply for an immigration permit in accordance with the Aliens Control Act, 1991 after five years of continuous residence in the country and from the date they were granted the asylum permit on the ground that the Standing Committee certifies that otherwise the person will remain a refugee indefinitely, and they are also entitled to an identity document in accordance with section 30.⁷² Other benefits enjoyed by refugees under South African refugee law include a South African travel document in accordance with section 31, the opportunity to seek employment and have access to basic health services and primary education as enjoyed by residents of the country.⁷³

The provisions of section 27 of the act are an affirmation of the South African government’s commitment to fulfilling her obligations to refugees under international law. All those who qualify to be granted refugee status can invoke the provisions of section 27 to enforce these rights.⁷⁴ However, the South African Refugee Act does not have a provision for accessing courts or to justice. In matters relating to refugee status, section 26 (1) provides that ‘any asylum seeker may lodge an appeal with the appeal Board in the manner and within the period provided for in the rules, if the Refugee Status Determination Officer has rejected the application in terms of section 24 (3) (c)’.⁷⁵

3.4 Access to courts in South Africa

The aim in this subsection is to investigate whether cases of SV against South African citizens are brought before a court of competent jurisdiction. Although the South African Refugee Act does not provide explicitly for access to courts or to justice, there is a legal basis for accessing courts implicitly or explicitly in other legal instruments. For instance, chapter 2 of the South

⁷⁰ Act No. 130, 1998 (n 64 above) sec 27 (a).

⁷¹ Act No. 130, 1998 (n 64 above) sec 27 (c); see also the South African Constitution (n 9 above).

⁷² Act No. 130, 1998 (n 64 above) sec 27 (c) (d).

⁷³ Act No. 130, 1998 (n 64 above).

⁷⁴ Act No. 130, 1998 (n 64 above).

⁷⁵ Act No. 130, 1998 (n 64 above).

African Constitution provides for the rights of all individuals in general in the territory,⁷⁶ because without rights there can be no enforcement against the violator. The South African Constitution declares that ‘everyone is equal before the law and has the right to equal protection and benefit of the law’.⁷⁷ Everyone can be held accountable for any crime they commit and all persons are entitled to be protected by the law and bring their disputes before the law. It is submitted that equal protection and equality before the law include having standing in law both perpetrators and victims.

Section 32 (1) (a) (b) provides for access to information and states every person has the right of access to ‘any information held by the state’ or by another person, which is required for the exercise or protection of any rights.⁷⁸ Refugees are also entitled to all information held by government and their agents or by any resident. Section 34 of the South African Constitution asserts 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.⁷⁹ These provisions in the constitution and the cases cited means it is trite to conclude that South Africa provides for access to courts.

3.5 Criminal judicial system of the Republic of South Africa

The South African judicial system has its foundation in the Constitution. It is intended to protect and address the infringement of the human rights of the people,⁸⁰ and has civil and criminal jurisdiction. The justice system is well established and is based on a combination of Roman

⁷⁶ South African Constitution (n 9 above)

⁷⁷ South African Constitution (n 9 above) Art 9 (1).

⁷⁸ South African Constitution (n 9 above); see also *PFE International INC (BVI) and Others v Industrial Development Corporation of South Africa Limited*, Case CCT 129/11 [2012] ZACC 21; see also the *President of the Republic of South Africa and Others v M & G Media Limited*, Case CCT 03/11 [2011] ZACC 32; see also *the South African history archive v The Mister of Justice and Correctional services and Others*, case No. 33696/14 in the high court of South Africa, Gauteng Local Division, Johannesburg.

⁷⁹ South African Constitution (n 9 above); see also *Hlophe, Mandlakayise John v Constitutional Court of South Africa and Others*, CASE NO: 08/22932; see also *The Competition Commission v Computicket* (853/13) [2014] ZASCA 185 (26 November 2014) see also *MEC for Health, Gauteng v Lushaba* [2015] ZACC 16; see also *MEC for Health, Gauteng v Lushaba* 2017 (1) SA 106 (CC).

⁸⁰ South African Constitution (n 9 above)

Dutch and English law.⁸¹

The criminal court is founded on an adversarial system, which denotes that there are two parties to a law suit and the magistrate or judge sits as an impartial and independent arbiter.⁸² The criminal justice system has been criticised for the protection it offers offenders at the expense of victims.⁸³ Criminal law seems to rule more in favour of perpetrators than victims, as will be discussed in an analysis of cases of sexual violence.

The criminal justice system consists of various types of courts including specialised courts as provided for by the Constitution.⁸⁴ The courts with jurisdiction over sexual offences are the ‘special sexual offences courts’.⁸⁵ Role players in the criminal justice system include the judiciary, magistrates and judges who are independent and non-aligned to parties and preside in the trial.⁸⁶ Secondly, the National Prosecuting Authority (NPA) which is empowered by both the Constitution and NPA Act⁸⁷ to initiate a criminal prosecution on behalf of the state and to implement the obligatory responsibilities in the execution of this assignment.⁸⁸ This function is executed by the public prosecutor who represents the state.⁸⁹ The next role player is the South African Police Force whose duties are to prevent, detect and investigate crime and thereafter hand over the report of investigation and evidence to the public prosecutor. Finally, there are legal representatives comprising advocates and attorneys.⁹⁰

The criminal process originates with the laying of a charge by a complainant, who is usually the victim or injured party, at the police station where a case is opened with a statement taken by

⁸¹ M Dyson ‘The criminal justice system and you, a guide to the South African criminal justice system for refugees and migrants, independent projects trust’ (2016) 6, http://www.ipt.co.za/pdf/criminaljustice_book.pdf (accessed 21 June 2017).

⁸² Dyson (n 81 above) 9.

⁸³ Dyson (n 81 above) 6.

⁸⁴ South African Constitution (n 9 above) sec. 166; see also Dyson (n 81 above) 9.

⁸⁵ Dyson (n 81 above) 9, see also Department of justice and constitutional development (the DOJ & CD.) ‘Support for victims of sexual offences’ (2017) www.justice.gov.za (accessed 20 June 2017); see also Ministerial advisory task team on the adjudication of sexual offence matters ‘Report on the re-establishment of sexual offences courts (2013) 8, <http://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report-aug-2013.pdf> (accessed 21 June 2017).

⁸⁶ Dyson (n 81 above) 9.

⁸⁷ National Prosecuting Authority Act 32 of 1998.

⁸⁸ Dyson (n 81 above) 9.

⁸⁹ Dyson (n 81 above) 10.

⁹⁰ Dyson (n 81 above) 10.

the police officer who opens a file for the case.⁹¹ This is followed by a police investigation by an Investigating Officer (I/O) who collects evidence for the prosecutor and ensures the arrest of the suspect.⁹² Then the docket of the case is handed over by the police to the prosecutor to prosecute the case. During this process the complainant may not be involved or consulted.⁹³ The witness is subpoenaed, which may include the complainant, and the trial continues until sentencing.

3.6 Legislation for combatting sexual violence in South Africa

The legislative instruments outlawing sexual violence in South Africa discussed in this section are the Criminal law (sexual offenses and related matters) Amendment Act, Criminal Law (Sexual Offences and Related Matters) Amendment Act 2015 and the Prevention and Combating of Trafficking in Persons Act.

Criminal law (sexual offences and related matters) Amendment Act

The Criminal law (sexual offences and related matters) Amendment Act⁹⁴ does not define sexual violence but gives a comprehensive and extensive explanation of relevant concepts and matters that are constituted by sexual offences. The act also makes provision for the treatment of victims and offenders, the role of the investigating officer, the jurisdiction of the court as a magistrate's court and the role of the magistrate.⁹⁵ Some of these definitions and descriptions of sexual offences constitute sexual violence, sexual violence is a sexual offence.

An overview of Act 32 of 2007

⁹¹ Dyson (n 81 above) 13.

⁹² Dyson (n 81 above) 15.

⁹³ Dyson (n 81 above) 15.

⁹⁴ Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act 32 of 2007).

⁹⁵ As above.

Section 1 defines the words and phrases used in the act for clarity of interpretation.⁹⁶ Section 2⁹⁷ declares the object of this act. Chapter 2 elucidates sexual offences: Part I criminalizes rape⁹⁸ and compelled rape,⁹⁹ part 2 bans sexual assault,¹⁰⁰ compelled sexual assault¹⁰¹ and compelled self - sexual assault.¹⁰² Part 3 prohibits ‘compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation’;¹⁰³ the exposure or display of or causing exposure or display of genital organs, anus or female breasts (‘flashing’),¹⁰⁴ child pornography to persons 18 years or older or engaging sexual services of persons 18 years or older¹⁰⁵ and engaging in sexual services of persons 18 years or older.¹⁰⁶ Part 4 proscribes incest,¹⁰⁷ bestiality¹⁰⁸ and sexual acts with a corpse.¹⁰⁹

Part one of chapter three outlaws any performance of any of the following acts against children. Sections 15 and 16 of the law have been amended by the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 2015 to the effect that ‘consensual sexual penetration and violation with certain children as known as statutory rape and sexual assault’¹¹⁰ has been replaced so that anyone who performs sexual penetration on children 12 years or under, and until the age of 16 years, even with the consent of the child is guilty of an offence.¹¹¹ However, if at the time of the commission of the offence both the assailant and victims are minors or if the perpetrator is either 16 or 17 years and is two years older than the victim, the prosecutor must obtain written permission to prosecute the offender from the National Director of Public Prosecutions.¹¹² The offender can be charged with the offence of subsection (1) at the

⁹⁶ Act 32 Of 2007 (n 94 above).

⁹⁷ Act 32 Of 2007 (n 94 above).

⁹⁸ Act 32 Of 2007 (n 94 above) sec 3.

⁹⁹ Act 32 Of 2007 (n 94 above) sec 4.

¹⁰⁰ Act 32 Of 2007 (n 94 above) sec 5.

¹⁰¹ Act 32 Of 2007 (n 94above) sec 6.

¹⁰² Act 32 Of 2007 (n 94 above) sec 7.

¹⁰³ Act 32 Of 2007 (n 94 above) sec 8.

¹⁰⁴ Act 32 Of 2007 (n 94 above) sec 9.

¹⁰⁵ Act 32 Of 2007 (n 94 above) secs 10.

¹⁰⁶ Act 32 Of 2007 (n 94 above) sec 11.

¹⁰⁷ Act 32 Of 2007 (n 94 above) sec 12.

¹⁰⁸ Act 32 Of 2007 (n 94 above) sec13.

¹⁰⁹ Act 32 Of 2007 (n 94 above) sec 14.

¹¹⁰ Act 32 Of 2007 (n 94 above) sec15 and 16.

¹¹¹ Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 2015, sec 15 (1) and 16 (1).

¹¹² As above, secs 15 (1) (a) (b) and 16 (1) (a) (b).

grant of the permission to prosecute by the National Director of Public Prosecutions.¹¹³ The National Director of Public Prosecutions may exercise his discretion whether to delegate the power to prosecute or not.¹¹⁴

Part two of the chapter disallows sexual exploitation and sexual grooming of children.¹¹⁵ It also criminalises the ‘exposure or display of or causing exposure or display of child pornography or pornography to children’ and the use of children for pornographic purposes or benefiting from child pornography.¹¹⁶ In part 3 of chapter three of the act, compelling or causing children to witness sexual offenses, sexual acts or self - masturbation¹¹⁷ and the ‘exposure or display of or causing exposure or display of genital organs, anus or female breasts “flashing” to children,’ are prohibited.¹¹⁸ In respect of persons with disability, the act outlaws ‘sexual exploitation’¹¹⁹ and ‘sexual grooming of persons who are mentally disabled’;¹²⁰ the ‘exposure or display of or causing the exposure or display of child pornography or pornography to persons who are mentally disabled’;¹²¹ and the use of persons with mental disability for pornographic purposes or benefiting therefrom’.¹²²

Chapter 5 of Act 32 of 2007 in general provides for services offered victims. Part one contains definitions of relevant words and phrases.¹²³ These include the establishment of health facility for the provision of Post Exposure Prophylaxis (PEP) and compulsory HIV testing of alleged sex offenders.¹²⁴

If the magistrate is satisfied that the prosecution has proved the case beyond reasonable doubt and convicts the offender, section 56A states that if no penalty is stated in the act for the offence

¹¹³ Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 2015 (n 111 above) secs 2 (a) and 16 (2) (a).

¹¹⁴ Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 2015 (n 111 above) sec 2 (b) and 16 (2) (b).

¹¹⁵ Act 32 of 2007 (n 94 above) secs 17 & 18.

¹¹⁶ Act 32 of 2007 (n 94 above) secs 19 & 20.

¹¹⁷ Act 32 of 2007 (n 94 above) secs 21.

¹¹⁸ Act 32 of 2007 (n 94 above) secs 22.

¹¹⁹ Act 32 of 2007 (n 94 above) secs 23.

¹²⁰ Act 32 of 2007 (n 94 above) secs 24.

¹²¹ Act 32 of 2007 (n 94 above) secs 25.

¹²² Act 32 of 2007 (n 94 above) secs 26.

¹²³ Act 32 of 2007 (n 94 above) secs 27.

¹²⁴ Act 32 of 2007 (n 94 above) sec. 28 - 32.

the court has recourse to section 276 of the Criminal Procedure Act, 1977¹²⁵ for appropriate punishment.¹²⁶ Section 276 provides that convicted persons may be sentenced to ‘imprisonment, including imprisonment for life or imprisonment for an indefinite period as referred to in section 286B (1) (c) periodical imprisonment’.¹²⁷ Section 286B (1) (b) states: ‘the court which declares a person a dangerous criminal shall... direct that such person be brought before the court on the expiration of a period determined by it, which shall not exceed the jurisdiction of the court’.¹²⁸ Other punishments as stated in sections 276 (1) (d) (e) (f) (h) include; ‘a declaration as a habitual criminal; committal to any institution established by law; a fine and/or correctional supervision’.¹²⁹

The Prevention and Combatting of Trafficking in Persons Act

Sexual violence is covered in chapter 2 of the Prevention and Combatting of Trafficking in Persons Act¹³⁰ in the form of the trafficking in persons for sexual exploitation or for prostitution and profiting from such an act.¹³¹ Section 4 (1)¹³² outlaws any person that ‘delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic’.¹³³ Section 4 (2) (b) prohibits forced marriages of a child or other persons. Benefiting from the services of victims of human trafficking is an offence under section 7.¹³⁴ These offences are under the jurisdiction of the High Court only,¹³⁵ and the penalty ranges from a fine of up to R100 million to life imprisonment.¹³⁶ Thus, sexual violence is criminalised in South Africa and there are mechanisms for combatting it.

3.7 Legal assistance in South Africa

¹²⁵ The Criminal Procedure Act, 1977 (Act No. 51 of 1977).

¹²⁶ Act 32 Of 2007 (n 94 above).

¹²⁷ Act No. 51 of 1977 (n 125 above).

¹²⁸ Act No. 51 of 1977 (n 125 above).

¹²⁹ Act 32 Of 2007 (n63 above).

¹³⁰ The Prevention and Combating of Trafficking in Persons Act 2013, (Act No. 7 of 2013).

¹³¹ As above, section 48, 3rd column of the schedule.

¹³² Act No. 7 of 2013 (n 130 above).

¹³³ Act No. 7 of 2013 (n 130 above).

¹³⁴ Act No. 7 of 2013 (n 130 above).

¹³⁵ Act No. 7 of 2013 (n 130 above) sec 12 (2).

¹³⁶ Act No. 7 of 2013 (n 130 above) sec13 (a).

The need for legal representation is associated with the right to legal counsel. If there is to be fair hearing in a criminal proceeding there is a need for legal representation for both the prosecution and the accused.¹³⁷ Section 35(2) (c)¹³⁸ provides that every person who is detained, including every sentenced prisoner, has a right to have a legal practitioner assigned to the detained person by the state and at the state expense if substantial injustice would otherwise result, and to be informed of this right promptly.¹³⁹

Pursuant to the above provision in the South African Constitution,¹⁴⁰ the Legal Aid South Africa Act, 2013 was promulgated.¹⁴¹ The purpose of the act is ‘to ensure access to justice and the realisation of the right of a person to have legal representation as envisaged in the constitution and to render or make legal aid and legal advice available and for the establishment of a legal entity named “Legal Aid South Africa” with a board to manage its affairs’.¹⁴² The objectives of the act are to ‘render or make available legal aid and legal advice’, which should be provided to persons at the expense of the state. Another aim is to provide ‘education and information concerning legal rights and obligations, as envisaged in the Constitution and this Act’.¹⁴³

In the same vein section 4 made provision for the powers, functions, and duties of the Board. Section 4 (1) (a) states that the Board is to provide legal services, representation, and advice, through the recruitment of the services of legal and paralegal practitioners, candidate attorneys from the private sector for the purpose of offering of legal service in accordance with section 3 of the Act.¹⁴⁴

The constitutional provisions and the Legal Aid Act have been challenged and upheld in South African courts. In *S v Blooms* the court held that ‘every accused at any criminal trial has the right to be represented by a legal practitioner’.¹⁴⁵ The trial magistrate had advance the date of

¹³⁷ *Legal Aid Board v The State*, (363/09) [2010] ZASCA 112 (21 September 2010); see also *S v Bloom* [1966] 4 SA 417 (C) 421; see also *R v Slabbert 1956(4) SA 18 (T) 21*; see also *S v Mabaso and Another* 1990 (3) SA 185(A).

¹³⁸ South Africa Constitution (n9 above).

¹³⁹ South Africa Constitution (n9 above).

¹⁴⁰ Act No. 39 of 2014: Legal Aid South Africa Act, 2013.

¹⁴¹ As above.

¹⁴² Act No. 39 of 2014 (n 140 above).

¹⁴³ Act No. 39 of 2014 (n 140 above).

¹⁴⁴ Act No. 39 of 2014 (n 140 above) sec 4 (1) (a) (i) (ii) (iii).

¹⁴⁵ *S v Bloom* [1966] 4 S.A. 417 (C) 421.

the trial thereby depriving the accused of legal representation and the court proceeded with the trial without legal representation for the accused.¹⁴⁶

In *Legal Aid Board v Pretorius*¹⁴⁷ the Supreme Court of Appeal upheld the decision of the lower court ordering the Legal Aid Board to provide the accused with alternative legal representation because the legal practitioner representing the accused together with other offenders was too overburdened to provide effective representation.¹⁴⁸ The Supreme Court supported the lower court in resorting to section 3B of the Legal Aid Act 22 of 1969 in arriving at the decision against the board and that it was within the lower court's province and power to ensure a fair trial.¹⁴⁹

In *S v Wessels* the Cape Court ruled that the denial of legal representation amounts to an irregularity that is equal to an improper trial, and which can lead to injustice.¹⁵⁰ In *Bruce Ehrlich v CEO Legal Aid Board and Grahamstown Justice Centre*¹⁵¹ the decision of the legal aid board in denying the appellant legal representation in the appeal against his sentence at the expense of the state was upheld by the High Court of Appeal because the legal aid board, after careful consideration of the case and request, realised that the appeal against the trial court judgement lacked merit and there was no chance of success. The refusal to advance legal representation to the appellant would not cause any harm. This decision is based on the last aspect of section 35 (2) (c) of the Constitution,¹⁵² which states that the accused should legally be represented 'if substantial injustice would otherwise result'.

In *Legal Aid South Africa v Magidiwana and Others*¹⁵³ the issue was whether the accused persons were entitled to legal representation at the Marikana Commission or the Commission of Inquiry at the expense of the government funds. The court held that Legal Aid South Africa had no obligation to provide legal representation in such a proceeding.¹⁵⁴ The case reveals that it is

¹⁴⁶ As above.

¹⁴⁷ *Legal Aid Board v Pretorius* [2006] SCA 81 (RSA).

¹⁴⁸ As above.

¹⁴⁹ *Legal Aid Board v Pretorius* (n 147 above).

¹⁵⁰ *S v Wessels* [1966] 4 S.A. 89.

¹⁵¹ *Bruce Ehrlich v CEO Legal Aid Board and Grahamstown Justice Centre*, Case No: 1137/05.

¹⁵² South African constitution (n 9 above).

¹⁵³ *Legal Aid South Africa v Magidiwana and Others* [2015] ZACC 28.

¹⁵⁴ As above.

not in all proceedings that accused persons are entitled to benefit from legal representations at the expense of the state.

As stated it is pursuant to the provision in the Constitution¹⁵⁵ that the Legal Aid South Africa Act, 2013 was promulgated.¹⁵⁶ In fulfilling its purpose ‘to render or make legal aid and legal advice available’, a legal entity named ‘Legal Aid South Africa’ was established.¹⁵⁷ Another aim is to provide ‘education and information concerning legal rights and obligations, as envisaged in the Constitution and this Act’.¹⁵⁸ Section 4 makes provision for the powers, functions, and duties of the Board.¹⁵⁹

It is only perpetrators of crime who come before a court of law or who are in custody or have been sentenced who are eligible for the services of legal aid in South Africa. Victims of crime have not been provided with such services.

Procedures for addressing sexual offences South African Criminal Justice system

The procedure commences with a complaint or report by the victim in person at a police station where a charge is laid against the perpetrator at any time without restriction.¹⁶⁰ In addition, the offence can be reported outside the jurisdiction of residence of the victim or of the commission of the crime.¹⁶¹ The investigating officer begins the investigation and the collection of evidence, and registers the docket.¹⁶² The victim is taken to an accredited hospital for medical examination and the suspect should be arrested and taken into custody. Samples for evidence will be taken from the victim, and medical treatment will be provided.¹⁶³ Thereafter, the victim’s full statement is taken through a rigorous process of questioning, followed by a medical examination of

¹⁵⁵ Act No. 39 of 2014 (n 140 above).

¹⁵⁶ Act No. 39 of 2014 (n 140 above).

¹⁵⁷ Act No. 39 of 2014 (n 140 above).

¹⁵⁸ Act No. 39 of 2014 (n 140 above).

¹⁵⁹ Act No. 39 of 2014 (n 140 above) sec 4 (1) (a) (i) (ii) (iii).

¹⁶⁰ The South African Police Service (SAPS) ‘National policy guidelines for victims of sexual offences’ (1998) the South African Police Service, http://www.justice.gov.za/policy/guide_sexoff/sex-guide01.html (accessed 21 June 2017)

¹⁶¹ As above.

¹⁶² SAPS (n 160 above).

¹⁶³ SAPS (n 160 above).

the suspect as required by section 37 of the Criminal Procedure Act, 1977.¹⁶⁴ The exhibit of evidence is preserved carefully without contamination. There is an identification parade, victim after care and preparation of the victim for the court trial.

South Africa has Thuthuzela Care Centres (TCC),¹⁶⁵ a one - stop facility positioned in all the Provinces in public hospitals close to communities plagued with the prevalence of sexual violence and concomitant to sexual offences' courts.¹⁶⁶ These amenities are operated by competent personnel, skilled in offering services to victims of sexual violence, who include 'prosecutors, social workers, magistrates, NGOs and police', and who are to be found in adjacent rooms to the facility.¹⁶⁷ These services were created as part of the strategy to combat rape in the country.¹⁶⁸ The main objective is to limit the re-victimisation of victims of sexual violence and to improve on rates of conviction of predators and to cut down on the length of time spent in the prosecution of offenders.¹⁶⁹

This programme is managed by NPA's Sexual Offences and Community Affairs Unit (SOCA) and the Departments of Justice, Health, Education, Treasury, Correctional Services, Police, Social Development and selected civil society bodies.¹⁷⁰ At the heart of the programme is the employment of the principles of 'respect, comfort, restoring dignity and ensuring justice' for victims of sexual violence. Thus, when reporting the crime of SV the victim is taken out of the view of the public into a convivial environment before transfer via an ambulance to the TCC in the hospital. In the course of the transfer the victim is given 'comfort and crises counselling' either by a competent ambulance volunteer or by a police officer.¹⁷¹ On arrival at the amenity

¹⁶⁴ The Criminal Procedure Act, 1977 Act No 51 of 1977.

¹⁶⁵ National Prosecuting Authority (NPA), Thuthuzela Care Centres (TCCs) 'Turning victims into survivors' The National Prosecuting Authority, South Africa (2009) 2 https://www.npa.gov.za/sites/default/files/resources/public_awareness/TCC_brochure_august_2009.pdf (accessed 30 August 2017); Networking HIV community of Southern Africa (NACOSA) 'Guidelines & standards for the provision of support to rape survivors in the acute stage of trauma' NACOSA with support from the Global Fund to fight AIDS, Tuberculosis and Malaria (2015) www.nacosa.org.za/wpcontent/uploads/2016/04/guidelinesstandards (accessed 30 August 2017).

¹⁶⁶ As above.

¹⁶⁷ NPA, TCCs (n 165 above) 3.

¹⁶⁸ NPA, TCCs (n 165 above) 3.

¹⁶⁹ NPA, TCCs (n 165 above) 2.

¹⁷⁰ NPA, TCCs (n 165 above) 3.

¹⁷¹ NPA, TCCs (n 165 above) 3.

the victim is admitted into a serene room, a doctor is called to examine the victim and explain the procedures, obtain consent from the victim and perform the medical procedure in order to obtain blood samples and body fluids.¹⁷² The specimen is sent for Deoxyribonucleic acid (DNA) analysis within 72 hours of the incident and the victims are placed on Post-Exposure Prophylaxis (PEP) and other relevant treatment. They are now allowed to bathe and change their clothing. The facility also accommodates children.¹⁷³ The victim is prepared for the court proceeding by a victim assistant officer and the matter is brought before the court and victims are taken to a place of safety.

3.8 Treatment of cases of sexual violence against citizens of South Africa

This section analyses court cases dealing with sexual violence. In the case of *Mudau v The State*¹⁷⁴ the appeal against the conviction of Mr. Samson Mawela Mudau in the Limpopo High Court, Thohoyandou for conviction of sexual assault on his thirteen year-old niece was dismissed and he was awarded fifteen years imprisonment.¹⁷⁵ The appellant had taken advantage of a request by a fifteen year-old girl to assist the child in filling in an admission form for high school to rape the child. The appellant was convicted and sentenced to life imprisonment for statutory rape. The Supreme Court of Appeal (SCA) felt that the imposition of life imprisonment on the appellant was not proportionate to the offence and observed that sentencing must be individualised and ‘punishment must fit the crime’. In the court’s opinion punishment must reflect a balance between the crime, the criminal and societal interests.¹⁷⁶

In the case of *S v Zinn* it was stated that for a sentence to be balanced and effective, the objectives of sentencing referred to as the ‘triad of factors warranting consideration in sentencing, namely the offender, the crime and the interests of society’, must be epitomised.¹⁷⁷ It is submitted that in criminal sentencing the rights of the victims are not usually given the same consideration. The SCA appreciates that ‘rape is undeniably a degrading, humiliating and brutal invasion of a

¹⁷² NPA, TCCs (n 165 above) 4.

¹⁷³ NPA, TCCs (n 165 above) 6-7.

¹⁷⁴ *Mudau v The State* (764/12) [2012] ZASCA 56 (9 May 2013).

¹⁷⁵ As above.

¹⁷⁶ *S v Rabie* 1975 (4) SA 855 (A).

¹⁷⁷ *S v Zinn* 1969 (2) SA 537 (A) at 540G.

person's most intimate, private space'.¹⁷⁸ In addition, that rape even without physical violence, 'is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way'.¹⁷⁹

In reducing Mudau's sentence from life imprisonment to 15 years, the SCA considered *Bailey v S* where an appeal against a sentence of life imprisonment imposed on a father for the rape of his 12 year-old daughter was dismissed.¹⁸⁰ The court in *Bailey v S* depended for its decision on the effect of the rape on the victim; 'anxiety, fear and sleeping disorders; misplaced feelings of guilt and shame; mood swings; a loss of trust in mankind and a great sense of anger and hostility towards her father'.¹⁸¹ In addition, the victim had dropped out of school since she became pregnant from the rape and suffered two spontaneous abortions. In this case Bosielo JA added that there should be the 'imposition of an appropriate sentence based on the particular facts of each case'.¹⁸²

In consideration of a victims' impact report, the court has to measure the weight of the crime against the injury suffered and impose a proportionate punishment. This principle is gleaned from utilitarian theory. Even though inflicting proportionate punishment on the perpetrator serves the interest of the crime, criminal and society. Then, how has the interest and rights of the victim as an individual in the wide ocean of the society been served or enforced by the criminal justice system? It is submitted that the domestic criminal justice system makes no provision for the enforcement of the rights of the victim, especially in cases of sexual violence,

In *Ndou v S* a stepfather raped his 16 year-old stepdaughter and was sentenced to life imprisonment. The appeal court set aside the life sentence and replaced it with 15 years' imprisonment because no evidence was presented before the court as to the consequences of the rape on the victim, even though the court acknowledge that the incident was traumatic to the victim.¹⁸³ It is

¹⁷⁸ *S v Chapman* 1997 (3) SA 341 (SCA) at 344J-345A.

¹⁷⁹ South African Constitution (n 9 above) sec 12 (1) (c) and (e).

¹⁸⁰ *Bailey v S* (454/11) [2012] ZASCA 154 (1 October 2012).

¹⁸¹ As above.

¹⁸² *Bailey v S*, (n 180 above).

¹⁸³ *Ndou v S* (93/12) [2012] ZASCA 148 (28 September 2012).

ironical to assume that the mere absence of physical effects does not exclude other consequences. The fact that evidence was not adduced as to such effects does not deny their existence, but exposes the weaknesses of the criminal judicial system and attests to the fact that some judges and judicial officials play down the effect of SV on the victim.

The court in *Kwanape v S* dismissed the appeal against a sentence of life imprisonment levied on a 24 year-old first offender who had raped a 12 year-old girl. The offender had kidnapped the girl and held her hostage overnight.¹⁸⁴ The victim's impact report revealed that the victim was devastated, suffered withdrawal syndrome, dropped out of school and became withdrawn from fear of ridicule, and her mother had to give up her employment 'to render emotional support to the complainant'.¹⁸⁵ In the *Mudau* case the court had argued that there was no victim's impact report and evidence had not been led of physical injury. It is submitted that sexual violence is the most invasive crime committed against an individual, the emotional trauma is as great as any physical injury.

In the case of *H v V*¹⁸⁶ the perpetrator appealed against his conviction and sentence to life imprisonment in respect of rape and ten years imprisonment for indecent assault.¹⁸⁷ The appeal court found no justifiable reason to overturn the decision of the trial court.¹⁸⁸ The appeal court determined the sexual assault had commenced as priming of the girl at a tender age and had progressed into sexual intercourse. The appeal was dismissed and the sentence upheld. The above authorities have shown that sexual violence against the victims of South Africa are addressed by the courts, there are a host of other cases attesting to this fact.¹⁸⁹

¹⁸⁴ *Kwanape v S* (422/12) [2012] ZASCA 168 (26 November 2012).

¹⁸⁵ As above.

¹⁸⁶ *H v V* (A400/2012) [2014] ZAGPJHC 214 (16 September 2014).

¹⁸⁷ As above.

¹⁸⁸ *H v V* (n 186 above) para. 75, 78-79.

¹⁸⁹ *Mulovhedzi v The State* (257/13) [2013] ZASCA 201 (2 December 2013); see also *Mudau v The State* (764/12) [2012] ZASCA 56 (9 May 2013); see also *S v Abraham* 2013 JDR 0909 (ECG); see also *S v Abisalile* 2015 JDR 2391 (ECG); see also *S v AL* 2016 JDR 0199 (ECG); see also *S v AR* 2017 JDR 1219 (WCC); see also *S v ALM* 2013 JDR 1584 (FB); see also *S v AR* 2013 JDR 2186 (SCA); see also *S v Amerika* 2017 JDR 0025 (WCC); see also *S v Baadjies* 2017 JDR 1010 (WCC); see also *S v Bangala* 2014 JDR 0919 (GSJ); see also *S v Bari* 2015 JDR 1951 (ECG); see also *S v Bopape* 2016 JDR 0652 (GJ); see also *S v Booysen* 2013 JDR 0789 (GNP); see also *S v Calvin* 2014 JDR 2020 (SCA); see also *S v Cebekhulu* 2016 JDR 0649 (GJ); see also *S v Chake* 2013 JDR 2184 (SCA); see also *S v Chauke* 2015 JDR 1522 (GP); see also *S v Chauke* 2014 JDR 0351 (GNP); see also *S v Chinridze* 2014 JDR 1516 (GP); see also *S v Cock* 2015 JDR 0155 (ECG); see also *S v Coetzee* 2015 JDR 1979 (NCK); see also *S v Cornelius* 2013 JDR 0544 (ECG); see also *S v De Wee* 2017 JDR 0005 (ECG) (victim is USA citizen); see also *S v Dire* 2015

JDR 0660 (GP) ; see also *S v DL* 2015 JDR 2681 (ECG) ; see also *S v Dladla* 2015 JDR 0239 (GP); see also *S v Dlamini* 2015 JDR 0257 (KZP) ; see also *S v Dlangamandla* 2017 JDR 0605 (GP); see also *S v Dos Santos* 2017 JDR 2053 (GP); see also *S v Draghoender* 2014 JDR 2108 (ECG); see also *S v Du Plessis* 2016 JDR 1241 (GP); see also *S v Dube* 2016 JDR 1760 (SCA); see *S v Duma* 2016 JDR 0232 (KZP); see also *S v Enslin* 2017 JDR 0241 (GP); see also *S v Fakude* 2017 JDR 0991 (GP); see also *S v FFD* 2013 JDR 0007 (GNP); see also *S v Flietor* 2013 JDR 0931 (FB); see also *S v FM* 2016 JDR 1564 (GP); see also *S v Fongoqa* 2015 JDR 0947 (WCC); see also *S v Ganga* 2015 JDR 2561 (WCC); see also *S v Gcaza* 2017 JDR 0995 (SCA); see also *S v Gcaza* 2016 JDR 1896 (ECG); see also *S v GO* 2017 JDR 1582 (SCA); see also *S v Govender* 2016 JDR 0265 (KZP); see also *S v Gqoba* 2016 JDR 1454 (ECG); see also *S v Guamba* 2014 JDR 2683 (FB); see also *S v Gubuza* 2014 JDR 0625 (WCC); see also *S v Gwarubana* 2015 JDR 1697 (WCC); see also *S v Gwedlane* 2015 JDR 2623 (GP); see also *S v H* 2014 JDR 1917 (GJ); see also *S v Hargreaves* 2015 JDR 0703 (KZP); see also *S v HCB* 2014 JDR 1327 (GP); see also *S v Hewitt* 2016 JDR 1079 (SCA); see also *S v Hekke* 2014 JDR 2330 (ECG); see also *S v JA* 2017 JDR 0621 (NCK); see also *S v Jacobs* 2014 JDR 2723 (WCC); see also *S v Jafta* 2017 JDR 0411 (ECG); see also *S v Jaftha* 2015 JDR 2250 (ECG); see also *S v JBN* 2013 JDR 0206 (ECG); see also *S v Jezile* (Seven Amici Curiae) 2015 JDR 0566 (WCC); see also *S v JR and WN* 2014 JDR 2515 (GP); see also *S v Joe* 2014 JDR 0803 (ECG); see also *S v Johannes* 2014 JDR 2509 (WCC); see also *S v Kaywood* 2016 JDR 2203 (SCA); see also *S v Kekana* 2014 JDR 0740 (GNP); see also *S v Klaas* 2013 JDR 1370 (KZP); see also *S v Kleinhans* 2014 JDR 0957 (WCC); see also *S v Khoza* 2013 JDR 0395 (GNP); see also *S v Khumalo* 2017 JDR 0589 (GJ); see also *S v Khumalo* 2014 JDR 2681 (FB); see also *S v Kruger* 2013 JDR 2713 (SCA); see also *S v Kwindu* 2014 JDR 2013 (SCA); see also *S v Larry* 2014 JDR 1291 (WCC); see also *S v Lebopa* 2015 JDR 0836 (GP); see also *S v Leve* 2013 JDR 0110 (ECG); see also *S v LK* 2013 JDR 1821 (GSJ); see also *S v Lore* 2015 JDR 0044 (GJ); see also *S v Lokhotshwayo* 2015 JDR 0496 (GP); see also *S v LP* 2014 JDR 0231 (WCC); see also *S v Lunga* 2014 JDR 1193 (GP); see also *S v Luruli* 2013 JDR 2553 (GSJ); see also *S v Mabaso* 2013 JDR 1425 (KZP); see also *S v Mabena* 2014 JDR 0674 (GP); see also *S v Mabula* 2013 JDR 1137 (GNP); see also *S v Mabuza* 2016 JDR 0517 (GP); see also *S v Madiba* 2014 JDR 0556 (SCA); see also *S v Madisha* 2016 JDR 0049 (GP); see also *S v Maduna* 2017 JDR 0398 (FB); see also *S v Madyo* 2015 JDR 1103 (ECG); see also *S v Magazi* 2016 JDR 1027 (FB); see also *S v Magano* 2014 JDR 0720 (GNP); see also *S v Magezi* 2013 JDR 2716 (SCA); see also *S v Mahlangu* 2016 JDR 1562 (GP); see also *S v Mahinje* 2014 JDR 2571 (ECB); see also *S v Mahlaba* 2016 JDR 1594 (FB); see also *S v Mahlangu* 2015 JDR 1606 (GP); see also *S v Mahlangu* 2015 JDR 0179 (GP); see also *S v Mahlangu* 2016 JDR 0095 (GP); see also *S v Majola* 2013 JDR 0400 (GNP); see also *S v Makoa* 2014 JDR 2612 (GP); see also *S v Makatu* 2013 JDR 2422 (SCA); see also *S v Makamo* 2015 JDR 0045 (GJ); see also *S v Makaringe* 2016 JDR 1327 (NWM); see also *S v Makhakha* 2013 JDR 1935 (WCC); see also *S v Makgai* 2013 JDR 1626 (GNP); see also *S v Makhhalima* 2016 JDR 0157 (GP); see also *S v Makhang* 2017 JDR 0540 (ECG); see also *S v Makhendlana* 2015 JDR 0788 (ECG); see also *S v Makube* 2015 JDR 1281 (GP); see also *S v Malgas* 2016 JDR 0909 (ECG); see also *S v Malakeje* 2016 JDR 1103 (NWM); see also *S v Malebe* 2014 JDR 0311 (GNP); see also *S v Maleka* 2015 JDR 0524 (GP); see also *S v Mali* 2015 JDR 0662 (GP); see also *S v Marutla* 2015 JDR 0557 (GP); see also *S v Manana* 2014 JDR 0732 (GNP); see also *S v Manoni* 2015 JDR 2682 (ECG); see also *S v Manzini* 2016 JDR 0992 (ECG); see also *S v Mapipa* 2016 JDR 1977 (ECG); see also *S v Maseko* 2013 JDR 0986 (GNP); see also *S v Maseko* 2016 JDR 1299 (GP); see also *S v Mashigo* 2015 JDR 0907 (SCA); see also *S v Masilo* 2014 JDR 1916 (GP); see also *S v Masiteng* 2016 JDR 0818 (GP); see also *S v Masuku* 2013 JDR 1093 (GNP); see also *S v Maswanganyi* 2013 JDR 2521 (GNP); see also *S v Mathuse* 2013 JDR 2610 (GSJ); see also *S v Matthys* 2015 JDR 1702 (WCC); see also *S v Mayisela* 2013 JDR 0752 (GNP); see also *S v Mawasha* 2016 JDR 1262 (GP); see also *S v Maxabaniso* 2015 JDR 0843 (ECG); see also *S v Mazibuko* 2014 JDR 0320 (GNP); see also *S v Mazondwa* 2013 JDR 0715 (ECG); see also *S v M B* 2016 JDR 2132 (WCC); see also *S v Mbetha* 2015 JDR 0497 (GP); see also *S v Mbokazi* 2015 JDR 1611 (KZD); see also *S v Mcambi* 2014 JDR 2268 (GP); see also *S v MD and Another* 2017 JDR 0624 (ECB); see also *S v MDT* 2014 JDR 0586 (SCA); see also *S v Mdaka* 2014 JDR 0953 (KZP); see also *S v Memane* 2016 JDR 1255 (GP); see also *S v Mendile* 2016 JDR 2010 (ECG); see also *S v MG* 2015 JDR 0131 (GP); see also *S v Mgangala* 2014 JDR 2442 (ECB); see also *S v Mgandela* 2016 JDR 1748 (ECM); see also *S v Mgxeke* 2013 JDR 2161 (ECG); see also *S v Mhlahlo* 2014 JDR 2438 (ECG); see also *S v Milisi* 2016 JDR 2336 (ECG); see also *S v Mini* 2015 JDR 2253 (ECG); see also *S v MJM* 2014 JDR 1525 (GP); see also *S v Mkhathshwa* 2015 JDR 1104 (GP); see also *S v Mkhungo* 2015 JDR 1687 (KZP); see *S v Mkhwanazi* 2016 JDR 0579 (GP); see also *S v ML* 2014 JDR 0782 (GP); see also *S v Mlangeni* 2015 JDR 2233 (GP); *S v Mletshe* 2014 JDR 0388 (ECM); see also *S v Moabi* 2015 JDR 1845 (GP); see also *S v Modise* 2017 JDR 1125 (NWM);

3.9 Treatment of refugees in South Africa in relation to Article 16 of the UN Refugee law

To have access to basic amenities in South Africa you require a passport, a permit or a South African identity document. Refugees in South Africa require an asylum permit to access facilities. South Africa has been adjudged to have a liberal refugee policy because it does not confine

see also *S v Modiko* 2015 JDR 1763 (GP); see also *S v Modise* 2014 JDR 2619 (FB); see also 1125 (NWM); see also *S v Modiko* 2015 JDR 1763 (GP); see also *S v Modise* 2014 JDR 2619 (FB); see also *S v Mofokeng* 2016 JDR 1144 (GJ); see also *S v Mofokeng* 2016 JDR 1591 (FB); see also *S v Mofokeng* 2016 JDR 0840 (FB); see also *S v Mofokeng* 2014 JDR 1814 (FB); see also *S v Mohalalelwa* 2015 JDR 0526 (GP); see also *S v Mokhari* 2014 JDR 1370 (GJ); see also *S v Mokoena* 2015 JDR 0554 (GP); see also *S v Mokoena* 2013 JDR 0635 (GNP); see *S v Molatudi* 2015 JDR 2319 (GJ); see also *S v Molefe* 2014 JDR 1317 (GP); see also *S v Molelekoa* 2014 JDR 1115 (ECP); see also *S v Molokoane* 2014 JDR 2067 (GP); see also *S v Moloi* 2013 JDR 0411 (FB); see also *S v Moloto* 2015 JDR 0486 (GP); see also *S v Molatlhehi* 2015 JDR 0498 (GP); see also *S v Moilwa* 2017 JDR 1018 (GP); see also *S v Moremi* 2015 JDR 1323 (GP); see also *S v Mosethla* 2014 JDR 1282 (GP); see also *S v Moss* 2015 JDR 0846 (ECG); see also *S v Mothata* 2015 JDR 0527 (GP); see also *S v Motsamai* 2016 JDR 2038 (FB); see also *S v Motshaba* 2014 JDR 1711 (GP); see also *S v Motshabi* 2017 JDR 0255 (GJ); also *S v Motsoeneng* 2016 JDR 1592 (FB); see also *S v Mouters* 2016 JDR 1464 (NWM); see also *S v Mphaphuli* 2014 JDR 0310 (GNP); see also *S v Mpithi* 2015 JDR 1330 (GP); see also *S v Mphaphuka* 2013 JDR 0766 (GNP); see also *S v Mpofu* 2014 JDR 0460 (GSJ); see also *S v Mqulwana* 2014 JDR 2163 (ECG); see also *S v Mroleli* 2016 JDR 0006 (ECB); see also *S v MS* 2017 JDR 0295 (FB); see also *S v MS* 2013 JDR 1133 (GNP); see also *S v Msibi* 2015 JDR 0193 (GP); see also *S v Msibi* 2016 JDR 1550 (KZP); see also *S v Msindwana* 2013 JDR 0841 (ECG); see also *S v MT* 2013 JDR 2102 (SCA); see *S v Mthembu* 2013 JDR 0703 (GNP); see also *S v Mthembu* 2014 JDR 1561 (GP); see also *S v Mthimkulu* 2016 JDR 0296 (GP); see also *S v Mthimunye* 2015 JDR 0773 (GP); see also also *S v Mthiyane* 2015 JDR 1280 (GP); see also *S v Mthombeni* 2015 JDR 1524 (GP); see also *S v Mthombeni* 2014 JDR 2446 (KZP); see *S v Mthombeni* 2014 JDR 0706 (GNP); see also *S v Mtyala* 2015 JDR 0178 (GP); see also *S v Mudau* 2013 JDR 0938 (SCA); see also *S v Mudzanani* 2013 JDR 2747 (SCA); see also *S v Mugridge* 2013 JDR 0658 (SCA); see also *S v Mugwedi* 2014 JDR 0595 (SCA); see also *S v Munyai* 2014 JDR 0604 (SCA); *S v Munyai* 2015 JDR 0121 (GP); see also *S v N* 2015 JDR 2300 (GP); see also *S v Ndaba* 2014 JDR 0525 (GSJ); see also *S v Ndebele* 2014 JDR 0376 (GSJ); see also *S v Ndimande* 2015 JDR 1416 (KZD); see also *S v Ndubatha* 2015 JDR 2303 (GP); see also *S v Nduna* 2013 JDR 0617 (GNP); see also *S v Ndllovu* 2014 JDR 1151 (GP); see also *S v Nengudza* 2015 JDR 2584 (GP); see also *S v Nevilimadi* 2014 JDR 0662 (SCA); see also *S v Ngcobo* 2015 JDR 0923 (KZP); see also *S v Ngcobo* 2014 JDR 0485 (KZP); see also *S v Ngwase* 2015 JDR 0559 (GP); see also *S v Ngwane* 2014 JDR 2699 (WCC); *S v Ngwenya* 2014 JDR 1620 (GP); see also *S v Nhleko* 2016 JDR 1015 (GP); see also *S v Nkabinde* 2014 JDR 2338 (FB); see also *S v Nkosi* 2014 JDR 1076 (GP); see also *S v Nkosi* 2014 JDR 0676 (GNP); see also *S v Nkuna* 2017 JDR 1020 (GJ); see also *S v Nkunkuma* 2013 JDR 2158 (SCA); see also *S v Nkwanyana* 2016 JDR 1762 (KZP); see also *S v Nkwanyane* 2014 JDR 2266 (KZP); see also *S v Nohaji* 2016 JDR 0575 (ECM); see also *S v Nokeva* 2013 JDR 0272 (ECG); see also *S v Nombiba* 2014 JDR 1551 (GP); see also *S v Nombiba* 2014 JDR 1554 (GP); see also *S v NS* 2014 JDR 1344 (GP); see also *S v Ntepe* 2016 JDR 1041 (FB); see also *S v Nthabalala* 2014 JDR 0608 (SCA); see also *S v Ntozini* 2015 JDR 1953 (ECG); see also *S v Ntsasa* 2014 JDR 1215 (FB); see also *S v Ntshabele* 2016 JDR 0837 (GP); see also *S v Nxele* 2014 JDR 0484 (KZP); see also *S v Nyaki* 2014 JDR 0461 (GSJ); see also *S v Palmer* 2017 JDR 1552 (SCA); see also *S v P N* 2014 JDR 0593 (SCA); see also *S v Pebane* 2013 JDR 1125 (GNP); see also *S v Peyani* 2013 JDR 2449 (GNP); see also *S*

refugees in camps.¹⁹⁰ Yet, their living conditions have been described to be very poor,¹⁹¹ which defeats the objective of a liberal policy of integration. Some asylum seekers still have trouble in either renewing or obtaining an asylum permit because of closure of reception centres.¹⁹²

In respect of access to courts a few court cases relating to asylum status have been

v Nyaki 2014 JDR 0461 (GSJ); see also *S v Palmer* 2017 JDR 1552 (SCA); see also *S v P N* 2014 JDR 0593 (SCA); see also *S v Pebane* 2013 JDR 1125 (GNP); see also *S v Peyani* 2013 JDR 2449 (GNP); see also *S v Phage* 2016 JDR 1232 (GP); see also *S v Phaliso* 2015 JDR 1289 (FB); see also *S v Phosha* 2014 JDR 1535 (GP); see also *S v Pilane* 2017 JDR 0103 (NWM); see also *S v Polorie* 2015 JDR 1093 (FB); see also *S v Prins* 2016 JDR 1716 (WCC); see also *S v Poswa* 2016 JDR 2332 (ECG); see also *S v Potgieter* 2014 JDR 2222 (GP); see also *S v Poni* 2016 JDR 1030 (ECG); see also *S v Pukane* 2014 JDR 0458 (GSJ); see also *S v Qila* 2014 JDR 2256 (ECG); see also *S v Qoka* 2013 JDR 0992 (GNP); see *S v Radebe* 2016 JDR 1436 (GP); see also *S v Ragaval* 2016 JDR 1398 (ECG); see also *S v Rakhudu* 2016 JDR 1115 (GJ); see also *S v Ramonyathi* 2014 JDR 2269 (GP); see also *S v Ratseke* 2013 JDR 2450 (GNP); see also *S v Ravele* 2014 JDR 1903 (SCA); see also *S v RC* 2015 JDR 1685 (KZP); see also *S v Rooiberg* 2015 JDR 0740 (ECG); see also *S v Ruiters* 2015 JDR 1966 (ECG); see also *S v Rumbu* 2016 JDR 1117 (ECG); see also *S v Seedat* 2016 JDR 1820 (SCA); see also *S v Seedat* 2015 JDR 0917 (GP); see also *S v Sekamette* 2016 JDR 1140 (GP); see also *S v Sekamette* 2016 JDR 1259 (GP); see also *S v Selebogo* 2015 JDR 1034 (GJ); see also *S v September* 2014 JDR 1105 (ECG); see also *S v Setshedi* 2017 JDR 0246 (GP); see also *S v Shiko* 2014 JDR 1581 (GP); see also *S v Shongwe* 2016 JDR 1141 (GP); see also *S v Silo* 2016 JDR 0524 (WCC); see also *S v Sovasi* 2013 JDR 0781 (ECG); see also *S v Sithole* 2016 JDR 1260 (GP); see also *S v SLW* 2014 JDR 1790 (ECP); see also *S v SM* 2015 JDR 1185 (GP); see also *S v SMM* 2013 JDR 1771 (GNP); see also *S v Solo* 2015 JDR 1292 (FB); see also *S v Strydom* 2015 JDR 0484 (GP); see also *S v Steyn* 2014 JDR 2271 (GJ); see also *S v SV* 2015 JDR 1242 (GP); see also *S v Syster* 2014 JDR 2544 (SCA); see also *S v T* 2017 JDR 0862 (GP); see also *S v Thafeni* 2015 JDR 0750 (ECG); see also *S v Tshabalala* 2013 JDR 1310 (GNP); see also *S v Tshabalala* 2014 JDR 1178 (GP); see also *S v Tshabuse* 2013 JDR 0990 (GNP); see also *S v Thulare* 2013 JDR 2233 (GNP); see also *S v Thunzi* 2014 JDR 0765 (WCC); see also *S v Tisani* 2013 JDR 2163 (ECG); see also *S v Tivane* 2015 JDR 0881 (GP); see also *S v Tladi* 2015 JDR 0583 (GP); see also *S v Tofa* 2015 JDR 0570 (SCA); see also *S v Toli* 2015 JDR 0765 (ECG); see also *S v Tshoga* 2017 JDR 0057 (SCA); see also *S v Trosello* 2015 JDR 2624 (GP); see also *S v Tshirana* 2015 JDR 0039 (ECG); see also *S v Tshoga* 2017 JDR 0057 (SCA); see also *S v Tose* 2014 JDR 0857 (ECP); see also *S v Tshabalala* 2014 JDR 1178 (GP); see also *S v Tuswa* 2013 JDR 0226 (KZP); see also *S v Van Wyk* 2014 JDR 2001 (SCA); see also *S v Voster* 2013 JDR 0905 (GSJ); see also *S v Wamo* 2013 JDR 0804 (GNP); see also *S v Wonci* 2015 JDR 0589 (ECG); see also *S v Xaba* 2013 JDR 0993 (GNP); see also *S v ZF* 2015 JDR 2411 (KZP); see also *S v Zondo* 2015 JDR 0278 (KZP); see also *S v Zuba* 2014 JDR 0155, see also *S v Zulu* 2015 JDR 1044 (GP); see also *S v Zungula* 2015 JDR 0556 (GP); see also *S v Zwane* 2016 JDR 0875 (GJ); see also *Seedat v S* (A547/12) [2015] ZAGPPHC 286; 2015 (2) SACR 612 (GP); [2015] 3 All SA 93 (GP) (12 May 2015).

¹⁹⁰ Human Rights Watch (HRW), 'No healing here: Violence, discrimination and barriers to health for migrants in south africa' Human rights Watch (2009) 7/81, <https://www.hrw.org/report/2009/12/07/no-healing-here/violence-discrimination-and-barriers-health-migrants-south-africa> (accessed 31 October 2017).

¹⁹¹ As above.

¹⁹² D Chambers, 'Reopen Cape Town refugee centre, appeal court orders home affairs' TimesLIVE, (2017) <https://www.timeslive.co.za/news/south-africa/2017-09-29-reopen-cape-town-refugee-centre-appeal-court-orders-home-affairs/> (accessed 31 October 2017); see also T Washinyira Home Affairs ordered to re-open Cape Town refugee office: Supreme Court of Appeal gives department until March 2018 (2017) <https://www.groundup.org.za/article/home-affairs-ordered-re-open-cape-town-refugee-office/> (accessed 2 March 2018).

documented.¹⁹³ Victims of sexual violence who are refugees are not believed by the police and are discriminated against;¹⁹⁴ there are yet to be documented prosecuted cases of SV against refugees in South Africa. Of over 328 prosecuted cases of SV reviewed between 2013 to 2017 in the course of this study, one victim is a US citizen and the other cases affect South African citizens.¹⁹⁵

It is reported that migrant female were an easy target for SV during the xenophobic attacks because they had less recourse to the criminal justice system and protection than South African women.¹⁹⁶ In addition, it is stated that despite the increase in state and civil society provision for health, psycho-social, legal/justice and security sectors in response, refugee women still experience problems of access to protection, justice and services following sexual violence.¹⁹⁷ Some of these problems are traced back to a ‘lack of co-ordination and no formal or consistent approach to referral’; also survivors are charged for or denied access to free medical services including PEP and lack shelter that complies with minimum standards.¹⁹⁸ Most female refugees in South Africa do not report cases for fear of deportation. It is submitted that female refugees who are victims of sexual violence do not have access to justice in the same way as their South African counterparts.

The analysis of law and cases relating to sexual violence has revealed that cases of SV against citizens are prosecuted, but SV against refugees is not prosecuted. It is argued that South Africa does not comply with the provisions of article 16 of the UN Refugee Convention, 1951. There are yet to be documented prosecuted cases of SV against female refugees in the territory.

¹⁹³ *Mohammed v President of the Republic of South Africa* (Society for the Abolition of the Death Penalty in South Africa and Another Intervening 2001 (3) SA 893 CC; See also *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC).

¹⁹⁴ I Kasamani, ‘Sexual and gender - based violence in the refugee context’ Uganda Solidarity summit on Refugee, <http://solidaritysummit.gou.go.ug/content/sexual-and-gender-based-violence-refugee-context> (accessed 26 March 2016).

¹⁹⁵ As above.

¹⁹⁶ The European Union/ Sector Budget Support, ‘Criminal Injustice: Violence Against Women in South Africa,’ Shadow Report on Beijing, (2013), 12, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Document/ZAF/INT_CEDAW_NGO_ZAF_48_10364_E.pdf (accessed 30 November 2016); see also Centre for the Study of Violence and Reconciliation ‘The Gendered Nature of Xenophobia in South Africa’ (2014) www.csvr.org.za (accessed 30 November 2016).

¹⁹⁷ As above.

¹⁹⁸ The European Union/ Sector Budget Support (n190 above); see also Center for the Study of Violence and Reconciliation (n196 above).

4 Legislative instruments addressing sexual violence in United Republic of Tanzania

This section interrogates how Tanzania addresses the issue of sexual violence among its citizens and whether refugees who are victims of SV receive similar treatment. This section examines the relevant provisions of the Constitution of the United Republic of Tanzania, the Tanzania Refugee Act and the criminal judicial system, as well as the procedures for addressing sexual offences in the criminal justice system and the legislative instruments criminalising SV, which includes the Sexual Offences Special Provisions Act, 1998. It will also look at the issue of access to courts and the provision of legal assistance and the treatment of refugees in relation to article 16 of the UN Refugee Convention 1951.

4.1 Introduction

Tanzania is a union of the former Tanganyika and the islands of Zanzibar, located in East Africa and situated between Kenya and Mozambique.¹⁹⁹ Tanganyika had been a German colony, after World War I it was designated a British protectorate by the League of Nations Charter.²⁰⁰ Tanzania became independent in 1961.²⁰¹ Its legal system is based on English Common Law. Judicial review of legislative acts is limited to matters of interpretation and it has not accepted ICJ jurisdiction.²⁰²

Tanzania is party to international treaties, such as the UN Refugee Convention 1951 and its Protocol 1967, assented accented to on 12 May 1964 and 4 September 1968 respectively.²⁰³

¹⁹⁹ Central Intelligence Agency (CIA) World fact book, 'Tanzania' World Factbook, (2016) <http://www.cia.worldfactbook.us/africa/tanzania.html> (accessed 23 November 2016).

²⁰⁰ As above.

²⁰¹ United Nations Department of Economic and Social Affairs: Population Division 'Tanzania Population 2016 | Current population of Tanzania,' (2016) <http://countrymeters.info/en/Tanzania>, (23 November 2016).

²⁰² (CIA) World fact book, 'Tanzania' (n199 above).

²⁰³ UN Treaty collections, Convention relating to the Status of Refugees, Geneva, 28 July 1951, status as at: 18 october 2016 07:31:04 EDT, <https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtid=sgnoV-2&chapter=5&Temp=mtdsg2&clang=end> (accessed 19 October 2016); see also UNHCR, United

Tanzania signed, ratified and deposited the OAU Convention on the 10 September 1969, 10 January 1975 and 24 January 1975.²⁰⁴

Tanzania's legal system follows the dualist model in respect of the status of international law in the domestic legal system, and it is bound by the treaties to which it is party. Tanzania hosts over 359 494 refugees in Lugufu, Mtendeli, Mtabila, Nduta and Nyarugusu, camps,²⁰⁵ in Dar es Salaam (urban), Kigoma villages, old settlements and Lumasi transit camps. The refugees mainly are from Burundi and the Democratic Republic of the Congo.²⁰⁶

4.2 The Constitution of the United Republic of Tanzania

The Constitution of Tanzania is the foundation for the protection of citizen's rights, freedom and enshrines the fundamental doctrines for the governance of the state.²⁰⁷ Part two of chapter one provides the fundamental objectives and directive principles of state policy.²⁰⁸ Article 9 protects against the violation of human rights and mandates officials and agencies to develop policies and programmes that guarantee 'that human dignity and other human rights are respected and cherished' and to uphold and enforce the laws of the land.²⁰⁹ This mandate is in accordance with the values of the Universal Declaration of Human Rights,²¹⁰ and is an affirmation of the willingness of the Tanzanian government to protect and enforce the rights of its citizens against human rights violations in accordance with international human rights standards.

Nations High Commissioner for Refugees, States parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol.

²⁰⁴ African Commission on Human and Peoples, 'Rights, ratification table: AU Convention Governing Specific Aspects of Refugee Problem in Africa' <http://www.achpr.org/instruments/refugee-convention/ratification/> (accessed 19 October 2016).

²⁰⁵ UNCHR, 'Tanzania Refugee Situation Statistical report 31-Oct-17' (2017) <https://data2.unhcr.org/en/documents/download/60875> (accessed March 2018).

²⁰⁶ (CIA) World fact book, 'Tanzania' (n130 above); see also Women's Legal Aid, 'Access to refugee women and girls,' Baseline Survey Report conducted in in Mtabila, Nyarugusu, and Lugufu camps, 2008.

²⁰⁷ Tanzania Constitution (n 23 above).

²⁰⁸ Tanzania Constitution (n 23 above).

²⁰⁹ Tanzania Constitution (n 23 above).

²¹⁰ Tanzania Constitution (n 23 above).

Article 12 (1) (2) of the Tanzanian constitution provides that all human beings are born free and equal and that every person is entitled to recognition and respect for his dignity'.²¹¹ This implies that any act that amounts to disrespect for human dignity, such as sexual violence, should be avoided and condemned.

4.3 Tanzania Refugee Act

The principal instrument for the protection of refugees in Tanzania is The Refugee Act 1998. It provides generally for eligibility in seeking asylum and the administration and regulation of refugees in Tanzania.²¹² Section 16 (1) provides that the minister may by notice in the gazette declare any part of the United Republic of Tanzania to be a designated area²¹³ for hosting refugees,²¹⁴ and administered by a settlement officer.²¹⁵ Section 17 restricts refugees from residing in areas that are not designated, it restricts their movement in and out of the area and considers non-compliance with this provision of the Act an offence, punishable under sections 18 (4) (a) (b), with confinement to the settlement or camp, being locked up for not more than three days or a fine not exceeding five thousand shillings.²¹⁶ The Tanzanian Refugee Act does not have provisions for non-refoulement; section 28 provides generally for the conditions under which refugees can be deported.²¹⁷

Tanzanian courts have upheld the principle of non-refoulement, for instance in *Republic v Ally Gibert and Others*,²¹⁸ the court dropped the charges against a refugee who possessed an asylum permit but had been arrested with ten other foreigners for deportation for their illegal presence in the country in contravention of section 31 (1) (i) of the Immigration Act,²¹⁹ which states that

²¹¹ Tanzania Constitution (n 23 above).

²¹² The Refugee Act 1998, Tanzania.

²¹³ As above.

²¹⁴ Tanzania Refugee Act (n 212 above) sec 17.

²¹⁵ Tanzania Refugee Act (n 212 above) sec 17.

²¹⁶ Tanzania Refugee Act (n 212 above) sec 17.

²¹⁷ Tanzania Refugee Act (n 212 above) sec 17.

²¹⁸ *Republic v Ally Gibert and Others* Criminal Case No. 106 of 2002, Kigoma District Court at Kigoma, Unreported.

²¹⁹ Immigration Act, 1995 (Tanzania immigration act).

any person who ‘unlawfully enters or is unlawfully present within Tanzania is in contravention of the provisions of this Act’.²²⁰

In *Republic v Ilola Shabani and Others*²²¹ the case dealt with two new refugees who had arrived in Kaseke village in Kigoma rural district of Tanzania. They reported to the village authorities in accordance with section 9 (1),²²² the headship of the village handed them over to the police for onward transmission to the UNHCR.²²³ However, they were detained for over a year and tagged as criminals who were unlawfully present in the republic before they were conditionally released and handed over to UNHCR.²²⁴ From the attitude of the Tanzanian court, despite the silence of the Tanzania Refugee Act on non-refouler, it can be concluded that refugees are entitled to the protection of the Tanzanian government.

4.4 Access to Courts

This section examines the provisions for citizens of Tanzania to have access to court. Article 13 (1) of the constitution provides that every person is ‘equal before the law’ and ‘entitled to equal protection and equality before the law’, devoid of any discrimination.²²⁵ In order to achieve equality before the law section 13 (6) calls on state authorities to create appropriate processes that will ensure that in the determination of the ‘rights and duties of any person’ before ‘the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or another legal remedy against the decision of the court or of the other agency concerned’.²²⁶ The constitution further provides that ‘for the purposes of preserving the right or equality of human beings, human dignity shall be protected in all events connected ‘to criminal investigations and process, and in any other matters for which a person is restrained, or in the execution of a sentence’.²²⁷

²²⁰ As above.

²²¹ *Republic v Ilola Shabani and Others*, Criminal Case No. 162 of 2001, Kigoma District Court at Kigoma, Unreported.

²²² Tanzania Refugee Act (n 212 above).

²²³ *Republic v Ilola Shabani and Others* (n 221 above).

²²⁴ *Republic v Ilola Shabani and Others* (n 221 above).

²²⁵ Tanzania Constitution (n 23 above).

²²⁶ Tanzania Constitution (n 23 above) 13 (6) (a).

²²⁷ Tanzania Constitution (n 23 above).

The citizens of Tanzania can expect to be treated with respect and to have access to justice. Refugees in Tanzania also should enjoy such treatment, as is provided for in article 16 of the UN Refugee Convention 1951. However, the Tanzania Refugee Act does not provide for access to court. The details of cases relating to sexual violence are discussed later.

4.5 Criminal judicial system of the United Republic of Tanzania

The judicial system of Tanzania is grounded in common law, but also encompasses Islamic law and customary law. The jurisdiction of the courts includes civil and criminal matters. Its legal foundation is created by chapter five of the Constitution.²²⁸ The courts include the High Courts of the United Republic,²²⁹ magistrates courts,²³⁰ the High Court of Zanzibar,²³¹ the Court of Appeal of the United Republic,²³² and the Special Constitutional Court of the United Republic.²³³ These courts are presided over by magistrates and judges.²³⁴ Court jurisdiction over sexual offences is with the magistrates courts.

The Tanzanian criminal justice system operates an adversarial system, a process by which an accused person enters a criminal proceeding until the case either is dismissed or he is convicted of the crime and sentenced.²³⁵ The players in the system are the police who are the investigators and law enforcers, an adjudication section comprising ‘the courts which embraces magistrates/judges, prosecutors, defence lawyers’ and the corrections services which include the ‘prisons, probation officers, and parole officers’.²³⁶ The main objective is to uphold the rule of law.²³⁷ As in other criminal legal systems the victim is the complainant who initiates the process by

²²⁸ Tanzania Constitution (n 23 above).

²²⁹ Tanzania Constitution (n 23 above) chapter five, part I.

²³⁰ Tanzania Constitution (n 23 above) part II.

²³¹ Tanzania Constitution (n 23 above) part III.

²³² Tanzania Constitution (n 23 above) part IV.

²³³ Tanzania Constitution (n 23 above) part VI.

²³⁴ Tanzania Constitution (n 23 above) part VI.

²³⁵ MT Philip ‘Victims of Criminal Justice System in Tanzania –The Need for Radical Approach in Advancing Juvenile Justice’ A paper to be presented at the 2015 Annual General Meeting at The Arusha International Conference Centre (2015) 1, <http://tls.or.tz/wp-content/uploads/2015/03/VICTIMS-OF-CRIMINAL-JUSTICE-SYSTEM-IN-TANZANIA-2.pdf> (accessed 17 July 2017).

²³⁶ As above.

²³⁷ Philip (n 235 above) 1.

means of the laying a complaint before a police officer, who in turn investigates the case and once satisfied prepares it for prosecution if he is satisfied that there is the likelihood of obtaining a conviction.²³⁸ The victim is a prosecution witness who testifies in court in support of the charge laid against the offender by the state. At this stage, the Director of Public Prosecutions takes over the case from the police as the official representative of the state,²³⁹ as provided for under sections 2 and 4 (3) of the National Prosecution Service Act No. 10 of 2008.²⁴⁰

Citizens of Tanzania who are victims of crime can only access the court to testify as state witnesses and not as individuals with legal standing to protect their individual rights in criminal proceedings. Refugees who are victims of crimes are expected to be treated similarly in accordance with article 16 of the UN Refugee Convention, 1951.

4.6 Legislation combatting sexual violence in the United Republic of Tanzania

The legislative enactments that will be discussed in this section are the Sexual Offences Special Provisions Act and the Anti-Trafficking in Persons Act.

The Sexual Offences Special Provisions Act, 1998

This act was enacted specifically to regulate sexual and other related offences in order to safeguard the personal integrity, dignity, liberty and security of women and children.²⁴¹ It repealed chapters XV and XVI of the penal code.²⁴² This Act generally prohibits all forms of sexual violence, identifies the offenders and victims, highlights the elements of the crime and prescribes the punishment to be awarded for each offence on conviction. In section 3 it offers definitions of words and phrases relating to sexual offences. The act defines:

²³⁸ Philip (n 235 above) 1.

²³⁹ Philip (n 235 above) 2.

²⁴⁰ The National Prosecution Service Act No. 10 of 2008.

²⁴¹ The Sexual Offences Special Provision Act, 1998, Tanzania (Sexual offences act Tanzania).

²⁴² As above.

‘Sexual abuse’ as illegal sexually oriented acts or words done or said in relation to any person for gratification or for any other illegal purposes; sexual intercourse whether natural or unnatural, shall for the purpose of proof of a sexual offence be deemed to be complete upon proof of penetration only not the completion of the intercourse by emission of seed; and sexual offence as any offence created in chapter XV of the Penal Code...²⁴³

Section 5 describes all forms of acts that could be regarded as rape, the victims, the perpetrators, its elements²⁴⁴ and the punishment of the offence for different types of offenders ranging from corporal punishment to a life sentence.²⁴⁵ Section 7 prohibits gang rape with a life sentence as punishment.²⁴⁶ Section 8 condemns attempted rape and carries either thirty years imprisonment or a life sentence.²⁴⁷ Section 9 outlaws sexual assault in form of intent to cause sexual annoyance and indecent assault on women with a punishment of a maximum of five years or a fine of three hundred thousand shillings or both.²⁴⁸

Section 11 punishes indecent assault with imprisonment for no more than five years or a fine of not more than three hundred thousand shillings; if the victim is below eighteen years of age the punishment ranges from ten years imprisonment with corporal punishment and the payment of compensation to the victim.²⁴⁹ Sexual exploitation of children is a crime punishable with a sentence of not more than twenty years in jail;²⁵⁰ grave sexual abuse carries a maximum of thirty years imprisonment, and sexual harassment is punished with a term of not more than five years or a fine of not more than two hundred thousand shillings.²⁵¹

²⁴³ Sexual offences act, Tanzania (n 241 above).

²⁴⁴ Sexual offences act, Tanzania (n 241 above).

²⁴⁵ Sexual offences act, Tanzania (n 241 above).

²⁴⁶ Sexual offences act, Tanzania (n 241 above).

²⁴⁷ Sexual offences act, Tanzania (n 241 above).

²⁴⁸ Sexual offences act, Tanzania (n 241 above).

²⁴⁹ Sexual offences act, Tanzania (n 241 above).

²⁵⁰ Sexual offences act, Tanzania (n 241 above).

²⁵¹ Sexual offences act, Tanzania (n 241 above).

The Anti - Trafficking in Persons Act

The Anti-Trafficking in Persons Act 2008 prohibits the trafficking of persons in general.²⁵²

Article 4 covers the following infringements: the adoption, facilitation, conscription, shipping, transfer, and harbouring, offering or obtaining an individual by any means, including those done under the excuse of domestic or foreign service, training or internship, for prostitution, pornography, sexual exploitation and for the organisation of sex tourism.²⁵³ The penalty for the convicted offender ranges from the forfeiture of the proceeds from the act by the government, compensation to the victim, a fine between five to one hundred million shilling or two to ten years of imprisonment.²⁵⁴

4.7 Legal assistance

The principal instrument for the provision of legal assistance is the Legal Aid Act, 2017.²⁵⁵ In Tanzania any indigent person²⁵⁶ who has a civil²⁵⁷ or criminal²⁵⁸ interest for justice and does not have sufficient funds to employ the services of a lawyer can apply for legal aid.²⁵⁹ However, in criminal cases indigent perpetrators of crime can apply for legal aid but there is no provision for victims of crime to do so.²⁶⁰

The right of an accused to legal representation was upheld in *Moses Muhagama Laurance v The Government of Zanzibar*²⁶¹ where the Court of appeal allowed an appeal against the 15 year sentence for drug related offences for lack of legal representation at the trial court, also the accused was not informed about his right to legal representation in the magistrate court.²⁶² However, the right to legal aid representation is not absolute for all accused persons.²⁶³ In *R v Munene*

²⁵² The Ant-Trafficking in Persons Act Cap 56 2008 (Tanzania Anti- Trafficking Law).

²⁵³ As above.

²⁵⁴ Tanzania Anti - Trafficking Law (n 252 above) section 4 (5), 14, and 15.

²⁵⁵ The Legal Aid Act, 2017, Tanzania.

²⁵⁶ As above sec 1.

²⁵⁷ The Legal Aid Act, Tanzania (n 255 above) sec 27.

²⁵⁸ The Legal Aid Act, Tanzania (n 255 above) sec 33.

²⁵⁹ The Legal Aid Act, Tanzania, (n 255 above) sec 21 & 22.

²⁶⁰ The Legal Aid Act, Tanzania (above n 255) sec 5 (c).

²⁶¹ *Moses Muhagama Laurance v The Government of Zanzibar*, Criminal Appeal No. 17 of 2002

²⁶² As above.

²⁶³ *R v Munene and another* (Criminal Appeal No. 109 of 2002) [2004] TZCA 19 (5 October 2004).

and Another the first appellant, a Kenyan in a second appeal against a sentence of 32 years for armed robbery, questioned why he was not given legal aid at the expense of the government, among other issues. The court held that it is a common knowledge that legal assistance is not available for ‘cases of this nature, irrespective of the nationality of the accused.’²⁶⁴

In the Legal Aid Act there is no mention of indigent victims of crime as persons who qualify to apply for the services of legal aid. Refugees who are victim of sexual violence also do not enjoy legal aid services in criminal proceedings in compliance with article 16 (2) of the UN Refugee Convention of 1951.

Procedures for addressing sexual offence in the Tanzanian Criminal Justice system

The victim report the crime to a police officer at a police station,²⁶⁵ if the officer believes the victim then he will issue a PF. 3 form for medical examination, the results of which will be used as evidence.²⁶⁶ Then the case is forwarded for the prosecution in the magistrates court.²⁶⁷

4.8 Treatment of cases of sexual violence against the citizens of Tanzania

This section illustrates how cases of sexual violence against the citizens of Tanzania are handled through an analysis of prosecuted cases. In *Amiri Omary v The Republic*²⁶⁸ the appellant, in a second appeal against his conviction and sentence of 30 years imprisonment and twelve (12) strokes of the cane for rape in contravention of sections 130 (1) (2) and 131 (3) of the Penal Code, Cap 16,²⁶⁹ contended that the High Court was in error in upholding the decision of the trial magistrate based only on the evidence of the victims testimony without the ‘opinion of an expert to prove the penetration’.²⁷⁰

²⁶⁴ As above.

²⁶⁵ *Davis v R* (127 of 2005) [2009] TZCA 2 (20 November 2009); also see *Jackson Davis v The Republic*, Criminal Appeal No. 127 of 2005.

²⁶⁶ As above.

²⁶⁷ *Davis v R* (n 265 above).

²⁶⁸ *Amiri Omary v The Republic*, Criminal Appeal No.6 of 2014, Appeal from the Decision of the High Court of Tanzania at Tanga to the court of appeal.

²⁶⁹ The Tanzania Penal Code Cap 16.

²⁷⁰ *Amiri Omary v The Republic* (n 268 above).

At the hearing the appellant appeared without an advocate and the state was represented. The two issues that affected the root of the matter raised by the court of appeal were the failure of the trial magistrate to take the plea of the accused in compliance with section 228 (1) of the Criminal procedure act (CPA)²⁷¹ and the assumption of the judge of the High Court ‘that failure to call upon the appellant to plead to the charge did not occasion miscarriage of justice to him since his plea was taken to be that of “NOT GUILTY”’.²⁷² The Court of Appeal disagreed with the decision of the trial magistrate and the High Court on both issue. In disagreeing with the issue of the assumption that if an accused is not called to plead to a charge his plea is taken as ‘not guilty’, the court of appeal cited the cases of *Rojeli s/o Kalegezi v R*,²⁷³ *Habonimana s/o Stanisalus v R*²⁷⁴ and *Hamed s/o Phillippo v R*.²⁷⁵ where it was stated that a failure to take the plea of the accused amounts to a no trial and therefore ordered a retrial of the accused.²⁷⁶

This case is an example of how magistrates courts handle sexual offences. The rules of court were not duly followed, although the magistrate and the high court in this case convicted and sentenced the accused. If the perpetrator were discharged and set free, the victim is handicapped since they cannot institute an appeal against their assailant.

In *Jackson Davis v The Republic*²⁷⁷ a 9 year-old boy, who was playing with friends, was enticed by Davis with a piece of biscuit into his house and was raped. The trial magistrate sentenced Davis to 30 years imprisonment.²⁷⁸ Davis appealed and the court ruled in favour of the appellant. At the time of the ruling the victim was 14 years old The Chief Justice misused article 3(1) of the United Nations Convention on the Rights of the Child (CRC),²⁷⁹ ratified by Tanzania, which avows that ‘in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be of primary consideration’.²⁸⁰ The Chief Justice felt that the court had

²⁷¹ Criminal Procedure Act 1985 (CPA) Tanzania.

²⁷² *Amiri Omary v. The Republic* (n 261 above).

²⁷³ *Rojeli s/o Kalegezi v R*, Criminal appeal No. 141 of 2009 (unreported).

²⁷⁴ *Habonimana s/o Stanisalus v R* Criminal appeal no CF 142 of 2009 (unreported).

²⁷⁵ *Hamed s/o Phillippo v R*, criminal appeal no CF 143 of 2009.

²⁷⁶ *Amiri Omary v. The Republic* (n 261 above).

²⁷⁷ *Davis v R* (n 265 above).

²⁷⁸ *Davis v R* (n 265 above).

²⁷⁹ UN General Assembly, Convention on the Rights of the Child (CRC) 20 November 1989, United Nations, Treaty Series, vol. 1577, 3.

²⁸⁰ CRC (n 295 above).

an obligation to discontinue the trial in the best interest of the child.²⁸¹ The court believed that if the trial continued it would provoke renewed emotional trauma for the boy. The court considered, since the perpetrator had been remanded in prison until the trial, there was no need to order a re-trial, therefore the court quashed the conviction and set aside the sentence. This decision is made in error and is a violation of the boy's right to a fair hearing. It is submitted that the opinion fails to understand the principle of the best interest of a child, and the court could have established mechanisms for the protection of the child allowing the trial to continue. Instead, the case represents a denial of access to justice for the victim, the promotion of impunity and an illustration of the partiality of the court to perpetrators at the expense of victims. If the victim had an opportunity to represent himself as a second prosecutor, he could appeal against this judgement.

In *Saasita Mwanamaganga v R*²⁸² the trial magistrate convicted and sentenced the appellant to 30 years imprisonment for rape of a minor who was in his custody. The doctor who examined the girl was not called as a witness and the magistrate failed to do a *voire dire* examination in accordance with section 127 (2) of the Evidence Act.²⁸³ The conviction was quashed and the 30 years sentence was set aside as a result. It is argued that the procedural discrepancies on the part of a magistrate can lead to the miscarriage of justice on the part of the victim during a retrial. It is submitted that irregularities in court proceedings are hindrances in accessing justice and courts must be diligent in handling cases. The court of appeal quashed the conviction and the 30 year sentence in *Musa Mohamed v The Republic*²⁸⁴ for the failure on the part of the magistrate to determine the age of the witness. These cases illustrate how cases involving citizens are not handled diligently and offer little comfort to refugees who are victims of sexual violence.

The cases reviewed in this section and other cases consulted demonstrate that sexual violence is condemned²⁸⁵ but they reveal, on grounds of the need for a fair trial, the courts are apt to order

²⁸¹ *Davis v R* (n 279 above).

²⁸² *Mwanamaganga v R* (65 of 2005) [2009] TZCA 6 (20 November 2009).

²⁸³ As above; see also Evidence Act, Cap 6 R.E. 2002.

²⁸⁴ *Musa Mohamed v. The Republic*, Criminal appeal NO. 216 of 2005.

²⁸⁵ *Abel Masikiti v The Republic* Criminal Appeal No. 24 of 2015 [2015] (21st August 2015); see also *Abdullah Ally v The Republic*, Criminal Appeal case no. 253 of 2013 (10th and 21 July 2015); see also

a retrial. It is doubtful that in doing so that the rights of victims are taken into consideration. It is submitted that in taking decisions the rights of victims of crime, especially those involving sexual violence, should be considered. The Universal Declaration of Human Rights and other instruments promote equality and equal protection before the law. If victims of crime are to obtain equality in domestic courts, it is submitted that apart from stating their case in court as witnesses, they should have a more active role. The criminal justice system needs to redefine the concepts of a fair hearing and equality before the law. It is submitted that the domestic judicial system should be reformed to incorporate victims right as individuals, and that a legal

Adam Rajabu v The Republic Criminal Appeal case no 369 of 2014 [2015] (8th June 2015); see also *Ally Bakari Danga v The Republic* Criminal Appeal No. 103 of 2015 [2015] (13th August 2015); see also *Amiri Omary v The Republic*, Criminal Appeal No.6 of 2014 [2015] (19th day of August 2015); see also *David Hallnga v The Republic* Criminal Appeal No.12 of 2015 [2015] (19th &24th August 2015); see al-so *Emmanuel Adam v The Republic* Criminal Appeal no. 31 of 2015 [2015] (17th August 2015); see also *Faraja Leserian v The Republic* Criminal Appeal No. 93 of 2009 [2011] (18th day of November 2011); see also *Haji Omary v The Republic* Criminal Appeal No.307 of 2009 [2015] (29th September 2015); see also *Hamisi Shabani v The Republic* Criminal Appeal No 227 of 2013 [2015] (30th April 2015); see also *Hassan Bundala @ Swaga v The Republic* Criminal Appeal No 386 of 2015 [2016] (18th & 23rd February 2016); see also *Israel Abraham v The Republic* Criminal Appeal No 97 of 2009 [2011] (22nd November 2011); see also *Juma Magori @ Patrick and 4 Others v The Republic* Criminal Appeal No 328 of 2014 [2015] (5th June 2015); see also *Jovitus Johansen v The Republic* Criminal Appeal No 509 of 2015 [2016] (20th February 2016); see also *Kimbutse Otiniei v The Republic* Criminal Appeal No 300 of 2011 [2016] (21st November 2014 and 25 April 2016); see also *Leiyani Meshikoki v The Republic* Criminal Appeal No 31 of 2009 [2011] (8th November 2011); see also *Layford Makene v The Republic*, Criminal Appeal No 45 of 2009 [2011] (29th June 2011); see also *Misago Ndendakumana v The Republic* Criminal Appeal No. 540 of 2015 [2016] (9th February 2016); see also *Mathias Barua v The Republic* Criminal Appeal No 105 of 2015 [2015] (13th of August 2015); see also *Mohamed Ally v The Republic* Criminal Appeal No. 356 'A' of 2014 [2015] (8th July 2015); see also *Matano Mnama v The Republic* Criminal Appeal No. 361 of 2014 [2015] (2 June 2015); see also *Mwanamaganga v R (65 of 2005) [2009] TZCA 6* (20 November 2009); see also *Nassibusio Abdallah v The Republic* Criminal Appeal No 39 of 2009 [2013] (6th day of September 2013); see also *Niyonzimana Augustine v The Republic* Criminal Appeal No.483 of 2015 [2016] (20th February 2016); see also *Oroondi S/O Juma v The Republic* Criminal Appeal No. 236 of 2012 [2015] (14th July 2015); see also *Petro Andrea v The Republic* Criminal Appeal No 108 of 2009 [2011] (28th November 2011); see also *Ramadhani Sheklka v The Republic* Criminal Appeal No 330 of 2009 [2013] (30th July 2013); see also *Ramadhani Rashidi v The Republic* Criminal Appeal No 22 of 2008 [2015] (13th April 2015); see also *Shija Juma v The Republic* Criminal Appeal No. 383 of 2015 [2016] (19th February 2016); see also *Said Msusa v The Republic* Criminal Appeal No. 268 of 2013 [2015] (16th July 2015); see also *Saimon Mwajanga v The Republic* Criminal Appeal No. 19 of 2015 [2015] (19th August 2015); see also *Sonda Sio Deus @ Mayombi v The Republic* Criminal Appeal No.75 of 2009 [2013] (16th September 2013); see also *Shija Shiloto v The Republic*, Criminal Appeal No.162 of 2009 [2011] (1st July 2011); see also *Shila S/O Bosco @ Hamis v The Republic* Criminal Appeal No.20B of 2009 [2009] (15th day of April, 2015); see also *Shija Shiloto v The Republic*, Criminal Appeal No.162 of 2009 [2011] (1st July 2011); see also *Shila S/O Bosco @ Hamis v The Republic* Criminal Appeal No.20B of 2009 [2009] (15th day of April, 2015); see also *Saning'o Meshuki Mollel v The Republic* Criminal Appeal No.3 of 2009 [2011] (28th November 2011); see also *Tauta Kikorisi v The Republic* Criminal Appeal No.94 of 2009 [2011] (4th November 2011); see also *Waziri Saldi v The Republic* Criminal Appeal No. 39 of 2012 [2015] (30th April 2015); see also *Yustinian Mulokozi v The Republic* Criminal Appeal No.7 of 2015 [2016] (15th February 2016); see also *Yust Lala v The Republic* Criminal Appeal No. 90 of 2015 [2015] (15th October 2015).

framework be instituted compelling contracting states to be diligent in the prosecution of cases of sexual violence.

4.9 Treatment of refugees in Tanzania in relation to Article 16 of the UN Refugee Convention 1951

An empirical study conducted in Tanzanian refugee camps by the Women's Legal Aid of Tanzania,²⁸⁶ ascertained that despite the presence of law enforcers and Non-governmental Organisations working on human rights in camps²⁸⁷ accessing legal services by refugee women and children is problematic. Perpetrators are let free by police, reported cases are sometimes ignored by the courts on grounds not understood by the victims, and some victims may not want to report violations to authorities for fear of not been taken seriously.²⁸⁸

The problem of a lack of prosecution of cases has been attributed to discrimination against refugees and a lack of qualified staff. For instance, the district courts of Kibondo, where cases from Mtendeli, Kanembwa, Ndata and Mkugwa refugee camps are prosecuted, has two male police prosecutors, a male magistrate and a male interpreter with no training on how to handle cases of SV.²⁸⁹ Where cases are prosecuted, poor investigation and inept prosecution usually result in the acquittal of the perpetrator of SV.

A similar scenario is replicated in Kibondo, Kasulu, Ngara and Kigoma refugee camps and districts courts. The presiding magistrate complains of a lack of paper for the maintenance of the court record.²⁹⁰ It is reported that there is difficulty in attracting qualified lawyers and prosecutors to those areas because of their remoteness,²⁹¹ and is a limiting factor in accessing justice. Out of about fifty decided cases of SV studied during this research there are no documented

²⁸⁶ Women's Legal Aid, 'Access to refugee women and girls', Baseline survey report conducted in in Mtabila, Nyarugusu, and Lugufu camps, 2008.

²⁸⁷ As above.

²⁸⁸ Women's Legal Aid (n 286 above).

²⁸⁹ R Mabuwa, Seeking protection: Addressing sexual and domestic violence in Tanzania's refugee camps, Human Right Watch, (2000) 60 - 61.

²⁹⁰ As above, 62.

²⁹¹ Mabuwa (n 289 above)

prosecuted cases of sexual violence reported or unreported against refugees in camps in Tanzania. It is argued that, although there are few prosecuted cases of SV against refugees in refugee camps in Tanzania as reported by Human Rights Watch.²⁹² The government of Tanzania needs to improve their compliance with the implementation of article 16 of the UN Refugee Convention, 1951.

5 Legislative instruments addressing sexual violence in Uganda

This section gives an overview of the situation in Uganda. It scrutinises how sexual violence is addressed and whether services are extended to refugees who are victims of SV in refugee settlements in the country. This subsection examines the relevant provisions of the Constitution of Uganda, the Refugee Act, the criminal judicial system which includes the procedures for addressing sexual offences in the criminal justice system and the legislative instruments criminalising SV which includes the Penal Code Act and the Prevention of Trafficking in Persons Act. It also addresses the issue of access to court and legal assistance and the treatment of refugees in Uganda in relation to article 16 of the UN Refugee Convention 1951.

5.1 Introduction

Uganda lies in East-Central Africa, west of Kenya and east of the Democratic Republic of the Congo.²⁹³ Uganda has a ‘mixed legal system of English common law and customary law’.²⁹⁴ The judiciary conforms to the arrangements in article 129 (1) of the Constitution, which establishes a Supreme Court, a Court of Appeal, the Constitutional Court, a High Court and subordinate courts.²⁹⁵ Uganda is a party to many international conventions including the UN Refugee Convention 1951 and its Protocol 1967 which they assented to and ratified on 27 September

²⁹² Mabuwa (n 289 above).

²⁹³ Central Intelligence Agency (CIA), The World Fact book, Africa: Uganda, World Factbook <https://www.cia.gov/library/publications/the-world-factbook/geos/ug.html> (20 November 2016).

²⁹⁴ As above.

²⁹⁵ Uganda Constitution 1951 (n 25 above).

1976.²⁹⁶ In addition, they signed, assented to and deposited the OAU Refugee Convention on 10 September 1969, 24 July 1987 and 7 August 1987 respectively,²⁹⁷ and have domesticated the regulations of the convention in the Refugees Act 2006.²⁹⁸ With regard to the status of international law in the domestic legal system Uganda ascribes to a dualist system in the application of treaties in their municipal law. Uganda hosts refugees from the following countries: South Sudan 564 440 refugees and asylum seekers; the Democratic Republic of the Congo 222 650; Burundi 41 167; Somalia 29 292; and Rwanda 15 226 in 2016.²⁹⁹

5.2 The Constitution of Uganda

Article 20 (2)³⁰⁰ of the Ugandan Constitution enjoins all persons, organs, and government agencies to respect, uphold and promote the rights and freedom of individuals and groups provided for under chapter 4.³⁰¹ Article 24³⁰² states that no person should be subjected to any form of torture or cruel, inhuman, or degrading treatment or punishment. Article 28 provides for the right to a fair hearing.³⁰³ Article 44 prohibits any derogation from the ‘rights and freedom from torture and cruel, inhuman or degrading treatment or punishment... slavery or servitude...’.³⁰⁴

In *Attorney General v Susan Kigula & 417 Ors* it was contended that death penalty is cruel, inhuman and degrading punishment and violates articles 24 and 44 of the Ugandan Constitution and that the court should set aside the decision of the lower court.³⁰⁵ The Constitutional court

²⁹⁶ UN Treaty collections, Convention relating to the Status of Refugees, Geneva, 28 July 1951, status as at: 18 October 2016 07:31:04EDT, https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtd_sg_no=V-2&chapter=5&Temp=mtd_sg2&clang=_end, (accessed 19/10/2016): UNHCR, United Nations High Commissioner for Refugees, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol

²⁹⁷ African Commission on Human and Peoples, ‘Rights, Ratification Table: AU Convention Governing Specific Aspects of Refugee Problem in Africa’ <http://www.achpr.org/instruments/refugee-convention/ratification/> (accessed 19 October 2016).

²⁹⁸ Uganda: The Refugee Act 2006, Act 21, 24 May 2006.

²⁹⁹ The World Fact book, Africa: Uganda (n 293 above).

³⁰⁰ Uganda Constitution (n25 above).

³⁰¹ Uganda Constitution (n25 above).

³⁰² Uganda Constitution (n25 above).

³⁰³ Uganda Constitution (n25 above).

³⁰⁴ Uganda Constitution (n25 above).

³⁰⁵ *Attorney General v Susan Kigula & 417 Ors*, Constitutional Appeal No. 03 OF 2006) [2009] UGSC 6 (21 January 2009); see also Uganda Constitution (n25 above) art 44 (a) (b) (c) (d)

found that it not to be a derogation because article 22 spells out conditions in which an individual can be deprived of life and declined the order the removal of the death sentence.³⁰⁶

5.3 Refugee Act Uganda

The principal instrument for the reception, protection and treatment of refugees in Uganda is the Refugee Act of 2006,³⁰⁷ which provides the standard. for the protection and treatment of refugees in Uganda generally. Section 3 (1) (2) provides that the grant of refugee status to anyone is a humanitarian act and that the Ugandan government reserves the discretion to refuse or grant asylum to any person.³⁰⁸ The foundation for the protection of refugees is section 42, which provides for the principle of non-refoulement, and states that under no circumstance should a ‘refugee be denied, entrance to Uganda, expelled, extradited or returned from Uganda to any other country or subjected to any similar measures’.³⁰⁹ If the ‘denial, expulsion, return or another measure, will force that ‘person to return to or remain in a country’, where they are exposed to persecution because of their ‘race, religion, sex, nationality, membership of a particular social group or political opinion’.³¹⁰ Additionally, if their life or liberty is in danger ‘because of external hostility, occupation, foreign domination or crises seriously upsetting public order either in some part or in the entire country...’.³¹¹

Uganda accommodates refugees in Settlements as provided for in section 44.³¹² The minister is empowered to designate public areas as settlements where refugees who receive asylum status can live.³¹³ Uganda has created some settlements including the Nakivale refugee settlement, six hours drive west of the capital Kampala,³¹⁴ which accommodates over 100 000 refugees and spans over 184 sq. km (71 sq. miles).³¹⁵ The Settlement covers rolling hills, fruitful fields, a

³⁰⁶ Uganda Constitution (n25 above).

³⁰⁷ Ugandan Refugee act (n 298 above).

³⁰⁸ Ugandan Refugee act (n 298 above).

³⁰⁹ Ugandan Refugee Act (n 298 above) sec 42 (1).

³¹⁰ Ugandan Refugee Act (n 298 above) sec 42 (10 (a)).

³¹¹ Ugandan Refugee Act (n 298 above) sec 42 (1) (b).

³¹² Ugandan Refugee Act (n 298 above).

³¹³ Ugandan Refugee Act (n 298 above).

³¹⁴ BBC, Uganda: ‘One of the best places to be a refugee’, BBC News, (2016) <http://www.bbc.com/news/36286472> (accessed 22 November 2016).

³¹⁵ As above.

brook and many streams, scattered around the landscape are small brick or mud houses, some with corrugated iron roofs'.³¹⁶ Yaxley opines that 'Uganda is the third largest host to refugees in Africa', and the Ugandan settlement model is unique because it allows freedom of movement for refugees to any part of the country.³¹⁷

The Kyangwali refugee Settlement is located in Hoima District, South West Uganda and accommodates over '20 000' refugees from Congo, Rwanda, Burundi, South Sudan, Somalia, and Kenya.³¹⁸ Another major Settlement is located in Kampala, other Settlements as at February 2016 include 'Adjumai 120 208, Kirandongo 51 002, Rwamwanga 47 514, Arua 32 167, Kyaka II 27 964 and Oruchinga 6,377'.³¹⁹ The refugees are allocated plots of land and materials to build basic homes and the citizens of Uganda also can benefit from investment in infrastructure.³²⁰ Uganda was rated the third largest host to refugees in Africa in 2015,³²¹ and has been applauded as 'one of the most favourable environments in the world for refugees, per the UNHCR'. Many countries host refugees in camps far away from their citizens, Uganda allows them 'to set up businesses, work for others, and move freely around the country'.³²²

5.4 Access to courts

Article 21(1) of the Ugandan Constitution provides that all individuals are equal before the law and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.³²³ Article 28 generally provides for the right

³¹⁶ BBC (n 314 above).

³¹⁷ C Yaxley, 'Uganda hosts record 500,000 refugees and asylum-seekers,' UNCHR, (2015) <http://www.unhcr.org/567414b26.html>, (accessed 10 May 2016) see also BBC (n 313 above).

³¹⁸ Action African Help International, Kyangwali Refugee Settlement, AAHI Uganda Country Programme (2016) <http://www.actionafricahelp.org/kyangwalirefugeesettlement>, (accessed 22 November 2016).

³¹⁹ As above.

³²⁰ A Patton 'Is Uganda the best place to be a refugee?' Global development professionals network; The Guardian (2016) <https://www.theguardian.com/globaldevelopmentprofessionalsnetwork/2016/aug/20/isugandathebestplacetobere Refugee> (accessed 22 November 2016).

³²¹ As above.

³²² Patton (n 320 above).

³²³ Uganda Constitution (n 25).

to a fair hearing, in subsection (1) it states that ‘in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law’.³²⁴

Article 42 provides that any person ‘appearing before any administrative official or body’ has a right to be treated in a fair and just manner and shall have a ‘right to apply to a court of law in respect of any administrative decision taken against him or her’.³²⁵ Article 50 (1) empowers individuals to seek redress in a competent court when their rights guaranteed under the constitution are under threat or encroached on and for the right to appeal against a court decision.³²⁶ This provision refers to all victims of human rights violations, however in criminal proceedings a victim cannot seek redress in court directly but testifies as a witness.

The Ugandan Constitution empowers individuals or organizations to institute a class suit against the violation of human rights of other individuals or groups of persons.³²⁷ Section 29 (h) of the Uganda Refugee Act provides that refugees should be granted free access to courts of law, including legal assistance, under the applicable laws of Uganda³²⁸ in accordance with the international and regional refugee regime.

5.5 The Criminal Judicial system of Uganda

The judicial system of Uganda consists of various institutions that are charged with the provision of legal services.³²⁹ The judiciary comprises magistrate courts, the High Court, Court of Appeal, the Constitutional Court and the Supreme Court headed by the Chief Justice and assisted by the Deputy Chief Justice, which are autonomous of the other arms of government.³³⁰

³²⁴ Uganda Constitution (n 25).

³²⁵ Uganda Constitution (n 25).

³²⁶ Uganda Constitution (n25) art (3).

³²⁷ Uganda Constitution (n25) art 50 (2).

³²⁸ Ugandan Refugee Act (n 298 above).

³²⁹ B Mahoro, ‘Uganda’s legal system and legal sector’ Hauser Global Law School Program, New York University School of Law (2006) <http://www.nyulawglobal.org/globalex/Uganda.html> (accessed 17 July 2017).

³³⁰ As above; see also Chapter 8 of the Constitution of the Republic of Uganda; see also B Mahoro ‘UPDATE: Uganda’s Legal System and Legal Sector’ Hauser Global Law School Program, New York University School of Law (2016) <http://www.nyulawglobal.org/globalex/Uganda1.html>. html (accessed 17 July 2017).

Uganda's legal system is based on common law, customary and Islamic law.³³¹ The court jurisdiction for the prosecution of crime is the both the magistrate court for minor cases and the High Court for major cases such as sexual offences.³³²

The Ugandan criminal justice system is empowered to handle all types of criminal cases. The institution of litigation starts with victims registering a complaint with a police officer at a local police post.³³³ The police will provide the complainant with a copy and reference number of the case, thereafter the police commence a criminal investigation into the complaint which may or may not result in the arrest of the offender provided there is evidence attesting to the fact.³³⁴ In the event that there is no tangible evidence cases are left under the heading 'Put away' *ad infinitum*, but such cases can be recalled if there is fresh evidence.³³⁵

In a minor case the offender can be released on bond, but not in cases of murder, rape, armed robbery or certain other violent offences.³³⁶ As soon as it is ascertained that there is concrete evidence against an offender a case file is opened and the criminal investigating officer hands over the case dossier to the Department of the Public Prosecutor (DPP), where a state prosecutor analyses the case file.³³⁷ In the event of inadequate evidence, the state prosecutor orders the police investigating officer to seek further evidence.³³⁸ The police are required to take the accused person either to a Magistrate or the High Court within twenty-four hours, depending on the severity of the offence.³³⁹ During the trial the victim is the principal witness or complainant. Once the offender is convicted and sentenced he has the right to appeal against the decision of the trial court.³⁴⁰ It is worthy of note that under a death sentence there must be an appeal against

³³¹ RM Byrnes, ed, 'Uganda: A Country Study', Washington: GPO for the US Library of Congress (1990) <http://countrystudies.us/uganda/> (accessed 27 July 2017).

³³² Mahoro (n 328 above).

³³³ US Embassy in Uganda, 'Assistance for crime victims: Help for American Victims of Crime in Uganda', <https://ug.usembassy.gov/u-s-citizen-services/victims-of-crime/assistance-for-crime-victims/> (accessed 27 July 2017).

³³⁴ As above.

³³⁵ US Embassy in Uganda (n 332 above).

³³⁶ US Embassy in Uganda (n 332 above).

³³⁷ US Embassy in Uganda (n 332 above).

³³⁸ US Embassy in Uganda (n 332 above).

³³⁹ US Embassy in Uganda (n 332 above).

³⁴⁰ US Embassy in Uganda (n 332 above).

the sentence.³⁴¹ Perpetrators of crime have rights, and it seems have preferential treatment rather than the victims of crime.³⁴²

5.6 Legislation for combatting sexual violence in Uganda

In this section the Ugandan Penal Code and the Prevention of Trafficking in Persons Act are examined.

The Uganda Penal Code.

The Uganda Penal Code does not use the term SV but prohibits rape and sexual acts as offences against morality.³⁴³ Section 123 defines rape as:³⁴⁴

Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, commits the felony termed rape.³⁴⁵

³⁴¹ US Embassy in Uganda (n 332 above).

³⁴² *Uganda v Tweshimye* (Criminal Case NO.0122 OF 2015) [2017] UGHCCRD 16 (23 January 2017); see also *Uganda v Tumusiime* (Criminal Case No.034 OF 2014) [2017] UGHCCRD 15 (23 January 2017); see also *Uganda v Ayebare & Anor* (Criminal Session Case NO.0086 of 2014) [2017] UGHCCRD 114 (28 August 2017); see also *Uganda v Atelemong* HCT-09-CR-SC-0021 OF 2013, UGHCCRD 84 (18 April 2017).

³⁴³ As above.

³⁴³ US Embassy in Uganda (n 333 above).

³⁴³ *Uganda v Tweshimye* (Criminal Case NO.0122 OF 2015) [2017] UGHCCRD 16 (23 January 2017); see also *Uganda v Tumusiime* (Criminal Case No.034 OF 2014) [2017] UGHCCRD 15 (23 January 2017); see also *Uganda v Ayebare & Anor* (Criminal Session Case NO.0086 of 2014) [2017] UGHCCRD 114 (28 August 2017); see also *Uganda v Atelemong* HCT-09-CR-SC-0021 OF 2013, UGHCCRD 84 (18 April 2017).

³⁴³ The Uganda - Penal Code (Amendment) Act 2007 (Act 8 of 2007).

³⁴⁴ As above.

³⁴⁵ Act 8 of 2007 (n 343 above).

Section 124 of the penal code proffers the death sentence as punishment for the conviction of rape.³⁴⁶ Section 125 declares that ‘any person who attempts to commit rape commits a felony and is liable to imprisonment for life with or without corporal punishment’.³⁴⁷ In addition, section 129 (1) states that any person who unlawfully has sexual intercourse with a girl under the age of eighteen years commits an offence and is liable to suffer death.³⁴⁸ Subsection (2) provides that ‘any person who attempts to have unlawful sexual intercourse with a girl under the age of eighteen years commits an offence and is liable to imprisonment for eighteen years, with or without corporal punishment’.³⁴⁹ These provisions in the penal code make clear the Ugandan attitude to SV.

The Prevention of Trafficking in Persons Act

The Prevention of Trafficking in Persons Act 2009³⁵⁰ prohibits sexual offences in the form of the recruitment, transfer and harbouring or the reception of an individual through threat or use of force or other forms of intimidation such as kidnapping, swindling, dishonesty and manipulation.³⁵¹ The act also refers to the use ‘of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for exploitation’.³⁵²

Additionally, the Ugandan anti-trafficking law criminalises the conscription, employment, sustenance, restriction, transportation and handover, as well as one who harbours or ‘receives a person or facilitates the aforesaid acts’.³⁵³ Also, the use of force or other forms of coercion for the purpose of engaging that person in sexual exploitation which includes, ‘prostitution, pornography, the production of pornographic materials, or the use of a person for sexual intercourse or other lascivious conduct, sex tourism, forced or organised marriage’ are offences which carry

³⁴⁶ Act 8 of 2007 (n 342 above).

³⁴⁷ Act 8 of 2007 (n 342 above).

³⁴⁸ Act 8 of 2007 (n 342 above).

³⁴⁹ Act 8 of 2007 (n 342 above).

³⁵⁰ The Prevention of Trafficking in Persons Act 2009 (Act 7 2009) (Uganda Anti - Trafficking law).

³⁵¹ As above, section 3 (1) (a).

³⁵² Uganda Anti - Trafficking law (n 349 above) section 3 (1) (a).

³⁵³ Uganda Anti - Trafficking law (n 349 above) section 3(1) (b).

a penalty of fifteen years of imprisonment.³⁵⁴

5.7 Legal assistance

The statutory instrument for the provision of legal assistance is the Advocates (Legal Aid to Indigent Persons) Regulations, 2007.³⁵⁵ The objectives of this act are provided for in article 2:

- (a) to regulate and monitor the quality of legal aid service delivery; (b) to ensure that legal aid and advice are provided in a most effective and efficient manner; (c) to ensure that all legal aid providers operating in Uganda have basic facilities and qualified personnel required to provide legal aid in a professional and ethical manner; (d) to establish clear and objective criteria to be followed by legal aid providers when reviewing applications for legal aid; (e) to encourage the provision of legal aid throughout the country.³⁵⁶

The Ugandan legal system is said to be functional but not without pitfalls. Improvement is projected in the next few years because of the implementation of reforms.³⁵⁷ Nevertheless, there are hindrances to the access of justice by the poor and vulnerable, and in zones affected by skirmishes.³⁵⁸

Procedures for addressing sexual offences in the Ugandan Criminal Justice system

In Uganda the victim of a sexual offence reports to the police who, in turn, send the victim to the police doctor for physical examination and for the preservation of evidence. Victims are required to pay US \$50 or its equivalent in Ugandan Shillings for the investigation.³⁵⁹ The procedure for the trial of the offender in a sexual offence is the same as the general procedure in a criminal proceeding.

³⁵⁴ Uganda Anti - Trafficking law (n 349 above) section 2 (m) (n) (j), 3(1) (b).

³⁵⁵ The Advocates (Legal Aid to Indigent Persons) Regulations, 2007.

³⁵⁶ As above.

³⁵⁷ The Danish Institute for Human Rights, 'Access to justice and legal aid East Africa' (2011) www.humanrights.dk/files/.../legal_aid_east_africa_dec_2011_dihf_study_final.pdf (accessed 29 November 2016).

³⁵⁸ As above, 34.

³⁵⁹ US Embassy in Uganda (n 333 above).

5.8 Treatment of cases of sexual violence against Ugandan citizens

This section analyses how sexual violence against citizens is handled as exemplified in the prosecuted cases.

In *Mugambe Francis v Uganda*³⁶⁰ the appellant was prosecuted for the rape and murder of Maria Nakintu on 27th July 2003. The conviction was quashed and the sentence set aside as a consequence of the inability by the prosecution to negate the alibi.³⁶¹ In *Uganda v Tweshimye* the appellant who was charged with Aggravated Defilement contrary to section 129 (3) and 4 (a) of the Penal Code Act was convicted on the sole evidence of the victim.³⁶²

In *Uganda v Ayungarach* the accused had been asked by the aunt of the victim to help to slaughter a goat for the victim and her friends; the accused requested the victim to take a walk with him and was caught in the act of rape by a witness.³⁶³ The accused denied the act, which meant the prosecution had to prove guilt beyond a reasonable doubt. The court was convinced by the prosecution; the victim was 9 years old and the ‘act was performed on the victim’, the accused was responsible for the sexual act and at the time the sexual act was performed ‘the accused was HIV positive’.³⁶⁴ He was found guilty as charged.

In *Uganda v Anyolitho*³⁶⁵ the accused was indicted for aggravated defilement of a 4 year-old girl. It was alleged that the accused and the proposed victim were brought to the police station with suspected semen in the panty of the girl. During prosecution the victim and her mother did not testify.³⁶⁶ On the proof of the elements of the crime it was ascertained that the girl was 4 year old, but there was no to proof of the fact that a sexual act was performed on the victim, since the hymen was intact and there were no injuries to either the labia minora or majora.³⁶⁷ In addition, no evidence was adduced to the fact that the accused was the perpetrator of the sexual act

³⁶⁰ *Mwanga Francis v Attorney General* (Criminal Appeal No.28 of 2003) [2005] UGSC 25 (21 December 2005)

³⁶¹ As above.

³⁶² *Uganda v Tweshimye* (n 341 above).

³⁶³ *Uganda v Ayungarach* (Criminal Sessions Case No. 0060 OF 2017) [2017] UGHCCRD 20 (10 July 2017).

³⁶⁴ As above.

³⁶⁵ *Uganda v Anyolitho* (criminal case No. 0182 of 2016) [2017] UGHCCRD 17 (2 February 2017).

³⁶⁶ As above.

³⁶⁷ *Uganda v Anyolitho* (n 365 above).

because the prosecution did not send the semen for forensic examination. The accused was acquitted.³⁶⁸ This case is a classic example of poor investigation and inept prosecution.

The mitigating factors considered by the court in sentencing increases the unfair treatment of victims. For instance, in *Uganda v Akope*³⁶⁹ the court, in sentencing the accused aged 26 for the offence of Aggravated Defilement of a 6 year-old girl, felt that the accused is ‘a first offender and was a relatively young person at the age of twenty-four years, and that he deserves more of a rehabilitative than a deterrent sentence’.³⁷⁰ The court reduced the sentence from 16 years to 9 years.³⁷¹ The court gave more credence to the plea of guilt without taking cognisance of the damage this act has inflicted on the child. Courts are concerned with deterrence and the welfare of the accused, however the impact on the victim receives less consideration. The law and some of the cases reviewed above as well as others that were examined in the course of this study testify to the harsh treatment of sexual violence in Uganda.³⁷²

³⁶⁸ *Uganda v Anyolitho* (n 365 above).

³⁶⁹ *Uganda v Akope* (Criminal Sessions Case No. 0032 of 2016) [2017] UGHCCRD 122 (29 September 2017).

³⁷⁰ As above.

³⁷¹ *Uganda v Akope* (n 369 above).

³⁷² *Abacha v Uganda* (Miscellaneous Criminal Application No. 0004 of 2016) [2016] UGHCCRD 82 (26 July 2016); see also *Adriko v Uganda* (Miscellaneous Criminal Application No. 0030 of 2016) [2016] UGHCCRD 106 (28 November 2016); see also *Andama v Uganda* (Miscellaneous Criminal Application No. 0023 OF 2016) [2016] UGHCCRD 105 (10 November 2016); see also *Awandal v Uganda* (Criminal Application No. 0014 of 2016) [2016] UGHCCRD 11 (14 July 2016); see also *Bamanya v Uganda* (HCT-12-CR-CM-0007-2013) [2013] UGHCCRD 66 (23 October 2013); see also *Busiku v Uganda* (Criminal appeal No. 33 of 2011) [2015] UGSC 3 (24 March 2015); see also *Kamanyiro v Uganda* (Criminal Appeal No. 066 of 2014) [2015] UGHCCRD 23 (31 July 2015); see also *Kasajja v Uganda* (Criminal Appeal No. 059 of 2011) [2015] Ughccrd 30 (7 April 2015); see also *Kasajja v Uganda* (Criminal Appeal No. 059 of 2011) [2015] UGHCCRD 30 (7 April 2015); see also *Komakech v Uganda* (HCT 02 CR CM- 0032 2014) [2014] UGHCCRD 82 (20 June 2014); see also *Komakech v Uganda* (HCT 02 CR CM- 0032 2014) [2014] UGHCCRD 82 (20 June 2014); see also *Lumala v Uganda* (Criminal Miscellaneous Application No. 0037 of 2016) [2016] UGHCCRD 138 (12 October 2016); see also *Lutalo v Uganda* (Criminal Miscellaneous Application No. 45 of 2016) [2016] UGHCCRD 137 (25 October 2016); see also *Masaba v Uganda* (Criminal Miscellaneous Application No. 0038 of 2016) [2016] UGHCCRD 136 (12 October 2016); see also *Mubiru Ali v Uganda* [2014] UGHCCRD 109 (30 May 2014); see also *Mubiru Kisingiri v Uganda* (HCT-0OCR-CN-O108 - 2015) [2016] UGHCCRD 6 (19 April 2016); see also *Musede v Uganda* (Criminal Miscellaneous 0150/2014) [2015] UGHCCRD 17 (17 April 2015); see also *Naluwemba & Anor v Uganda* (Criminal Appeal Number 04/2011) [2014] UGHCCRD 35 (19 July 2014); see also *Muwonge & 2 Ors v Uganda* (Criminal Appeal Nos.61 of 2013, (Muwonge Abdu –VS- Uganda); 65 of 2013; see also *Ndyanabo v Uganda* (HCT – CR – CA – NO. 004 of 2016) [2016] UGHCCRD 116 (9 December 2016); see also *Ochima v Uganda* (Miscellaneous criminal application No. 0012 of 2016) [2016] UGHCCRD 12 (20 July 2016); see also *Ochima v Uganda* (Miscellaneous Criminal Application No. 0012 of 2016) [2016] UGHCCRD 78 (20 July 2016); see also *Rev Father Santos Wapokra v Uganda* ([node:field-casenumbr]) [2016] UGHCCRD 48 (7 June 2016); see also *Yali v Uganda* (Criminal Case No. 0004 of 2017) [2017] UGHCCRD 107

(15 June 2017); see also *Uganda v Abiriga alias Mayia & Anor* (Criminal Case No. 0094 of 2016) [2016] UGHCCRD 84 (30 August 2016); see also *Uganda v Aberninga* (Criminal Case No. 0167 of 2016) [2017] UGHCCRD 69 (19 April 2017); see also *Uganda v Acema* (Criminal Case No. 0026 of 2014) [2016] UGHCCRD 81 (4 August 2016); see also *Uganda v Achia* (Criminal Case No. 0166 of 2015) [2017] UGHCCRD 119 (28 September 2017); see also *Uganda v Andama* (Criminal Case No. 0131 of 2016) [2016] UGHCCRD 127 (8 December 2016); see also *Uganda v Abdala Nabil* (Criminal Case No. 0004 of 2016) [2016] UGHCCRD 69 (20 September 2016); see also *Uganda v Agatiyo* (Criminal Case No. 0177 of 2014) [2016] UGHCCRD 57 (23 August 2016); see also *Uganda v Adritia* (Criminal Case No. 0031 of 2016) [2017] UGHCCRD 73 (19 April 2017); see also *Uganda v Akope* (Criminal Case No. 0032 of 2016) [2017] UGHCCRD 122 (29 September 2017); see also *Uganda v Aleper* (Criminal Session Case No. 110 of 2013) [2014] UGHCCRD 62 (22 September 2014); see also *Uganda v Alepere* (Criminal Case No. 0041 of 2015) [2017] UGHCCRD 123 (29 September 2017); see also *Uganda v Amidu* (Criminal Case No. 0051 of 2014) [2017] UGHCCRD 106 (28 June 2017); see also *Uganda v Andabati* (Criminal case No. 0198 of 2014) [2016] UGHCCRD 87 (6 October 2016); see also *Uganda v Angumaniyo* (Criminal Case No. 0095 of 2014) [2017] UGHCCRD 102 (28 June 2017); see also *Uganda v Anyolitho* (Criminal Case No. 0182 of 2016) [2017] UGHCCRD 17 (2 February 2017); see also *Uganda v Atabua* (Criminal Case No. 0123 of 2015) [2017] UGHCCRD 54 (19 April 2017); see also *Uganda v Arukor* (Criminal Session Case No. 8 of 2011) [2013] UGHCCRD 85 (1 November 2013); see also *Uganda v Atandu* (Criminal Case No. 0171 of 2016) [2017] UGHCCRD 66 (19 April 2017); see also *Uganda v Atelemong* (Criminal Case No. HCT-09-CR-SC-0021 OF 2013) [2017] UGHCCRD 84 (18 April 2017); see also *Uganda v Avaga* (Criminal Case No. 0114 of 2016) [2017] UGHCCRD 63 (19 April 2017); see also *Uganda v Awekonimungu* (Criminal case No. 0186 of 2014) [2016] UGHCCRD 129 (23 December 2016); see also *Uganda v Ayebare & Anor* (Criminal Case No. 0086 of 2014) [2017] UGHCCRD 114 (28 August 2017); see also *Uganda v Ayimani* (Criminal Case No. 0159 of 2016) [2017] UGHCCRD 62 (19 April 2017); see also *Uganda v Ayungarach* (Criminal Case No. 0060 OF 2017) [2017] UGHCCRD 20 (10 July 2017); see also *Uganda v Baluku* (HCT-00-CR-SC-0015 of 2012) [2013] UGHCCRD 16 (22 April 2013); see also *Uganda v Balunywa* (Criminal Session Case No. 24 of 2011267) [2011] UGHCCRD 46 (1 October 2013); see also *Uganda v Bagira* (Criminal session case No.0062 of 2015) [2016] UGHCCRD 117 (13 October 2016); see also *Uganda v Bahena* (Criminal Session Case No. 0049 of 2016) [2016] UGHCCRD 118 (11 October 2016); see also *Uganda v Balikamanya* (Criminal Case No. 025 of 2012) [2012] UGHCCRD 04 (9 January 2014); see also *Uganda v Bainomugisha* (HCT-04-CR-SC-0045-2013) [2013] UGHCCRD 9 (26 March 2013); see also *Uganda v Bamigwa* (Criminal Session No. 75 of 2012) [2014] UGHCCRD 95 (14 May 2014); see also *Uganda v Barisigala* (HCT-06-CR-SC-0021 of 2013) [2016] UGHCCRD 20 (19 May 2016); see also ;*Uganda v Burimwezi & 2 Ors* (Criminal Case No. 70/2014) [2017] UGHCCRD 111 (30 May 2017); see also *Uganda v Byarugaba* (Criminal Case No. 361 of 2013) [2017] UGHCCRD 116 (15 August 2017); see also *Uganda v Byamukama* (HCT – 01 – CR – CS – 0160 – 2015) [2016] UGHCCRD 94 (10 November 2016); see also *Uganda v Candia* (Criminal Case No. 0054 of 2017) [2017] UGHCCRD 109 (15 June 2017); see also *Uganda v Chelimo* (HCT-04-CR-SC-169 of 2015) [2016] UGHCCRD 110 (21 September 2016); see also *Uganda v Chekuta* (Criminal Case No. 0095 of 2015) [2017] UGHCCRD 125 (15 August 2017); see also *Uganda v Dimba* (Criminal Case No. 0089 of 2014) [2017] UGHCCRD 5 (16 January 2017); see also *Uganda v Dradriga* (Criminal case No. 0015 of 2013) [2016] UGHCCRD 76 (30 August 2016); see also *Uganda v Drasiku* (Criminal Case No. 0164 of 2016) [2017] UGHCCRD 56 (19 April 2017); see also *Uganda v Eeru* (Criminal Case 82 of 2011) [2014] UGHCCRD 45 (14 March 2014) see also *Uganda v Ebau* (Criminal Case. 90 of 2011) [2014] UGHCCRD 44 (2 April 2014); see also *Uganda v Eguru* (HCT-09-CR-SC-0040-2011) [2011] UGHCCRD 84 (19 December 2013); see also *Uganda v Ejoyi* (Criminal Case No. 0014 of 2015) [2017] UGHCCRD 51 (19 April 2017); see also *Uganda v Emuteng* (Criminal Session Case 63 of 2012) [2013] UGHCCRD 88 (19 December 2013); see also *Uganda v Enyangu* (Criminal Session Case. 5 of 2012) [2014] UGHCCRD 46 (18 June 2014); see also *Uganda v Epuku* (Criminal Session Case No. 59 of 2011) [2013] UGHCCRD 89 (1 November 2013); see also *Uganda v Erisa* (Criminal Case No. 6 of 2011) [2013] UGHCCRD 91 (30 October 2013); see also *Uganda v Esia* (Criminal Case No. 44 of 2011) [2013] UGHCCRD 92 (24 October 2013); see also *Uganda v Etonu* (Criminal Session Case. 11 of 2012) [2014] UGHCCRD 47 (18 June 2014); see also *Uganda v Gaijok* (Criminal Session Case No. 36 of 2015.) [2015] UGHCCRD 16 (10 June 2015); see also *Uganda v Gimei* (HCT-04-CR-SC- 41-2012) [2014] UGHCCRD 13 (22 January 2014); see also *Uganda v Inuot* (Criminal Session 34 of 2011) [2014] UGHCCRD 48 (8 January 2014); see also *Uganda v Kahiriita* (Kabale 00-CR-CO-0039 of 2014) [2016] UGHCCRD 119 (24 September 2016); see also *Uganda v Kahooza* (HCT – 01 – CR – CS – 020 – 2013) [2016] UGHCCRD 96 (10 November

6 Treatment of refugees in Uganda with reference to article 16 of the UN Refugee Convention

In order to facilitate access to court for refugees in Settlements, the government of Uganda in

2016); see also *Uganda v Kalani* (Criminal Case No. HCT - 04 - CR - SC - 0032/2014) [2017] UGHCCRD 91 (26 February 2017); see also *Uganda v Kamugisha* (HCT-06-CR-SC-0074 of 2013) [2016] UGHCCRD 25 (28 April 2016); see also *Uganda v Kapukomo* (Criminal Case No. 0086 of 2015) [2017] UGHCCRD 127 (28 September 2017); see also *Uganda v Karibu* (Criminal Case No. 0048 of 2011) [2013] UGHCCRD 32 (9 September 2013); see also *Uganda v Kasadha* (Criminal Session No. 005 of 2011) [2011] UGHCCRD 72 (12 November 2013); see also *Uganda v Kasule* (Criminal Session Case No. 037 of 2011) [2011] UGHCCRD 49 (1 October 2013); see also *Uganda v Kasibante* (HCT-06-CR-SC-0052 of 2013) [2016] UGHCCRD 27 (29 April 2016); see also *Uganda v Kasoro* (Criminal Case No. 0058 of 2011) [2013] UGHCCRD 42 (11 September 2013); see also *Uganda v Katerega* (Criminal Session Case No. 0405 of 2013) [2016] UGHCCRD 1 (13 April 2016); see also *Uganda v Kayinga* (HCT-06-CR-SC-0161 of 2012) [2016] UGHCCRD 30 (19 May 2016); see also *Uganda v Kidyel* (Criminal Session No. 0009 of 2014) [2014] UGHCCRD 84 (22 August 2014); see also *Uganda v Kigoye* (HCT- 06-CR- 81 of 2013) [2013] UGHCCRD 25 (13 May 2013); see also *Uganda v Kiwalabye* (Criminal Case No. 0020 of 2013) [2016] UGHCCRD 79 (2 August 2016); see also *Uganda v Kiwanuka Kiggundu* (Criminal Session Case No. 039 of 2011) [2014] UGHCCRD 22 (17 February 2014); see also *Uganda v Kizuri* (Criminal Session Case No. 20 of 2011) [2011] UGHCCRD 55 (2 October 2013); see also *Uganda v Kule* (Criminal Case No. HCT-01-CR-SC-163/2014) [2017] UGHCCRD 41 (10 March 2017); see also *Uganda v Kunyoma* (HCT-04-CR-SC-0146-2013) [2014] UGHCCRD 76 (7 August 2014) ; see also *Uganda v Layoor* (Criminal Session Case No. 117 of 2013) [2014] UGHCCRD 70 (29 September 2014); see also *Uganda v Lopeyok* (Criminal Session Case No. 179 of 2013.) [2014] UGHCCRD 67 (30 September 2014); see also *Uganda v Logit* (Criminal Session Case. No. 178 of 2013.) [2014] UGHCCRD 66 (1 October 2014); see also *Uganda v Lokut* (Criminal Case No. 0053 of 2017) [2017] UGHCCRD 130 (29 September 2017); see also *Uganda v Lolem* (Criminal Case No. 0123 of 2015) [2017] UGHCCRD 126 (30 September 2017); see also *Uganda v Lomerimoe* (Criminal Case No. 0086 of 2015) [2017] UGHCCRD 131 (30 September 2017); see also *Uganda v Longole* (Criminal Session Case No. 104 of 2014) [2016] UGHCCRD 18 (25 July 2016); see also *Uganda v Longori* (Criminal Case No. 0150 of 2015) [2017] UGHCCRD 132 (27 September 2017); see also *Uganda v Lorapo* (Criminal Session Case No. 114 of 2013) [2014] UGHCCRD 69 (1 October 2014); see also *Uganda v Lopeyok* (Criminal Session Case No. 179 of 2013.) [2014] UGHCCRD 67 (30 September 2014); see also *Uganda v Lubowa* (HCT-06-CR-SC-0046 of 2013) [2016] UGHCCRD 31 (16 May 2016); see also *Uganda v Lukwago* (HCT-06-CR-SC-0058 of 2013) [2016] UGHCCRD 33 (16 May 2016); see also *Uganda v Madolo* (Criminal Case No. HCT-04-CR-SC-150-2013) [2016] UGHCCRD 145 (10 March 2016); see also *Uganda v Maku* (HCT-04-CR-SC-0124-2012) [2014] UGHCCRD 16 (22 January 2014); see also *Uganda v Maliya* (Criminal Case No. 0143 of 2012) [2016] UGHCCRD 67 (23 August 2016); see also *Uganda v Mewuva & Anor* (Criminal Case No. 0046 of 2011) [2013] UGHCCRD 36 (10 September 2013); see also *Uganda v Mpala* (Criminal session case no. 065 of 2011) [2011] UGHCCRD 75 (13 November 2013); see also *Uganda v Mugamba* (High Court Criminal Session Case No. 0091 of 2013) [2013] UGHCCRD 101 (27 August 2013); see also *Uganda v Munguriek* (Criminal Case No. 0098 of 2015) [2017] UGHCCRD 53 (19 April 2017); see also *Uganda v Musobo* (HCT-04-CR-SC- 00270-2013) [2014].

collaboration with UNHCR established a mobile court to visit Nakivale refugee settlement.³⁷³ Despite this initiative, ‘access to justice for refugees remains a problem for all refugees in settlements in terms of long distances to travel, and over-stretched national judiciary...’³⁷⁴ Besides, the mobile court serves only the Nakivale refugee settlement.

However, there is yet to be documented prosecuted cases of SV by the mobile courts in Uganda, refugee Settlements. Of over 187 prosecuted cases of sexual offences reviewed between 2013 and 2017 in Uganda, there was non-related to refugee victims of sexual violence.³⁷⁵ Thus, the researcher contends that although there are efforts by the Ugandan government to extend the prosecution of SV to refugees in the various Settlements, yet the efforts is yet to yield the desired result. Therefore, it is submitted that Uganda is in still in breach of article 16 of the UN Refugee Convention 1951.

7 Victims involvement in domestic criminal proceedings

The analysis of the laws and cases in the three countries reveals that victims of crime in criminal proceeding in domestic courts are prosecution witnesses, whose testimony either confirms the guilt of the accused person or leads to the acquittal of the offender. The victims of crime under the domestic law of host states are not parties to the suit; they do not have limited access as do victims under the ICC and they do not have free access to courts as injured parties in the criminal proceeding. Victims of sexual violence do not have *locus standi* to institute a criminal proceeding in their own right as an injured party against the perpetrator in a domestic court. Instead, they must overcome administrative and procedural bureaucratic obstacles before a prosecutor brings the case to court. If they are not believed by the administrative organs, then they will not see their assailant prosecuted and testify against them in court. As parties to the proceedings, victims will be able to ensure that cases are well investigated and prosecuted and protect their rights.

³⁷³ UNHCR Uganda, ‘SGBV fact sheet | Southwest Uganda | 2014’ <file:///C:/Users/user/Downloads/1052.pdf> (accessed 23 November 2016); see also C Cruise, ‘Activists: rape in Africa driven by inequality and weak prosecution’ Voice of America (2013) <http://learning.english.voanews.com/a/south-africa-rape-uganda-refugee-camp-drc-unhcr/1794666.html> (accessed 30 November 2016).

³⁷⁴ As above.

³⁷⁵ See n372 above.

Most constitutions of nations promote equality before the law. Equality incorporates equal opportunity, but the current domestic criminal regime does not promote equality between the ‘real victim’, who is regarded either as the principal witness for the state or the complainant, and the accused person. The accused has an opportunity to defend himself, to procure legal assistance or is granted legal aid, whereas the real victim is rendered invisible, excluded and does not enjoy such rights. Victims are treated disproportionately in respect of equality and equal protection before the law. Their rights are subsumed in those of the public. It is submitted that to deprive a victim of the right to free access to court is a violation of the constitutional rights to equality before the law and a fair hearing.

8 Comparative analysis of the treatment of cases of sexual violence against citizens and refugees in South Africa, Tanzania and Uganda

The analysis reveals that with regard to the status of international South Africa is both a monist and a dualist state, whereas Tanzania and Uganda adopt a dualist approach in the application of treaties in their domestic. The three countries all have ratified and domesticated the UN Refugee Convention 1951, its Protocol of 1967 and the OAU Refugee Convention. All three are bound by these treaties and owe refugees in their territories the duty to protect and to enforce their rights.

Refugees are also protected under the constitutions of South Africa, Tanzania and Uganda. With regard to access to court they provide their citizens with access. All three frown upon SV and offer stiff penalties ranging from years of imprisonment to life and death sentences. In Tanzania an additional punishment is corporal punishment as determined by the court. The jurisdiction for addressing SV in South Africa and Tanzania are Magistrate Courts, in Uganda, it is the High Court. The procedures for reporting the crime to the police are similar. South Africa has Thuthuzela Care Centres, close to a one-stop facility located in hospitals and in close proximity to a police station where victims of rape report and have access to facilities. In these countries the victim is the complainant and principal witness and cases are prosecuted by the state.

In respect of the treatment of refugees as yet there are no documented prosecuted cases of SV against refugees in South Africa. Tanzania reports prosecuting few cases of SV against refugees, but records are hard to find because of poor documentation. Uganda has a mobile court dedicated for addressing the problem of sexual violence against refugee in Settlements, but there is no record of a prosecution of a case of SV.

9 Conclusion

This chapter investigated whether the citizens of host states are protected by law against sexual violence using, South Africa, Tanzania and Uganda as case studies. It inquired whether victims of sexual violence against citizens in the host states have free access to courts in order address violations and have their cases prosecuted. Chapter 5 further investigated whether refugees are generally protected in the states of study and whether refugees enjoy the same protection against sexual violence as the citizens.

The chapter explored whether the states of study comply with the provisions of article 16 of the UN Refugee Convention of 1951 by treating refugees who are victims of sexual violence as the citizens in respect of access to court. The interrogation revealed that the states outlawed sexual violence against their citizens through various legislative instruments. The examination exposed the fact that cases of sexual violence against citizens are prosecuted and sentence handed down without a remedy to ameliorate the plight of the victims. Victims of crime are prosecution witnesses who attest to the guilt of the accused persons or to prove their innocence.

With regard to refugees in the host states there are yet to be documented prosecuted cases of SV against refugees in South Africa. Tanzania has reported cases, but many cases do not end up in court. Where there are prosecuted cases of SV against refugees, many are dismissed as a consequence of poor investigation, a want of evidence and tardiness on the part of the prosecution, as has been reported by Human Rights Watch. Convictions carry gaol sentences and victims are left to live with the harm suffered.

There have been reports of cases of SV against female refugees in the refugee Settlements in

Uganda. Uganda has a mobile court that visits one of the camps, there is yet to be a documented prosecuted case of SV against refugees.

It was found that victims do not have a right to participate as individual parties whose rights have been violated in criminal proceedings under domestic courts. If the case is not well investigated and prosecuted they do not have the capacity to intervene and seek access to court and to justice. They are deprived of the opportunity to testify against their assailant and at the same time they are denied the opportunity to challenge injustice.

Despite the legal framework for dealing with sexual violence in the countries discussed in this chapter, it is maintained that access to justice for female refugees who are victims of sexual violence in camps is a mirage. Hence the need for access to justice for victims should be addressed through an international instrument that compels contracting parties to ensure protection against sexual violence and if violated that they obtain justice.

Generally, crime, including sexual violence, is seen as a crime against the community or rather against the state and not against the victim. Therefore, the norm is that victims are used as a prosecution witness and are not reckoned as people whose rights have been infringed. Under certain criminal judicial systems where parole operates, as in South Africa, after serving a certain percentage of the sentence the perpetrator is released.

From the practice of the states in accordance with their criminal legal framework, as enunciated by legal aid laws in South Africa and Uganda, it is observed that there is no provision to offer legal assistance to victims; legal aid is advanced to the indigent defendant or perpetrator of crime. However, in Tanzania legal aid is for all who need it and apply for it, but in practice, accused persons enjoy more of the service. There is a need for a victim-oriented criminal justice system to be implemented that prioritises the needs of victims.

The questions left unanswered are: How has the prosecution of the crime and the sentencing helped the victim? Have the victims of sexual violence been served justice? It is submitted that half justice is no justice; victims should be treated better to compensate for what they have suffered. There is a need for reform of the domestic criminal justice system to become a victim-oriented criminal system that regards victims not only as prosecution witnesses but as human beings whose rights have been violated and who need the right to be enforced in accordance

with international and regional human rights instruments. The next chapter explores how victims of sexual violence in refugee camps have access to justice.

Chapter 6

Facilitation of access to justice for victims of sexual violence in refugee camps

1 Introduction

Chapter 2 discussed the theories that underpin the thesis of this study. Chapter 3 narrated the plight of victims of sexual violence in refugee camps. Chapter 4 investigated the international and regional legislation for accessing justice for victims of SV in refugee camps. Chapter 5 considered whether South Africa, Tanzania and Uganda grant access to court to their citizens who are victims of sexual violence and whether such access is given to female refugees who are victims of SV in their countries in accordance with the provisions of article 16 of the UN Refugee Convention of 1951.

The above investigations exposed gaps in accessing justice for female refugees who are victims of sexual violence in refugee camps. This chapter explores how to facilitate access to justice for these victims. This chapter attempts to answer the question: How can victims of sexual violence in refugee camps be given access to justice? This chapter briefly narrates the evolution of the concept of access to justice, deliberates further on the type of access required, outlines the barriers to access and suggests a holistic model for accessing justice by victims of SV. The chapter also discusses the facilities required for accessing justice for victims, such as health-care facilities, policing, legal clinics and courts.

In addition, there is a discussion of other measures that promote access to justice, such as the issue of criminal responsibility for the crime of sexual violence and complicity in crimes as a basis for holding all perpetrators accountable, customary international law as a principle for compelling states to fulfil their obligation to refugees and *locus standi* to enable victim to have full participation in criminal proceedings.

A major and indispensable component of the attainment of human rights and the provision of individuals with a degree of control is by means of an effective access to justice through which

rights may be demanded and violations of rights rectified.¹ Access to justice and to a justice system is a right in and of itself, but it is also a necessary precondition to ensuring that other rights are respected.² Access to justice has been observed to have suffered a lack of care in election campaign manifestos of countries around the world.³ Caplen argues that most of the issues on the front burner in election campaigns are those of the ‘economy, health services, education’ and rarely are issues of access to justice included, though they may be highlighted in issues of law and order⁴ in the form of combatting crime and its root causes.⁵

Caplen stresses that the issues of ‘the administration of justice like the efficiency of the courts and tribunals’ are hardly captured because they are not regarded as ‘vote winners’,⁶ never mind issues related to victims of crime. He reiterates that despite two reforms to the British justice system there is no recourse to any improvement on access to justice.⁷ Instead, the policy changes have brought about a reduction in legal aid.⁸ There is a need for an international legal framework that will bind and compel states to provide access to justice for their citizens and refugees. Caplen posits that the main obligation of a government is to provide an effective administration of justice to its citizenry, which should be suitable and at a reasonable cost, to access the justice system in all aspects of law. This responsibility extends to refugees in their territory per article 16 of the UN Refugee Convention 1951.⁹

2 The development of access to justice

Historically, access to justice has been held to have developed in various dispensations. At the

¹ AL Purkey, ‘Whose right to what justice? The administration of justice in refugee camps’ (2011) 2 *New England Journal of International & Comparative Law* Vol. XVII, 123.

² U.N. Development Programme, ‘Programming for Justice: Access for all a practitioner’s guide to a human Rights - based approach to access to justice 3 (2005) (UNDP, Programming for Justice).

³ A Caplen ‘Access to justice: The view from the society’ in E Palmer et al, *Access to justice: Beyond the policies and politics of austerity* (2016) 13.

⁴ As above.

⁵ Caplen (n 3 above) 13.

⁶ Caplen (n 3 above) 13.

⁷ Caplen (n 3 above) 13.

⁸ Caplen (n 3 above) 13.

⁹ UN General Assembly, Convention Relating to the Status of Refugees, 2 (UN refugee convention) 8 July 1951, United Nations, Treaty Series, vol. 189, 137.

outset, there is the advent of ‘legal aid’¹⁰ which involves the facilitation of access to legal representation in the courts for the underprivileged.¹¹ This concession was upgraded into the right to lawful representation with ‘an emphasis on group and collective rights’, also known as ‘diffuse interest’, in which the challenge of inequality began to be addressed.¹² Finally, alternatives to litigation have been employed to resolve disagreements and difficulties in obtaining justice.¹³ This aspect included modifications that simplified the justice system and consequently facilitated better accessibility,¹⁴ and is termed the advent of a tactic of established access to justice by Cappelletti and Garth.¹⁵

3 What is access to justice

The catch phrase ‘access to justice’ has been described in many ways. Paterson asserts that the phrase ‘access to justice’; has an imprecise connotation and denotes expressions like the rule of law.¹⁶ The strength and weakness of the phrase are ‘in its nebulosity. In short, access to justice is a community of phrases referred to as “a feel-good” concept’ one that everyone can sign up to without critical examination.¹⁷

Cornford,¹⁸ asserts that the meaning of the phrase ‘access to justice’ can be expressed descriptively and normatively.¹⁹ Descriptively, it represents the extent to which citizens can access legal services to protect and defend their legal rights.²⁰ Its normative aspect signifies a standard

¹⁰ M Cappelletti and B Garth (eds.) *Access to justice: A world survey*, vol. I (1978); see also A Currie ‘A brief history of access to justice: Riding the third wave: rethinking criminal legal aid within an access to justice framework,’ Department of Justice (2014) http://www.justice.gc.ca/eng/rppr/csjsjc/ccsajc/rr03_5/p2.html (accessed 3 February 2017).

¹¹ Department of Justice, ‘A brief history of access to justice: riding the third wave: Rethinking criminal legal aid within an access to justice framework’ http://www.justice.gc.ca/eng/rppr/csjsjc/ccsajc/rr03_5/p2.html (accessed 3 February 2017)

¹² M Cappelletti & B Garth, ‘Access to Justice: The newest wave in the worldwide movement to make rights effective’ (1978) 27 *Buffalo Law Review*, 194.

¹³ As above.

¹⁴ Department of Justice (n 11 above).

¹⁵ Cappelletti & Garth (1978) (n12 above) 194.

¹⁶ Cappelletti & Garth (eds.) (1978); Department of Justice (n 11 above).

¹⁷ A Paterson, *Lawyers and the public good: Democracy in action*, (The Hamlyn Lectures) Cambridge (2011) 60; see also T Cornford et al, ‘The Meaning of Access to Justice’ in E Palmer, T Cornford, A Guinchard & Y Marique, *Access to Justice: Beyond the policies and politics of austerity* (2016) 27.

¹⁸ Cornford (n 17 above) 28.

¹⁹ Cornford (n 17 above) 28.

²⁰ Cornford (n 17 above) 28.

where all humans have equal opportunity to protect their rights, which is termed ‘ideal equal access’.²¹ Cornford adds that the capability to secure legal rights is boosted and may be contingent on the availability of professional assistance of any category, yet to access legal assistance is still imbalanced.²² This unequal access to justice is what the ‘ideal of equal access’ outlaws.²³ Additionally, access to justice has also been interpreted to denote social rights and practical legal assistance for poor people.²⁴ Social rights are considered in the sense that they have become the duty of the state to preserve and enforce.

4 Why access to justice

Access to justice is the ultimate outcome of the rule of law since, without it, the rule of law is a mere perception.²⁵ The phrase signifies the means by which legal rights and obligation are enforced, individuals and public and private entities are brought to account for their actions or omissions. It is the main element that constitutes a humane, just and civilised society.²⁶

In emphasising the importance of access to justice, the US Supreme Court Judge Brennan 1956,²⁷ declared that the most provoking incident in the life of a human being is the threat of unjust treatment; that we can cope with sicknesses and other life situations but injustice rankles.²⁸ Injustice is more painful when the poor who need justice most cannot afford it.²⁹ Justice Brennan added that without justice there is no democracy, because democracy is dependent on justice and it is expected that democracy will deliver justice that is fair.³⁰

The existence of a strong and effective justice system is particularly important to refugees. They already have suffered significant injustice prior to their status as refugees and are particularly

²¹ Cornford (n 17 above) 28.

²² Cornford (n 17 above) 28.

²³ Cornford (n 17 above) 28.

²⁴ Cornford (n 17 above) 28.

²⁵ Caplen (n 3 above) 24.

²⁶ Caplen (n 3 above) 24; A Caplen and D McIlroy, “‘Speaking up’ - defending and delivering access to justice today” Theos | 77 Great Peter Street | London | SW1P 2EZ (2015) 8, <http://www.theosthinktank.co.uk/files/files/Speaking%20up%20final.pdf> (accessed 22 August 2017).

²⁷ Caplen (n 3 above) 25

²⁸ Caplen (n 3 above) 25.

²⁹ Caplen (n 3 above) 25.

³⁰ Caplen (n 3 above) 25.

vulnerable to further abuse and exploitation because of their displacement and dependence on others.³¹ For the enforcement of human rights to be meaningfully realised there must be institutions that are accountable and that permit a transparent realisation of these rights.³² Access to justice is now considered a basic human right and neither a traditional system of justice nor alternative dispute resolution has appropriate mechanisms for redress, victim protection, fair hearings, or proper punishment as can be seen in relation to refugees from Burma.³³

5 Militating factors against access to justice

In order to facilitate access to justice for victims of SV in refugee camps there is a need to identify factors that obstruct accessing justice in general and those specific to victims of sexual violence in refugee camps.

5.1 General factors

There are many factors that are barriers to access to justice; these factors are generally applicable to persons who seek the services of the justice system, including refugees.

The cost of justice

The cost of litigation in courts has been noted to be exorbitant. The high cost of court cases has been discovered to be a major barrier to accessing justice. For instance, in the German national report for the Florence Project,³⁴ it was specified that in two cases the amount of money in dispute, which was about eight months' salary of the plaintiffs, was just one and a half times the cost of legal fees to be paid.³⁵ The United States report for the Florence project recorded that

³¹ Purkey (n 1 above) 123.

³² A Farmer 'Refugee responses, state - like behaviour, and accountability for human rights violations: A case study of sexual violence in guinea's refugee camps' (2006) 9 *Yale Human Rights & Development Law Journal* 73.

³³ UN High Commissioner for Refugees (UNHCR), 'Operational protection in camps and settlements, A reference guide of good practices in the protection of refugees and other persons of concern,' June 2006, <http://www.refworld.org/docid/44b381994.html> (accessed 9 October 2017).

³⁴ Cappelletti & Garth, (n 12 above) 186; see also R Bender & C Strecker, 'Access to justice: Report on the Federal Republic of Germany' in M Cappelletti & B Garth *Access to Justice* (1978) (Florence Project) 531.

³⁵ Bender & Strecker, (n 34 above); see also Cappelletti & Garth (1978) (n 12 above) 186.

victims of road traffic accidents paid 35.5% as legal fees and an additional 8% for other expenses out of the \$3,000 they claimed as compensation;³⁶ in the end the litigants receive 56.5% of the total amount as compensation.

A study in England of personal injury litigation reported that in about a third of all litigated matters the total legal costs were more than the amount in dispute.³⁷ In France, it was documented that the cost of litigation for complainants whose salaries were below 1,750 francs per month was 144% of their monthly income.³⁸ It was declared that in Italy if the amount in dispute was more than 1,600 US dollars the cost of the lawsuit to parties is 8.4% , whereas in cases where the disputed amount is less than 160 US dollars legal fees are 170%.³⁹

The situation is no different in Africa. Klaaren asserts that litigation in ‘South Africa is expensive, particularly for the poor’.⁴⁰ The African Governance Monitoring and Advocacy Project (AfriMAP) established that ‘the major barrier to access to justice in South Africa remains the high cost of legal services’.⁴¹ It is stated that a typical South African family will have to sacrifice a week’s value of their earnings in order to pay for an hour session with a standard lawyer.⁴² The Socio - Economic Rights Institute of South Africa (SERI) attests that ‘clients with a monthly income of R 600 ... are frequently charged fees in the region of R 1,500 ... just for an initial consultation’.⁴³ The High Court rules provide that the cost of a quarter of an hour consul

³⁶ E Johnson *et al*, ‘Access to justice in the United States: The economic barriers and some promising solutions section IB, in M Cappelletti & B Garth eds. *Access to justice*, vol. I book II Florence project 913; see also Garth and Cappelletti (1978) (n 12 above) 186.

³⁷ M Zander, *Cases and materials on the English legal system* (1976) 323; see also Garth & Cappelletti (1978) (n12 above) 187.

³⁸ Garth, & Cappelletti (1978) (n 12 above) 187.

³⁹ Garth, & Cappelletti (1978) (n 12 above) 187.

⁴⁰ J Klaaren, ‘The Cost of Justice’ Briefing paper for public positions theme event, (2014) WiSER, history workshop & Wits Political Studies Department, <file:///D:/Klaaren%20-%20Cost%20of%20Justice%20-%202014.pdf> (accessed 19 December 2016).

⁴¹ Africa Governance Monitoring and Advocacy Project (AfriMAP) and Open Society Foundation for South Africa, ‘South Africa justice sector and the rule of law’, the Open Society Foundation for South Africa’ (2005) 113, https://www.opensocietyfoundations.org/sites/default/files/afriMAPreport_20060223.pdf (accessed 19 December 2016).

⁴² As above.

⁴³ J Dugard & K Drage ‘To whom do the people take their issues?’ The contribution of community-based paralegals to access to justice in South Africa, the legal Vice Precedency, The World Bank, The International Bank for reconstruction and development/The World Bank (2013) 2, <http://documents.worldbank.org/curated/en/598681468307740801/pdf/793390NWPJ0D0T00PUBLIC00Box0377373B.pdf> (accessed 19 June 2017); see also Klaaren (n 40 above).

tation will be R235.00 and the drafting of pleading costs R235.00 per page.⁴⁴

The other factor that militates against access to justice is that if the amount in dispute is too small, for instance, the proportion of cost to that of the disputed amount, the cost of litigation will be more than the amount in dispute, thus, litigating in such cases amounts to the defeat of justice. It was recorded that the costs of litigating a claim of the equivalent of 100 US dollars in Germany is about 150 US dollars in a regular court.⁴⁵

In addition, litigation costs time. It has been observed that court cases in the majority of countries take about two to three years to be decided and for remedies to be enforced.⁴⁶ It was recorded in Italy in 1973 that the cases of the first instance before the Pretoria last 566 days; those in the tribunal of the first instance last 944 days; and those in the Court of Appeal of the second instance last 769 days.⁴⁷

Competence of the parties

A party's ability to litigate is based on the belief that certain parties 'enjoy a set of strategic advantages'.⁴⁸ This Advantage may be due to their status or certain factors that they possess that will enhance their capacity to promote their cause, for instance, financial resources.⁴⁹ Individuals or groups who are wealthy may have an advantage over the poor. For instance, refugees in camps may not be able to pursue their right to litigation, because of financial constraints and if they decide to exercise this right, they may not be able to withstand the protracted process of obtaining justice. The poor man who is thinking of the next available meal will want to abandon the matter,⁵⁰ whereas the richer party employs the services of an articulate lawyer to present his claim.

⁴⁴ Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), amendment of rule 70.

⁴⁵ Garth & Cappelletti (1978) (n12 above) 188.

⁴⁶ Garth & Cappelletti (1978) (n12 above) 189.

⁴⁷ Garth & Cappelletti (1978) (n12 above) 189.

⁴⁸ M Galanter, 'Afterward: Explaining Litigation' (1975) 9 *Law & Society Review* 347, 360.

⁴⁹ As above.

⁵⁰ Galanter (n 48 above) 360.

Capacity is also dependent on an individual's ability to recognise and pursue his claims or defend them. Ignorance of rights can stem from a low social status, illiteracy or cultural or religious background.⁵¹ If a victim does not recognise the harm they suffered as enforceable, then the victim will be robbed of the opportunity to enforce restitution. This barrier is fundamental and common among the less privileged and should be addressed with sound knowledge. Another problem is an imperfect appreciation of the need to enforce their rights.

5.2 The police

The duties of the police are to prevent crimes, maintain law and order, arrest offenders, ensure proper investigations of cases and refer offenders for prosecution. However, there are certain factors and acts of police that obstruct the chain of justice. These include unsuitable legal frameworks, situations where the police agencies still operate under regal laws and regulations which do not ascribe to the values of human rights such as transparency, responsibility and public participation.⁵² These laws are obsolete and result in ineffective policing.⁵³

Police indulge in discriminatory practices against certain groups of people in society such as women, the poor, the disabled, refugees and foreigners who come to seek the enforcement of their rights. These discriminatory attitudes range from resentment, mockery and discounting of the victim's complaint to bigotry and derogatory annotations, including favouritism shown the elite and the wealthy in society.⁵⁴

The police can manifest impervious conduct towards victims of crime, for instance, police are insensitive to the needs of victims of sexual violence, and sometimes chastise them as if they are the cause of the act⁵⁵ since they do not turn their mind to the psychological and therapeutic

⁵¹ Galanter (n 48 above) 360.

⁵² United Nations Development Programme (UNDP), 'Programming for justice: access for all' A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice,' United Nations Development Programme, 2005, 123, https://www.un.org/ruleoflaw/files/Justice_Guides_ProgrammingForJustice-AccessForAll.pdf (accessed 23 January 2017).

⁵³ As above.

⁵⁴ UNDP (n 52 above) 123 - 124.

⁵⁵ UNDP (n 52 above) 123-124.

needs of the victim.⁵⁶ Consequently, victims do not receive the requisite care and support; which leads to lack of confidence in the police.⁵⁷ A lack of confidence and faith in the police hinders access to justice because people do not want to report incidents of violence, therefore the perpetrators are not brought to account and the victims do not obtain justice.

There is an absence of a mechanism for transparency and access to information in police practices.⁵⁸ Police are unfriendly to the public, especially refugees and foreigners. For instance, if an individual wants information that will advance their rights, the question the police ask the refugee is ‘Do you have a permit? In a case involving a migrant and a citizen, the police suddenly switch to the local language and the refugee, who does not understand the language without an interpreter, is excluded from the conversation. Refugees whose status is yet to be determined may withdraw from the case and may never try again. This attitude is compounded by the ineffective and insufficient oversight and accountability mechanisms, both internal and external, that monitor the quality of policing.⁵⁹ For instance, the zero-tolerance to crime policy of most governments has been perceived to overlook the abuses perpetrated by the police.⁶⁰ This situation leads to diminished police accountability in the name of fighting crime and terrorism.⁶¹

External factors also have an influence. For instance, police operations are under the authority of the chief executive,⁶² hence, the political leadership makes incursions on the police and exert undue influence, culminating in the improper functioning and performance by the police.⁶³ Other factors affecting access to justice due to the role of the police include unwarranted arrest, the poor protection of prisoners, lack of an operational moral code, low self-esteem and poor management and insufficient capacity building, coupled with insufficient funds and mismana

⁵⁶ UNDP (n 52 above) 124.

⁵⁷ UNDP (n 52 above) 124.

⁵⁸ UNDP (n 52 above) 124.

⁵⁹ UNDP (n 52 above) 124.

⁶⁰ UNDP (n 52 above) 124.

⁶¹ UNDP (n 52 above) 124,

⁶² UNDP (n 52 above) 124.

⁶³ UNDP (n 52 above) 124,

gement.⁶⁴ There is also widespread corruption and unprofessional conduct, unskilled crime prevention, weak investigations and poor management in the investigation of cases.⁶⁵ Other obstacles to accessing justice include a lack of synchronisation among police forces, poor prosecution and ineffective procedures, for example, police need to be apt in transferring cases to a suitable division of the judiciary.⁶⁶

5.3 The judicial system

The judicial system comprises the courts, the judiciary and the prosecutors.⁶⁷

The Judiciary

The judiciary comprises judges and magistrates, as well as administrative staff such as clerks, bailiffs, translators, and security personnel.⁶⁸ It is the third arm of government under the principle of the separation of powers. The main purpose of the judiciary is to adjudicate legal disputes, ensure the provision of a remedy sought for a grievance through the application of the law, determine violations of criminal laws and evaluate punishments or other remedies.⁶⁹ In addition, the judiciary acts as an oversight body for the executive and legislative arms of the government.⁷⁰

The Court

The court has been described as ‘an official, public forum, which a public power establishes by lawful authority to adjudicate disputes and to dispense justice [per] the law’.⁷¹ The court is meant to offer an environment in which rich and poor stand as equals before the law and the rights of people who cannot protect themselves are defended.⁷² The court broadly is divided

⁶⁴ UNDP (n 52 above) 24,

⁶⁵ UNDP (n 52 above) 124, 125.

⁶⁶ UNDP (n 52 above) 125.

⁶⁷ UNDP (n 52 above) 71.

⁶⁸ UNDP (n 52 above) 71.

⁶⁹ UNDP (n 52 above) 71.

⁷⁰ UNDP (n 52 above) 71.

⁷¹ UNDP (n 52 above) 71.

⁷² UNDP (n 52 above) 71.

into civil and criminal jurisdictions. This study concentrates on the aspect of the court where criminal matters are adjudicated. Crimes are an offence against society, thus the state arraigns an offender in a criminal case before the court. In criminal cases the victims are prosecution witnesses in the case against their assailant. The prosecution and conviction of criminals is a benefit. Victims who have suffered injury are less likely to gain directly from a successful prosecution.

For a court system successfully to deliver access to justice it must be accountable, accessible and independent.⁷³ The court system faces challenges that are inimical to fulfilling its function. These challenges include operational inefficiencies in the form of a lack of necessary resources and capacities,⁷⁴ a lack of streamlined procedures and legal information, and excessive bureaucratic attitudes and behaviour.⁷⁵

In addition, the lack of human resource development is due to⁷⁶ insufficient funding for training programmes, inadequate numbers of qualified, competent and committed teachers and lawyers, limited access to updated judicial and legal tools and text books.⁷⁷ The situation is worsened by the incomplete and inadequate assessment of the needs of the judiciary and limited understanding of international human rights norms crucial in the training of higher-level judges and administrative staff,⁷⁸ as well as entrenched attitudes and behaviour of staff that compromise reform and lead to a lack of resourcefulness.⁷⁹

With regard to the principles of integrity and accountability the following factors militate against access to justice. These are the lack of a legal mechanism for accountability and the political will to combat corruption, tolerance of corruption, proper case tracking, monitoring and accountability within the courts. Corruption also emanates from within the justice system.⁸⁰

⁷³ UNDP (n 52 above) 72.

⁷⁴ UNDP (n 52 above) 72.

⁷⁵ UNDP (n 52 above) 73.

⁷⁶ UNDP (n 52 above) 76.

⁷⁷ UNDP (n 52 above) 77.

⁷⁸ UNDP (n 52 above) 77.

⁷⁹ UNDP (n 52 above) 78.

⁸⁰ UNDP (n 52 above) 78

Other factors include a poor salary structure for the judiciary/prosecutors and deficient legal knowledge of prevailing laws and regulations.⁸¹ There is an absence of transparency in adjudication procedures and pervasive use of closed door trials. Public perception of corruption is an impediment to embarking on judicial reform.⁸² Inadequate data/statistics on the extent of judicial corruption, a lack of effective mechanisms for employee selection, promotion and discipline and the non-existence of external review mechanisms by state and non-state actors⁸³ are all obstacles.

Judicial independence signifies the ability of the judiciary as an organ and judges individually to be free from interference, in the discharge of their duties.⁸⁴ It is the fundamental basis of the judiciary in order to safeguard access to justice and uphold the rule of law.⁸⁵ Certain dynamics interfere with the freedom of the court. These include insufficient ‘constitutional provisions for judicial, power and independence’, inadequate budgets for the judiciary and the control of excessive expenditures.⁸⁶ There are the poor mechanisms for judicial appointments, the absence of security of tenure and unclear disciplinary mechanisms, as well as deficient law school training, judicial training and continuing legal education.⁸⁷ Judicial reform aimed at the reinforcement of the independence of the judiciary often encounters stiff opposition, and frequently is combined with tension between independence and accountability.⁸⁸

A further difficulty in accessing justice is the challenge of ‘approachability’ which is synonymous with accessibility.⁸⁹ Accessibility denotes ‘the right of every person to access an independent and impartial court and the opportunity to receive a fair and just trial with a view to providing an effective remedy to a grievance’.⁹⁰ It is a mandatory precondition for accessing justice. However, there are various obstacles to accessibility. These limitations may be in the form of the high cost of court processes and the lack of clarity in the normative framework on

⁸¹ UNDP (n 52 above) 81.

⁸² UNDP (n 52 above) 81.

⁸³ UNDP (n 52 above) 82.

⁸⁴ UNDP (n 52 above) 84.

⁸⁵ UNDP (n 52 above) 84.

⁸⁶ UNDP (n 52 above) 84.

⁸⁷ UNDP (n 52 above) 84.

⁸⁸ UNDP (n 52 above) 85.

⁸⁹ Collins, ‘Approachability’ in *Collins English Thesaurus*, Harper Collins Publishers (2018) <https://www.collinsdictionary.com/dictionary/englishthesaurus/approachability> (accessed 14 February 2018).

⁹⁰ UNDP (n 52 above) 86.

the justice dimensions of social, economic and cultural rights.⁹¹ Also, there are restrictive rules of ‘standing’ that act as a barrier to accessing justice, complex regulations and procedures are alien and repulsive to the majority of the population, as well as geographical, physical, cultural and linguistic barriers.⁹²

The prosecution

The prosecutor is a government official responsible for the prosecution of a crime against the social order;⁹³ a legal party responsible for the presentation of a case against an individual suspected to have contravened a law in criminal proceedings.⁹⁴ Prosecutors supervise the police or other bodies responsible for evidence-gathering and for the enforcement of court decisions in some legal systems. They can be private lawyers with permission to prosecute public cases or civil servants on the government payrols or be quasi-judicial.⁹⁵

The foremost responsibility of prosecutors is to institute criminal charges and prosecute offenders of the law.⁹⁶ Prosecutors are also endowed with the power to demand ‘the conditional release of detainees, act on behalf of states to protect the rights of all parties, which include the accused and the public, in criminal proceedings’.⁹⁷ They assist in the delivery of justice rather than merely to punish and are charged with the duty of investigating for both conviction and exculpation.⁹⁸ As stated, prosecutors oversee the police and also may supervise the enforcement of court decisions.⁹⁹

These duties in ensuring justice may be impeded by operational inefficiency which includes a lack of adequate finance and inadequate ‘communication between the government and professional/bar associations of lawyers’.¹⁰⁰ The lack of integrity and accountability in the form of

⁹¹ UNDP (n 52 above) 86.

⁹² UNDP (n 52 above) 87.

⁹³ UNDP (n 52 above) 71.

⁹⁴ UNDP (n 52 above) 71.

⁹⁵ UNDP (n 52 above) 71.

⁹⁶ UNDP (n 52 above) 71.

⁹⁷ UNDP (n 52 above) 89.

⁹⁸ UNDP (n 52 above) 89.

⁹⁹ UNDP (n 52 above) 90.

¹⁰⁰ UNDP (n 52 above) 91.

corruption, poor remuneration in many countries and lack of national criteria for the appointment, promotion and transfer of prosecutors,¹⁰¹ also affect access to justice. In addition, the absence of codes of conduct and ethics for prosecutors, as well as ‘imprecise criminal procedural codes’¹⁰² are hindrances. Prosecutors are not independent but are civil servants and so they can be influenced by their employer.

There is sometimes a power tussle between the police and prosecutors¹⁰³ leading to a lack of collaboration in the prosecution of cases, which can compromise the result. In remote areas prosecutors may violate their quasi-judicial power by mediating in cases that ought to be prosecuted and leading to a lack of access to court. These problems are compounded by the lack of protection for them and their families.¹⁰⁴

The inaccessibility of prosecutors is a problem for victims which could hinder justice. Inaccessibility manifests itself in the form of an unsupportive approach by the prosecutor towards the legal proceeding which is discouraging for victims, as well as geographical, physical, cultural and linguistic barriers.¹⁰⁵

5.4 Informal Justice Systems

It refers to processes of resolving disputes other than the formal justice system which include state-sanctioned alternative dispute resolution (ADR) processes, plus non-state justice systems, i.e., traditional and indigenous justice systems (TIJS).¹⁰⁶ For the purpose of dealing with sexual violence against refugees these systems are a barrier to accessing justice because there is no effective enforcement mechanism for ADR decisions.¹⁰⁷ Also, verdicts are unpredictable and can be, with unclear criteria and guiding principles for decision-making, coupled with a lack of political will and funding.¹⁰⁸ Traditional and indigenous systems of justice are problematic and

¹⁰¹ UNDP (n 52 above) 91.

¹⁰² UNDP (n 52 above) 91.

¹⁰³ UNDP (n 52 above) 91.

¹⁰⁴ UNDP (n 52 above) 91 - 92.

¹⁰⁵ UNDP (n 52 above) 91 - 92.

¹⁰⁶ UNDP (n 52 above) 97.

¹⁰⁷ UNDP (n 52 above) 97.

¹⁰⁸ UNDP (n 52 above) 98 - 99.

an obstruction to justice, especially in dealing with issues of sexual violence. In most cases they do not consider the opinion of victims, but decisions are made in favour of the victim's parents or in favour of the perpetrator. If the victim was a virgin the perpetrator may be forced to marry her.¹⁰⁹ Other factors that militate against access to justice include the gulf between traditional laws and human rights values, the inappropriate use of traditional and indigenous justice systems and the exclusion of disadvantaged groups such as women.¹¹⁰

A further challenge is in the form of 'forum shopping', which usually occurs where the jurisdiction of issues is not properly defined. If an aggrieved party is dissatisfied with the decision of a particular forum, they appeal to another group within society which renders the TIJS decision unenforceable.¹¹¹ Sometimes the punishment violates human rights principles, for example corporal, cruel and inhuman punishment for committing minor crimes,¹¹² and rape victims forced into marriage with their perpetrator.¹¹³ These systems are corrupt and consequently justice is forever denied.¹¹⁴ It is submitted that the traditional and indigenous system is not competent to deal with issues of sexual violence.

5.5 Oversight institutions

A key to successful access to justice in a rights-based approach is the ability to hold accountable those who run the system. This can be achieved through the establishment of regulatory bodies who oversee the activities of the system, investigate, report and possibly hold accountable the officers responsible. There are various types of oversight bodies such as the National Human Rights Institutions (NHRIs), namely, National Human Rights Commissions (NHRC), Ombudsman offices, and thematic commissions charged with the responsibility to investigate human

¹⁰⁹ CW Mwangi, 'Women refugees and sexual violence in Kakuma Camp, Kenya; Invisible rights, justice, protracted Protection and human insecurity.' A Research Paper presented in partial fulfilment of the requirements for obtaining the degree of Master of Arts in Development Studies, Specialization: Human Rights Development and Social Justice. International Institute of social studies, The Hague, The Netherlands, unpublished, (2012) 16, file:///C:/Users/user/Downloads/Clare%20Waithera%20Mwangi_CLAIRE%20WA ITHIRA %20MWANGI %20RESEARCH%20 PAPER _1683, pdf (accessed 17 February 2016).

¹¹⁰ UNDP (n 52 above) 102.

¹¹¹ UNDP (n 52 above) 102.

¹¹² UNDP (n 52 above) 103.

¹¹³ UNDP (n 52 above) 104.

¹¹⁴ UNDP (n 52 above) 104.

rights violations and make recommendations with regards to law reform and the implementation of the law to protect people from human rights violations.¹¹⁵ Civil society, such as non - governmental organisations and the media, can investigate abuses, publish misdeeds and campaign for modifications within the justice system.¹¹⁶ Finally, the legislature in the separation of powers watches over the justice system so as to ensure that the task of delivery of justice is effective and appropriate and addresses incongruities in the system.¹¹⁷

Nevertheless, there are several obstacles to ensuring access to justice by these bodies. Under the National Human Rights Institutions (NHRIs) there are deficiencies in legal frameworks ensuring minimum standards for the institution, sub - standard performance, a perception of insufficient legitimacy and limited political commitment, as well as inadequate budgets and a lack of efficient, qualified and experienced staff.¹¹⁸

Civil Societies Oversight (CSOs) bodies grapple with the following issues in their attempt to promote access to justice. For instance, their civil and political rights may not be legally protected and lacking accountability or enforcement mechanisms, and an effective media.¹¹⁹ Journalists may be deficient in professional expertise. A handful of CSO groups are prepared to advocate justice and legal reform, but championing reform agendas is always a challenge because they are unable to form a coalition to pursue them.¹²⁰

The CSOs misuse their power and freedom. Non-lawyers may not be well-acquainted with the laws and the lack the expertise and disposition to monitor efficaciously.¹²¹ Other challenges faced by CSOs include a lack of competence, erudition and technical skills as a result of inadequate funds and consequently there is a dearth of the legality and reliability requisite to accomplish their goals.¹²² There is struggle for revenues among CSOs and an absence of a stable

¹¹⁵ UNDP (n 52 above) 109.

¹¹⁶ UNDP (n 52 above) 109.

¹¹⁷ UNDP (n 52 above) 109

¹¹⁸ UNDP (n 52 above) 109 - 110.

¹¹⁹ UNDP (n 52 above) 115.

¹²⁰ UNDP (n 52 above) 115.

¹²¹ UNDP (n 52 above) 116.

¹²² UNDP (n 52 above) 116.

means of financing their activities, which are perceived as destitute of transparency and accountability due to a ‘circumscribed capacity for felicitous financial and administrative management’.¹²³ In addition, CSOs are accountable to their sponsors so their loyalty is more towards the donors than towards achieving their goals.¹²⁴ Furthermore, the antagonism between some governments whose modes of operation are characterised by fraudulent and inept bureaucracies and CSOs is detrimental to the acceptance of transformations that will promote access to justice.¹²⁵

6 Specific factors militating against access to justice for victim of sexual violence in refugee camps

As well as the above general obstacles to accessing justice, female refugees who are victims of SV in refugee camps face other peculiar circumstances. These circumstances are discussed next.

6.1 Absence of refugee permit and restrictions on freedom of movement

In the circumstance of closed borders a permit is key to accessing services. Without the asylum permit it is almost impossible for a refugee to access any social services. For instance, Human Rights Watch¹²⁶ records that refugees who are victims of SV are afraid to report their violation to the requisite authority because they fear detention and deportation as an illegal or undocumented immigrant.¹²⁷

In addition, refugees without the required legal permit, who reside in camps or who are yet to fulfil the obligatory administrative or other requirements to stay in the camps, are perceived as illegal and have no rights or limited rights in contrast to other refugees and therefore they are

¹²³ UNDP (n 52 above) 116.

¹²⁴ UNDP (n 52 above) 116.

¹²⁵ UNDP (n 52 above) 116.

¹²⁶ Human Rights Watch (HRW) ‘Prohibited persons, abuse of undocumented migrants, asylum seekers and refugees in South Africa, (1998) 83; see also R Mabuwa, *Seeking protection: Addressing sexual and domestic violence in Tanzania's refugee camps* (2000) 48.

¹²⁷ As above.

deprived of access to the state judicial system.¹²⁸ The restriction of the movement of refugees in and out of camps constitutes an interruption to accessing justice because freedom of movement is key to accessing any facilities.¹²⁹

6.2 Absence of political will on the part of the government of host states

The problem of access to justice is compounded by the lack of political will on the part of the host administration to sponsor and enforce domestic law in cases of crimes against refugees.¹³⁰ Their defence is that they lack the resources to meet the needs of their citizens and therefore cannot meet the needs of refugees.¹³¹

6.3 Location of refugee camps and court facilities

Refugee camps usually are situated far away from major cities with poor road networks, distant from courts and other judicial facilities located either in major city centres or municipality headquarters.¹³² Most refugee camps are without court facilities, thus victims travel long distances to attend court sessions.¹³³ Uganda as discussed in chapter 5 offers a mobile court facility, yet access to justice remains elusive. In addition, certain countries require refugees to have permission to travel out of the camps,¹³⁴ as a result they are discouraged from going to court because of the bureaucratic delays obtaining a permit.

6.4 Deficient legal representation and lack of familiarity with the formal legal system

¹²⁸ R Da Costa, 'The administration of justice in refugee camps: A study of practice' UN High Commissioner for Refugees (UNHCR) (2006) 30, <http://www.unhcr.org/protection/globalconsult/44183b7e2/10-administration-justice-refugee-camps-study-practice-rosa-da-costa.html>, (accessed 7 February 2017).

¹²⁹ As above 27.

¹³⁰ Mwangi, (n 109 above).

¹³¹ As above.

¹³² Da Costa (n 128 above) 27.

¹³³ Mwangi (n 109 above).

¹³⁴ Da Costa (n 128 above) 13.

A weak judicial system, tardiness and the lack of preparation on the part of the prosecutor always jeopardises the successful outcome of the matter and denies the victim justice.¹³⁵ A lack of acquaintance with the host state's procedural and substantive legal system hinders refugees from assessing justice.¹³⁶ Even though refugees can access the justice systems of Tanzania and Zambia they lack the requisite knowledge of court procedures, which is a limiting factor.¹³⁷

6.5 Fear of retaliation and communal pressures

Female refugee victims of SV in refugee camps are afraid of reprisals, sanctions and sometimes face intimidation from their perpetrators, especially when the act is perpetrated by those charged with their care.¹³⁸ These threats may be against their persons, families and even their ethnic or tribal group.¹³⁹ These forms of intimidation are potent in refugee camps with no victim or witness-protection systems, no detention facility, and if coupled with the inaccessible nature of camp locations, compounded by the insecurity and restriction of movement in and out of the camps, create an environment conducive to reprisal.¹⁴⁰ Consequently, they may be deterred from reporting incidents of violence. Cases already reported are withdrawn because of family and social pressures.¹⁴¹ Alternatively, victims are forced to submit cases to alternative dispute resolution, which includes traditional courts that usually do not favour the victims..

6.6 Scepticism of the decision and adjournments in the judicial process

Refugees do not have faith and confidence in the host state's judicial system with regard to its efficacy and the likelihood of winning the case.¹⁴² In conjunction with the protracted legal battle that is undetermined before they can exit the refugee camp, their lack of confidence frequently dampens the enthusiasm of refugees for engaging in a formal legal trial.¹⁴³ These uncertainties

¹³⁵ Mabuwa (n 126 above) 39; see also Da Costa (n 128 above) 27; see also Mwangi (n 109 above).

¹³⁶ Da Costa (n 128 above) 28.

¹³⁷ Da Costa (n 128 above) 28.

¹³⁸ Da Costa (n 128 above) 28.

¹³⁹ Da Costa (n 128 above) 28.

¹⁴⁰ Da Costa (n 128 above) 28.

¹⁴¹ Da Costa (n 128 above) 28.

¹⁴² Da Costa (n 128 above) 29.

¹⁴³ Da Costa (n 128 above) 29.

and delays are compounded by the indifferent attitude of the police towards victims of sexual violence. The judicial system may be shrouded in an atmosphere of manipulation and fraud surrounding the process of reporting or complaint, such as ‘the loss of complaint/reports; misquoting the incident; placing reports at the bottom of the pile; or complications related to medical or other examinations due to lack of female doctors and inadequate funds to pay for the examination’.¹⁴⁴ These drawbacks limit access to justice.

6.7 Lack of resources and logistical challenges in accessing justice

Finance is a problem for refugees; they do not have the means to earn a livelihood and are dependent on aid and thus cannot pay for medical care or travel costs to attend a court session or other related costs that can facilitate their cause.¹⁴⁵ This situation contributes to the inaccessibility to justice; the lack of transportation and physical access to courts and health facilities compound their lack of resources and deprive them of accessing justice.¹⁴⁶

6.8 Linguistic obstacle

Language is another barrier to accessing justice. Most refugees do not understand the local languages or the legal system of the host state, which dissuades them from reporting crimes and approaching the system to seek redress.¹⁴⁷ Da Costa observes that language was identified as a barrier in almost thirteen countries in her study.¹⁴⁸

6.9 Overt or inherent predilection by germane antecedent entities to have refugees resolve their disputes amongst themselves

¹⁴⁴ Da Costa (n 128 above) 29.

¹⁴⁵ Da Costa (n 128 above) 30.

¹⁴⁶ Da Costa (n 128 above) 30.

¹⁴⁷ Da Costa (n 128 above) 30.

¹⁴⁸ Da Costa (n 128 above) 30.

Host countries hesitate to advance access to the state justice system by refugees through the deliberate refusal to document reports or prosecute cases.¹⁴⁹ This reluctance is corroborated by the lack of enthusiasm security and judicial officers display, as well as the insubstantial and inexact reporting and tardiness in service delivery.¹⁵⁰ Discouragement is greater where there is regulation restricting the movements of refugees.¹⁵¹

6.10 The fear of discrimination and bias

This fear is not unfounded, refugees are regularly discriminated against. In disputes between a refugee and a citizen of a host state refugees are treated as the perpetrator.¹⁵² These concerns about the potential for discrimination and bias within the state legal system are particularly acute in cases of dispute between a refugee and a national.¹⁵³ However, these apprehensions are general among refugees in relation to the host state's judicial system; chiefly so where authorities encourage refugees to resolve disputes internally, add to the restriction of their rights, and where the refugee population does not share the ethnicity or language of the host population.¹⁵⁴

6.11 The prerequisite for inducements, incentives and the trepidation of corruption

The fear of being asked by those in authority to pay a certain amount of money as bribe in order to accelerate the case on time and equitably, even when the case is in the refugee's favour, acts as a discouragement to start a court proceeding within the state system by the victims of crime in refugee camps.¹⁵⁵ This fear is common when the movements of refugees are restricted.¹⁵⁶

¹⁴⁹ Da Costa (n 128 above) 30.

¹⁵⁰ Da Costa (n 128 above) 30.

¹⁵¹ Da Costa (n 128 above) 30.

¹⁵² Da Costa (n 128 above) 30.

¹⁵³ Da Costa (n 128 above) 30.

¹⁵⁴ Da Costa (n 128 above) 30.

¹⁵⁵ Da Costa (n 128 above) 30.

¹⁵⁶ Da Costa (n 128 above) 30.

6.12 Ignorance in relation to the rights of refugees

The appropriate state authorities may lack knowledge or familiarity with the specific rights and sources of law relevant to refugees, including refugee and human rights law, minimum standards of treatment for both victim and the accused and the concept of due process.¹⁵⁷ In fact, there is confusion as to whether refugees and foreigners have any rights at all, particularly at the local level. The result is that the application of state law in internal camp affairs is not necessarily seen as mandatory.¹⁵⁸

7 Mechanisms for accessing justice for the victims of sexual violence in refugee camps

The analysis in subsections 5 and 6 of this chapter exposed the general and specific obstacles to accessing justice for victims of SV in refugee camps. The key factors inhibiting access to justice are the failure to hold perpetrators accountable, to create a congenial atmosphere that encourages reporting, to preserve evidence and to establish a victim-centred approach to criminal prosecution. This section discusses the concept of responsibility and the need to establish supporting facilities equipped with competent experts and resources with the goals of preserving evidence and facilitating justice for victims.

Without responsibility there is little chance of justice. Reuters is of the view that ‘responsibility is at the heart of international law ... it constitutes an essential part of what may be considered the Constitution of the international community’.¹⁵⁹ The purpose of responsibility is to hold a juristic person accountable for the wrong committed against a person or the society. In English

¹⁵⁷ Da Costa (n 128 above) 30.

¹⁵⁸ Da Costa (n 128 above) 30.

¹⁵⁹ P Reuter ‘Trois observations sur la codification de la responsabilité internationale des États pour fait illicite’, in *Le droit international au service de la paix, de la justice et du développement-Mélanges Michel Virally, Pedone*, Paris, (1991) 390; reproduced in P Reuter (1995) *Le développement de l’ordre juridique international-Écrits de droit international*, Paris, economica (1995) 574. See also A Pellet ‘The definition of responsibility in international law’ in Crawford *et al.* (ed.) *the law of international responsibility*, Oxford University Press (2010) 3.

responsibility also designates a ‘position of authority over someone’, ‘a duty to ensure the implementation of the precise task’¹⁶⁰ and ‘culpability for an act’.¹⁶¹ It also signifies, the ‘capability of fulfilling an obligation or duty’; ‘the quality of reliability or trustworthiness, a state or fact of being accountable which includes liability and accountability for something’.¹⁶² The word also indicates a ‘burden, task or assignment for which one is responsible’ a, ‘moral obligation to comport yourself in an acceptable manner, and answerability towards or in respect of a person or thing’.¹⁶³ ‘Responsibility’ in law means ‘liability’, an individual’s ‘mental fitness to answer in court for their actions’, ‘answerability or accountability is used in criminal law to denote criminal responsibility’.¹⁶⁴ There are many types of responsibility.

State responsibility

Under international law the state can be held liable for an injury suffered by a person which arose from the state’s failure to respect the law or their treaty obligations; a necessary condition for incurring responsibility.¹⁶⁵ Article 1 of Responsibility of States for Internationally Wrongful Acts,¹⁶⁶ provides: ‘Every internationally wrongful act of a state entails the international responsibility of that State’.¹⁶⁷ For the state to be held responsible for a crime the act must be an ‘internationally wrongful act of a national whose conduct or omission, can be attributable to the state under international law; and constitutes a breach of an international obligation of the State’.¹⁶⁸

¹⁶⁰ Cambridge University press (CUP) ‘Responsibility’ in Cambridge online dictionary (2017) dictionary.cambridge.org/dictionary/English/responsibility, (accessed 13 February 2017); see also Oxford University press (OUP), ‘Responsibility’ in Oxford English dictionary online (2017) <http://www.oed.com.uplib.idm.oclc.org/view/Entry/163862?redirectFrom=responsibility#eid> (accessed 13 February 2017).

¹⁶¹ As above.

¹⁶² CUP (n 160 above); see also OUP (n 160 above).

¹⁶³ Oxford University press, ‘Responsibility’ in Oxford English Dictionary online (OED), (2017) www.oed.com.uplib.idm.oclc.org/view/Entry/163862?redirectFrom=responsibility#eid (accessed 13 February 2017).

¹⁶⁴ BA Garnier (ed.) ‘Responsibility’ in Black law dictionary, Thomson West 8th ed. (2004) 1338.

¹⁶⁵ Pellet (n 159 above) 6.

¹⁶⁶ UN General Assembly, ‘Responsibility of States for internationally wrongful acts: resolution adopted by the General Assembly, 8 January 2008, A/RES/62/61, art 2 (UN GA Responsibility) <http://legal.un.org/ilc/texts/instruments/english/draftarticles/962001.pdf> (accessed 22 April 2016).

¹⁶⁷ As above.

¹⁶⁸ UN GA ‘Responsibility (n 166 above) art 2.

States who receive refugees have an obligation in accordance with article 16 of the UN refugee convention¹⁶⁹ Denial of access to court is a breach of article 2(a) (b), and constitutes a wrongful act. As discussed in chapters 4 and 5 the responsibility to provide access to court for refugees rests on the host states, a failure to fulfil this obligation is tantamount to a breach of an international obligation for which the state is held responsible.¹⁷⁰

It is asserted that if a violation of international law results in an injury, the remedy of reparation is invoked: ‘In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of the State that matters, independently of any intention’.¹⁷¹ In addition, article 4 (1) (2)¹⁷² provides that:

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.¹⁷³

Since the responsibility to prosecute crime rest on the state through its security and judicial systems, state entities charged with these duties should ensure reported cases are well investigated and prosecuted so that victims of crime have an opportunity to testify against their assailants. In the event state representatives fail to carry out their duties, then the state is liable and should be held accountable under international criminal law.

With regard to customary international law state practice is that when a crime is committed, the state brings the perpetrator to answer and account for the crime. If the state refuses to prosecute the crime of sexual violence against refugees, then they are in breach of a peremptory norm.

¹⁶⁹ UN refugee convention (n 9 above).

¹⁷⁰ UN refugee convention (n 9 above).

¹⁷¹ International Law Commission, ‘Draft articles on responsibility of states for internationally wrongful acts, with commentary’ (2001) <http://legal.un.org/ilc/texts/instruments/english/commentaries/962001.pdf> (accessed 4 February 2018).

¹⁷² UN GA ‘Responsibility (n 166 above) art 2.

¹⁷³ UN GA ‘Responsibility (n 166 above) art 2.

The crime of sexual violence against refugees is committed by a host of perpetrators, including nationals of host states, the police of the host state, workers deployed to work in refugee camps, fellow refugees, peacekeepers, aid workers and family members. The need for these perpetrators to be held accountable cannot be over-emphasised because without criminal accountability for the crime of sexual violence against refugees the violations will continue.

It is argued there should be individual criminal responsibility, command responsibility if the act was authorised by a superior and state responsibility if it was committed by the agent of the state in the exercise of their official duty for crimes of sexual violence against refugees. Bassiouni¹⁷⁴ claims that individual criminal responsibility is both a norm of national law and international criminal law; this implies that perpetrators could either be held under the domestic laws of states or international criminal law.

A health facility located in the refugee camps

The location of a health facility in a refugee camp is vital in the reporting of sexual violence. The victim can report to the health facility where she will receive medical and psychological therapy, a sample of semen or hair (DNA) from the assailant will be taken and kept as evidence. If necessary the victim can be given therapy after giving a statement and a medical report will be added to the evidence.

Effective policing

The establishment of a police facility with holding cells in the refugee camp on its own will create a level of fear amongst the inhabitants of the camp. It will serve to deter crime by creating the fear of being apprehended and prosecuted. The role of policing in accessing justice can be broadly divided into three elements, namely, the prevention of crime through the maintenance of law and order, the enforcement of the law and the enforcement of jurisdictional verdicts.

¹⁷⁴ MC Bassiouni Introduction to international criminal law, (2003) 64.

A law clinic

The presence of a law clinic in the refugee camp will promote the dissemination of information about legal rights and the role of the victim in litigation. It will create awareness that a perpetrator of SV will be prosecuted and therefore victims will be encouraged to report incidents of crime and confidence in the judicial system of the host state will be strengthened. The presence of the law clinic will create a fear of prosecution and punishment, and curb the culture of impunity.

Effective formal justice facility

The presence of a formal justice system located in or near the refugee camp will enhance access to justice and curb the current culture of impunity. This system should provide victims of crime, especially sexual violence, access to justice, which must be affordable, characterised by a relaxed atmosphere responding promptly to their needs and staffed by experts with good judgment who possess both legal and technical expertise.

In addition, the court should incorporate the principle of reparation as enshrined in article 75¹⁷⁵ which provides for reparation for victims of violations of international human rights and gross violations of international humanitarian law. Article 79¹⁷⁶ creates a trust fund for the settlement of reparation to victims and relieves the problem of logistics in approaching a civil court for remedies.

8 Complicity in crime as a basis for criminal responsibility for the crime of sexual violence against refugees in camps

¹⁷⁵ Rome Statute of the International Criminal Court (Rome statute) 17 July 1998, United Nations, Treaty Series, volume 2187, 3.

¹⁷⁶ As above.

Criminal law is declared to be ‘premised on individual autonomy that views the offender as a rational person who is responsible for their own act’.¹⁷⁷ This statement is grounded in rational choice theory. Complicity in a criminal act has as a premise that either people created the environment or opportunity for the crime or they are an accomplice or failed to prevent the crime or did not hold accountable the perpetrators of the crime. Complicity exists in the criminal judicial systems of various countries.¹⁷⁸ Under international law complicity has its foundation in the law of neutrality and the principle of ‘just and unjust wars as an attribution model to capture the failure of states to prevent or to punish a harmful conduct by an individual’.¹⁷⁹ The failure of a state and its organs to hold perpetrators accountable for the crime of sexual violence against refugees amounts to complicity, the state should be held liable for its failure.

Complicity in a crime has been defined in a number of ways. For instance, Black’s law dictionary, defines ‘complice’ as an accessory or accomplice,¹⁸⁰ and complicity is the ‘association or participation’ in a criminal act; it also includes the performance or state of being an accomplice, which could emanate either from an individual’s conduct or that of another for which he is legally accountable’.¹⁸¹ An accomplice is a ‘person who is in any way involved with another in committing a crime, whether as a principal in the first or second degree or as an accessory’.¹⁸² An accessory is ‘a person who aids or contributes in the commission or concealment of a crime’.¹⁸³

Complicity denotes the principle that attributes criminal acts to persons who are not the direct offenders of the crime, with ‘the aim of drawing a nexus between the accomplice and the direct offender’.¹⁸⁴ Jackson describes complicity as ‘a derivative form of responsibility for the participation of wrongdoing committed by another person’.¹⁸⁵ Kutz describes complicity as a ‘concept that renders one person liable for the criminal act of another, when the accomplice

¹⁷⁷ KJM Smith, *A Modern treaty on the law of criminal complicity* (1991) 81.

¹⁷⁸ M Aksenova, *Complicity to crime in international law* (2016) 9.

¹⁷⁹ V Lannovoy, *Complicity and its limits in the law of international responsibility* (2016) 22.

¹⁸⁰ BA Garner (ed.) ‘Complicity’ in BA Garner, *Black Law Dictionary* (2004) 303.

¹⁸¹ As above 303 - 304

¹⁸² Garner (ed.) (n 180 above) 17.

¹⁸³ Garner (ed.) (n 180 above) 15.

¹⁸⁴ Aksenova (n 176 above) 1.

¹⁸⁵ M Jackson, *Complicity in International Law* (2015) 11.

intentionally aids, encourages, or both intentionally aids and encourages, the direct perpetrator in the commission of the crime'.¹⁸⁶

In addition, Salmon declares that complicity can arise in the 'form of international responsibility', and is a method of attributing private conduct to 'States that have failed to exercise the required degree of vigilance' and have a liability under international criminal law¹⁸⁷ and corporate liability under international law. Perpetrators of sexual violence against refugees who are not direct participants in the crime, such as commanders of peacekeepers, aid workers, government officials or anyone in authority who fails to prevent, act or turns a blind eye, is complicit in the crime and can be held accountable.

8.1 Complicity under international law

Participation in crime is recognised under international criminal law, although the concept is declared to be multifaceted.¹⁸⁸ Salmon declares that complicity to crime can arise in the 'form of international responsibility', a method of attributing 'the private conduct of citizens to states that have failed to exercise the required degree of vigilance'. As stated this attribution of criminal responsibility to a state can be a liability under international criminal law¹⁸⁹ and corporate liability under international law.¹⁹⁰

These concepts have been upheld in the International Criminal Court, for instance in the *Prosecutor v Galic* the commander of Bosnian Serb troops was sentenced to life imprisonment due to his failure to act against the crimes committed under his command.¹⁹¹ In the *Prosecutor v Taylor*¹⁹² the acting president of Liberia, who sponsored and assisted warlords in the neighbouring country Sierra Leone with the knowledge of large scale crimes perpetrated by them, was

¹⁸⁶ C Kutz, 'The philosophical foundations of complicity law,' in DJ and D Dolinko (eds) *The Handbook of philosophy of criminal Law* (2011)151.

¹⁸⁷ J Salmon, *Dictionnaire de droit international public* (2001) 218 - 229.

¹⁸⁸ Aksenova, (n 178 above) 1; see also Lannovoy (n 179 above) 3

¹⁸⁹ Salmon (n 187 above) 218 - 229.

¹⁹⁰ Lannovoy (n 178 above) 3.

¹⁹¹ *Prosecutor v Galic*, ICTY Case No IT-9829-t, Trial Judgement, 5 December 2003 (Galic Trial Judgement) para 741 - 749.

¹⁹² *Prosecutor v Taylor*, SCSL-03-1-T, Trial Judgement, 11 May 2012 (Taylor Trial Judgement) para 6920, 6952, 6956.

convicted and sentenced to 50 years imprisonment for aiding, abetting and planning murders, rapes and other acts of violence committed during the Sierra Leonean conflict.

8.2 Complicity under domestic law

Participation in crime is codified in most models of domestic law, where those who are complicit are known as an accomplice or accessory. The approach differs in different forms of domestic law, for instance the German approach is deductive, that is, dependent on legal ideology reliant on the application of logic and the well-developed nature of interpretation.¹⁹³ On the other hand, the common law approach is premised on an inductive approach which depends on the facts of respective cases.¹⁹⁴

Participation in crime has various prototypes, for instance the ‘unitary perpetrator model’,¹⁹⁵ also called the model of ‘individual agency’ in which all contributors to a criminal act are seen as perpetrators, without distinction between ‘perpetrators and accomplices’.¹⁹⁶ The unitary practice is common in Italy, Austria and Poland.¹⁹⁷ There is also ‘the differential participation model’ practiced by a majority of countries.¹⁹⁸ Differential participation models separate a direct perpetrator from a mere participant in the criminal act because it is believed that unintended ‘contribution to the commission of a crime varies in weight and closeness’.¹⁹⁹ So, it considers treating an accomplice and a perpetrator in the same way is an injustice.²⁰⁰ The proponents of this model believe that it provides an opportunity for the ‘perpetrators and accessory’ to be punished differently, as a result the accessory receives a lesser sentence than the perpetrator.²⁰¹

¹⁹³ Aksenova (n 178 above) 21.

¹⁹⁴ M Bohlander, *The German Criminal Code: Modern English translation* (2008) 1 - 2; see also Aksenova (n 176 above) 21.

¹⁹⁵ A Eser, ‘Individual criminal responsibility (Article 25)’ in A Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 781 - 783; see also E Van Sliedregt, ‘The criminal responsibility of individuals for violations of international humanitarian law’, *The Hague, TMC Asser Press* (2003) 61 - 62; see also Aksenova (n 176 above) 22.

¹⁹⁶ Eser (n 195 above) 781.

¹⁹⁷ Eser (n 195 above) 781 - 783; see also van Sliedregt (n 193 above) 61 - 62; see also Aksenova, (n 176 above) 22.

¹⁹⁸ Eser (n 195 above) 781 - 783; see also Van Sliedregt (n 193 above) 61 - 62; see also Aksenova (n 176 above) 22.

¹⁹⁹ Eser (n 195 above) 782.

²⁰⁰ Eser (n 195 above) 782.

²⁰¹ Eser (n 195 above) 782.

In addition, there is a nexus between perpetrators, because the responsibility of the accomplice is dependent on the crime committed by the perpetrator, which means the consequence is either ‘derivative or accessory’.²⁰²

Legal basis for complicity under domestic law

As discussed above, many domestic laws codify complicity, for instance the German Penal Code condemns the primary culprit, a co-perpetrator, an indirect offender, an instigator and a facilitator of criminal act.²⁰³ The French Penal Code identifies a perpetrator who is the principal offender and an accomplice as participants in crime; the accomplice ‘aids and assists the commission of the crime, incites the commission of the act through rewards, promises, an order or an abuse of authority or power or gives direction for the commission of the crime’.²⁰⁴

Under English law the punishment of an accomplice is based on the idea of individual freedom and premised on reverence for rational decision-making by individuals, ‘who are sovereigns of their own action’.²⁰⁵ Consequently, an accomplice receives the same punishment as the perpetrator. English law outlaws the notion of an accomplice in the form of an accessory or a ‘secondary party’ without distinction, but includes anybody who ‘aids, abets, counsels or procures a principal’.²⁰⁶

In the USA participants of crime are identified as direct and indirect perpetrators, describing the ‘promotion or facilitation of an offence, soliciting others to commit an offence, assisting or consenting or attempting to aid someone in planning and committing an offence and failure to prevent a crime as a legal duty’.²⁰⁷ In *Backun v US* the seller who transported stolen goods to

²⁰² Eser (n 195 above) 782; see also E van Slieddregt, *Individual criminal responsibility in international law* (2012) 65.

²⁰³ German Penal code, articles 25 (1) (2), 26 and 27 (1).

²⁰⁴ French Penal code articles 121.4 - 121.7.

²⁰⁵ A Ashworth, *Principles of Criminal Law* 2nd Ed. Oxford, Clarendon (1995) 532; see also SH Kadish, ‘Complicity, cause and blame: A study in interpretation of doctrine’ (1985) 73(2) *California Law Review* 409.

²⁰⁶ Accessories and Abettors Act 1861 as amended by the Criminal Law act 1977, s 64(4); see also Ashworth (n 205 above) 410.

²⁰⁷ Model Penal Code 1962, sections 2.06 (1), 2.06 (2) (c), (3) (a) (i) (ii) (iii).

another state was held complicit in the theft.²⁰⁸ The Italian Penal Code,²⁰⁹ in criminalising participation in crime, adopts the unitary approach in the belief that crime participation is by free choice and it depends on the contribution of the participant.²¹⁰ Article 110²¹¹ provides that ‘when more than one person participates in the same offence, each of them shall be subject to the punishment prescribed, except as provided in the following article’.²¹² This regulation is an indication of how slight is the involvement to be enough evidence to secure a conviction.²¹³ Article 110 covers all types of criminal involvement by co-participants. However, for a conviction to be obtained there must be a nexus between the act and the criminal outcome and that each participant must know the final objective of the action. This formulation signifies that each accomplice must purposefully and intentionally have assisted in the commission of the crime, rationally and physically.

The Russian Penal Code enumerates types of crime participants²¹⁴ to include a ‘primary’ and ‘co-perpetrator, as well as ‘an indirect perpetrator, that is a person who is not subject to criminal responsibility due to age, insanity or other factors’.²¹⁵ A crime participant is someone who ‘organised the crime or directed its execution, including anybody that created an organised group or criminal organisation or supervised them’.²¹⁶ The crime participant also is a person who ‘induced another to commit a crime, through persuasion, bribery, threat or any other means’.²¹⁷ Someone complicit is a person who ‘assisted in the commission of the crime by supplying counsel, directions, information or the means for commission’.²¹⁸

²⁰⁸ *Backun v US* 112 F 2d 635 (4th Cir 1940).

²⁰⁹ Italian Penal Code 1960.

²¹⁰ A di Amato, *Criminal Law in Italy* (Alphen aan den Rijn, Wolters Kluwer (2011) 109; Aksenova (n 176 above) 37.

²¹¹ Italian Penal Code (n 209 above).

²¹² Italian Penal Code (n 209 above).

²¹³ U Sieber, *Participation in crime: Criminal liability of leaders of criminal groups and networks, a comparative analysis* (2006) 13.

²¹⁴ Russian Penal Code 1996, art 33.

²¹⁵ As above, Art 33(2).

²¹⁶ Russian Penal Code (n 214 above) art 33(4).

²¹⁷ Russian Penal Code (n 214 above) art 33(4).

²¹⁸ Russian Penal Code (n 214 above) art 33 (5).

The Indian Penal Code²¹⁹ differentiates between the actual perpetrator of the crime and the complicit actor, and holds abetment as an offence in its own right.²²⁰ The code provides for three types of abetment: they are the instigator, conspirator and the aider of the crime.²²¹ The Criminal Law of the Peoples Republic of China (PRC) defines ‘a joint crime as an intentional crime committed by two or more persons jointly’.²²² It enumerates the actors to include a principal offender, an accomplice, someone who is compelled or induced to participate and an instigator.²²³

The Criminal Procedure Act²²⁴ of South Africa designates participants in crime in the form of an accessory before the fact and after the fact.²²⁵ The Act disallows and punishes rape committed by co-perpetrator or an accomplice.²²⁶ The Penal Code of Tanzania²²⁷ outlaws and punishes an accessory to various crimes, including treason.²²⁸ In addition, it criminalises offering advice to commit a crime,²²⁹ ‘aiding, abetting, inciting or accessory to mutiny, sedition and concealment of a crime’.²³⁰ Furthermore, it states: ‘A person who receives or assists another who is, to his definition of knowledge, guilty of an offence, in order to enable him to escape a punishment; is said to become an accessory after the fact to the fact offence’.²³¹ This code prohibits and punishes an accessory to felony and to misdemeanours.²³²

The penal code of Uganda similarly prohibits and punishes participants in crime,²³³ including persons aiding, abetting crime, or an ‘accessory before and after a crime or conceals any of those

²¹⁹ India Penal Code 1860

²²⁰ *Jamuna Singh v State of Bihar* AIR 1967 SC 553; see also *Kishori Lal v State* MAT AIR 1999 SCW 1115; see also *Sohan Raj Sharma v State of Haryana* 2007 SCW 1464, see also Aksenova (n 176 above) 42.

²²¹ India Penal Code (n 219 above) sec 107.

²²² Criminal Law of People Republic of China (PRC) 1973, art. 25.

²²³ As above, arts. 26, 27, 28, and 29.

²²⁴ The Criminal Procedure Act, Act 51 of 1977, sec 155.

²²⁵ As above, sec 257.

²²⁶ Act 51 of 1977 (n 224 above) Schedule 6 Rape (a) and sec 1 (b) (iii).

²²⁷ The Penal Code, Cap. 16, 1981 (This Code) Tanzania.

²²⁸ As above, sec 41.

²²⁹ This Code (n 227 above) sec 45, 46, 47, 213.

²³⁰ This Code (n 227 above) sec 213.

²³¹ This Code (n 227 above) sec 387.

²³² This Code (n 227 above) sec 288-389.

²³³ Penal Code Act, Chapter 120 1950, Uganda, sec 994 and 395.

acts’,²³⁴ as well as anybody who incites agitation or is rebellious to legal instruction.²³⁵ Complicit persons are those who ‘procure, persuade, attempt to procure or persuade, harbour or aid in concealing,²³⁶ anyone who induces, and compels others to unlawful acts’.²³⁷ Section 393 defines an accessory as a ‘person who receives or assists another who is, to his or her knowledge, guilty of an offence, in order to enable him or her to escape punishment, becomes an accessory after the fact to the offence’.²³⁸

The domestic criminal laws clearly view complicity to crimes as a crime. Those who are complicit in sexual violence against refugees camps should be held accountable in the same way as the direct participant in the crime in order to deter the committing of crime and end the current culture of impunity. International and domestic law outlaw complicity in crime which is punished under both jurisdictions. It is submitted that these principles should be adhered to in promoting access to justice for victims of sexual violence in refugee camps. It suggests in accordance with the doctrines of complicity that the state and its agents who fail to act or prevent the commission of sexual violence should be prosecuted and held liable.

9 Customary international law

The primary sources of international law are customary international law (CIL) and treaties. The focus here is on customary international law, and will begin with a brief explanation of ‘custom’. ‘Custom’ has been described as traditional conduct that is consistent and is considered a representation of a communal life system that develops into law over a period of time and which helps to establish and preserve cohesion in a social order.²³⁹ Also, customs are denoted to represent ‘a habitual practice’ or a typical mode of acting in specified environments, compartments

²³⁴ As above, sec 23 (d), 206.

²³⁵ Penal Code Act (n 233 above) sec 29.

²³⁶ Penal Code Act (n 233 above) secs 31 and 32.

²³⁷ Penal Code Act (n 233 above) secs 251 and 252.

²³⁸ Penal Code Act (n 233 above).

²³⁹ A Crossman, ‘Customs -The importance in society’ ThoughtCo (2017) <https://www.thoughtco.com/custom-definition-3026171> (accessed 19 July 2017).

or ‘a practice that has been used regularly to the extent that it has the force of law or duties imposed by law’.²⁴⁰

Sociologically, the word ‘custom’ defines a set of practices is ‘transferred from one generation to another’.²⁴¹ There are general and special customs under international law; general customs are those ‘rules, norms and principles that are applicable to all nations’, for instance, the laws relating to the ‘high seas, airspace, diplomatic treaties, and laws of armed conflict’.²⁴² It is argued that the apprehension, investigation, prosecution, conviction, and sentencing of perpetrators of crime, including sexual violence should be regarded as customary practices of states, because it is the custom of all states to act in these circumstances in terms of domestic law. If regarded as a general custom of international law, then states in default of their obligations in this respect could be held accountable.

The special customs of international law refer to the relationships between specific states.²⁴³ These customs apply to non-comprehensive issues, for instance, ownership or ‘rights to some ‘world real estate’, to ‘cases of acquisitive prescription, boundary disputes, and so-called international servitudes’.²⁴⁴ They may also refer to laws explicitly restricted to nations or certain regions, such as asylum law in Latin America.²⁴⁵

Article 38 (1) (b) of the Statute of the International Court of Justice acknowledges customary international law (CIL) as ‘international custom, and an evidence of the general practice of law’.²⁴⁶ This notion was applied by the ICJ in *North Sea Continental Shelf Cases (F.R.G. v. Denmark; F.R.G v.the Netherlands)*.²⁴⁷ In the *North Sea Continental Shelf case* ²⁴⁸ a dispute

²⁴⁰ Dictionary.com, ‘Custom’ in Dictionary.com, <http://www.dictionary.com/browse/customs> (accessed 19 July 2017).

²⁴¹ As above

²⁴² A D’Amato ‘The Concept of Special Custom in International Law’ Faculty working papers, paper 116, North-western University School of Law (2010) 2, <http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/116> (accessed 19 July 2017).

²⁴³ As above.

²⁴⁴ D’Amato (n 240 above) 2.

²⁴⁵ D’Amato (n 240 above) 2.

²⁴⁶ United Nations, Statute of the International Court of Justice (SICJ), 18 April 1946, art 38 (1) (b).

²⁴⁷ *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, 1969 I.C.J. 3 (Feb. 20).

²⁴⁸ As above, para. 39, 77.

arose between the Netherlands and Denmark over incomplete borderlines created ‘on the equidistance principle (A-B and C-D)’.²⁴⁹ A covenant to expand the frontier was inutile because Denmark and the Netherlands preferred an option by which expansion was on the ‘equidistance principle (BE-DE)’. Germany felt that the arrangement of ‘the demarcation of both borders will be disadvantageous to her’²⁵⁰ as a result of the concavity of the seaboard, resulting in Germany's loss of her portion of the continental shelf, founded on proportionality to the span of its North Sea seashore’.²⁵¹ The court had to decide whether under article 6 of the 1958 Geneva Convention²⁵² Germany was bound by customary international law, amongst other issues.²⁵³ The court held that the ‘use of the equidistance’ technique of measurement had not developed into customary law and thus the technique was not compulsory for the demarcation of the parts in the North Sea related to the current court action.²⁵⁴

The court added that ‘for the rule to be classified as customary international law the custom must be prevalent and show illustrative involvement by states in the convention, including states whose interests were especially affected’.²⁵⁵ Additionally, the practice must be identical with consistent and uniform usage in such a way as to establish ‘universal acceptability under the rule of law or lawful duty (opinion juris)’.²⁵⁶ The court held further that the number of states (31) complying with the convention as inadequate to establish a CIL rule.²⁵⁷ Since at that time 126 UN members were indifferent to the application of the convention.²⁵⁸ In arriving at this decision the court stated:

With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any

²⁴⁹ *Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands* (n 247 above).

²⁵⁰ *Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands* (n 247 above).

²⁵¹ *Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands* (n 247 above).

²⁵² International Law Commission, Convention on the Continental Shelf, 29 April 1958, United Nations, Treaty Series, vol. 499, 311.

²⁵³ *Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands* (n 247 above).

²⁵⁴ *Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands* (n 247 above).

²⁵⁵ *Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands* (n 247 above).

²⁵⁶ *Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands* (n 247 above).

²⁵⁷ *Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands* (n 247 above); see also Convention on the Continental Shelf (n 252 above).

²⁵⁸ United Nations, ‘Growth in United Nations Membership, 1945–present’, United Nations, <http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html> (16 April 2018).

considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.²⁵⁹

Customary international law has been denoted as emanating from ‘a general and consistent practice of states followed by them from a sense of legal obligation’.²⁶⁰ In terms of these definitions the essential elements of customary international are ‘general practice’ which is accepted as law and ‘a sense of legal obligation also known as *opinio juris sive necessitatis*’.²⁶¹

State Practice

State practice as the objective element of CIL reflects acts or omissions by states and can be conceived of as any act of a state representative.²⁶² It can be respect for ‘a particular issue that amounts to direct action by, or has a direct effect on, the state whose behaviour is in question’.²⁶³ For instance, state practice includes scenarios in which a state sends its armed forces to occupy a disputed border in order to resolve a border dispute or makes a formal proclamation declaring the disputed border as part of its territory or ‘a diplomatic protest of another state’s occupying that territory’.²⁶⁴

Conversely, a state agent voting in favour of a ‘non-binding resolution’ in an international body deciding on ‘a border dispute to which the voting state was not a party would have no effect on that state’ and would not create state practice.²⁶⁵ ‘*A fortiori*, a state’s vote for a non-binding resolution purporting to establish general rules for addressing border disputes, since no specific issue would be involved’ does not constitute state practice.²⁶⁶

²⁵⁹ *Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands* (n 247 above).

²⁶⁰ American Law Institute, ‘Restatement of the Law, Third, the Foreign Relations Law of the United States’, St. Paul, Minn.: American Law Institute Publishers, (1987) art 102(2).

²⁶¹ General Assembly, ‘Second report on identification of customary international law’ Sixty-sixth session Geneva, 5 May-6 June and 7 July-8 August 2014; see also G Norman and JP Trachtman ‘The Customary International Law Game’ (2005) 99 (3) *The American Journal of International Law* 541 - 580.

²⁶² A.M Weisburd, ‘The International Court of Justice and the Concept of State Practice’ (2009) 32 (2) *University of Pennsylvania Journal of International Law* 303.

²⁶³ As above.

²⁶⁴ Weisburd (n 262 above) 303.

²⁶⁵ Weisburd (n 262 above) 303.

²⁶⁶ Weisburd (n 262 above) 303.

State practice has been declared to consist of ‘diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states’, for instance the ‘Organization for Economic Cooperation and Development (OECD)’.²⁶⁷ State practice includes inaction, this is when a state complies with the ‘acts of another state that affect its legal rights’²⁶⁸ or does not take any action.

The practice may have exist for a brief time, but the vital issue is that the practice is ‘general and consistent’.²⁶⁹ It is inconsequential whether or not the practice is unanimously followed by states, but it must ‘reflect wide acceptance among the states particularly involved in the relevant activity’.²⁷⁰ However, a dissenting state during its establishment is not bound by the rule.²⁷¹

Brownlie enumerates the practice of states to include ‘diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. manuals of military law, executive decisions and practices, orders to naval forces etc’.²⁷² Brownlie further states that ‘comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions’ also constitute state practice’.²⁷³ Other acts classified as state practice are ‘recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly’.²⁷⁴

Opinion juris

²⁶⁷ American Law Institute, Restatement of the Law, third (n 260 above).

²⁶⁸ American Law Institute, Restatement of the Law, third (n 260 above).

²⁶⁹ American Law Institute, Restatement of the Law, third (n 260 above).

²⁷⁰ American Law Institute, Restatement of the Law, third (n 260 above).

²⁷¹ American Law Institute, Restatement of the Law, third (n 260 above).

²⁷² I Brownlie, *Principles of Public International Law* (2003) 6.

²⁷³ As above.

²⁷⁴ Brownlie (n 269 above) 6.

Opinion juris is the subjective and a psychological element of CIL²⁷⁵ and denotes, for a state practice to be considered a CIL rule, the state must observe the practice from the reasoning of a legal duty.²⁷⁶ It implies that a level of consent by the state is required to be bound by the rule.²⁷⁷ Thus, in *Nicaragua v the United States of America (USA)*²⁷⁸ the ICJ denoted customary international law as a steady action of states in compliance with the rule because it is legally binding.²⁷⁹ In that case the military and paramilitary of the United States engaged in actions against the Nicaraguan state from 1981 to 1984.²⁸⁰ The USA claimed they acted in self-defence pursuant to article 51 of the UN Charter.²⁸¹ Nicaragua requested the court to declare the USA's actions a violation of customary international law.²⁸² The court in determining all the questions raised held that the United States was in contravention of customary international law obligations by intervening in the affairs of another independent state and that they cannot rely on the provision of self-defence in the use of force.²⁸³

Customary international law can also arise from treaties, where these are intercontinental contracts established amongst countries in print form, administered by international law and whether it is expressed in one device or in two or more linked documents with a precise title.²⁸⁴ States have to declare their intention to be bound by the contract through consent in the form of 'ratification, acceptance, approval and accession' or 'make reservations through the exclusion or modification of certain clauses that they would not like to be bound by as a State'.²⁸⁵

²⁷⁵ *South West Africa, Ethiopia v South Africa*, Second Phase, [1966] ICJ Rep 6, ICGJ 158 (ICJ 1966), 18th July 1966, International Court of Justice [ICJ] 10, J. Pleadings. Oral Arguments and Annexed Documents, 8.

²⁷⁶ American Law Institute, Restatement of the Law, third (n 260 above).

²⁷⁷ *Ethiopia v South Africa* (n 275) 8; see also O Elias, The nature of the subjective element in customary international law (1995) 44 (3) *The International and Comparative Law Quarterly* 501 - 520.

²⁷⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* Merits, Judgment, I.C.J. Reports 1986, 14 para. 186.

²⁷⁹ As above.

²⁸⁰ *Nicaragua v United States of America* (n 278 above).

²⁸¹ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

²⁸² *Nicaragua v United States of America* (n 276 above)

²⁸³ *Nicaragua v United States of America* (n 276 above).

²⁸⁴ Vienna Convention on the Law of Treaties Done at Vienna on 23 May 1969, art 2 (1) (a).

²⁸⁵ As above art. 2(1) (b) (d).

In the *Continental Shelf case of Libyan Arab Jamahiriya v Malta*²⁸⁶ customary international law was also upheld to have originated from treaties adopted by nations and from other governmental activities.²⁸⁷ In this case the Socialist People's Libyan Arab Jamahiriya and the Republic of Malta submitted a disagreement to ICJ with regard to the demarcation of the continental shelf between them.²⁸⁸ The court had to agree on the guidelines to apply under the principles and rules of international law for the delineation of the continental shelf between the Republic of Malta and the Libyan Arab Republic, and how such principles and rules could be employed devoid of misperception.²⁸⁹ Both parties were signatory to 1982 United Nations Convention on the Law of Sea, even though it had not come into force at that time. The court had to depend on this law and decided in favour of Malta. It is submitted that the court may have relied on the principle of the second report on identification of customary international law²⁹⁰ paragraph 62, that 'some other extra-customary obligations be taken as indicating acceptance as law'²⁹¹ when the parties to a treaty act in compliance with their conventional obligations; this generally does not demonstrate the existence of an *opinio juris*.²⁹²

On the other hand, where states act in conformity with a treaty by which they are not (yet) bound or towards states not parties to the treaty, the existence of 'acceptance as law' can be established.²⁹³ It can be inferred in situations where non-parties to a treaty comply with the rules embodied therein, for example, with certain non-parties to the United Nations Convention on the Law of the Sea.²⁹⁴ It is submitted that on these grounds nations who host refugees can be held liable when they are in breach of their obligations to protect refugees against sexual violence and be held accountable for not granting access to court.

²⁸⁶ *Continental Shelf (Libyan Arab Jamahiriya/Malta)* Judgment, I.C.J. Reports 1985, 13, para 27

²⁸⁷ As above.

²⁸⁸ *Libyan Arab Jamahiriya/Malta* (n 286 above).

²⁸⁹ *Libyan Arab Jamahiriya/Malta* (n 286 above).

²⁹⁰ General Assembly, 'Second report on identification of customary international law' Sixty-sixth session Geneva, 5 May-6 June and 7 July-8 August 2014.

²⁹¹ O Schechter, 'Entangled treaty and custom' in Y Dinstein, & M Tabory (eds.) *International law at a time of perplexity: Essays in honour of Shabtai Rosenne* (Martinus Nijhoff Publishers, 1989), 717.

²⁹² Second report on identification of customary international law (n 290 above).

²⁹³ *Venezuelan practice in Colombian-Peruvian asylum* case, Judgment of November 20th, 1950: I.C.J. Reports 1950, 266, 370 (Dissenting Opinion by Judge ad hoc Caicedo Castilla).

²⁹⁴ Second report on identification of customary international law (n 290 above): see also Maritime Dispute (*Peru v Chile*) CR 2012/34, 43, para. 10.

What is required for customs to become law? In order to establish a rule as CIL section 103 of Restatement of the Law, Third, the Foreign Relations Law of the United States, provides that the rule must be conferred with ‘substantial weight’ by ²⁹⁵

- a) judgments and opinions of international judicial and arbitral tribunals
- (b) judgments and opinions of national judicial tribunals
- (c) the writings of scholars
- (d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states.²⁹⁶

Hart believes that customs are the legitimate framework of a nascent society devoid of ‘a legislature, courts, or officials of any kind’.²⁹⁷ Hart declare that society imposes obligations on itself.²⁹⁸ For a rule to exist means that most inhabitants of a community are engaged in that conduct and nonconformity to that norm is viewed as an offence which is criticised by those who uphold that particular conduct. Therefore, people are compelled to adhere to that behaviour.²⁹⁹ Hart states that the existence of an ‘internal attitude’ in relation to such a conduct by distinct dwellers of the community is what makes those rules a law, because they are being obeyed by the society.³⁰⁰ He observes that in an advanced society the situation is different because the rule must be accepted. It confers legislative powers on an individual or bodies and authorises individuals to decide whether the rule is violated or not.³⁰¹

It is trite to argue that the mere acceptance of refugees by states, whether or not that state is a signatory to the 1951 refugee convention or its regional counterpart, by default, have created a rule of hosting refugees that they have to abide by. Thus, states which have an obligation to protect their citizens against SV also assume responsibility for protecting refugees in their territory against SV and for bringing offenders to book.

²⁹⁵ American Law Institute, Restatement of the Law, third (n 260 above).

²⁹⁶ American Law Institute, Restatement of the Law, third (n 260 above).

²⁹⁷ RM Walden, ‘Customary international law: a jurisprudential analysis’ (1978)13 *Israel Law Review* 86.

²⁹⁸ As above.

²⁹⁹ Walden (n 297 above)

³⁰⁰ Walden (n 297 above) 87.

³⁰¹ Walden (n 297 above) 88.

10 Locus standi

For an individual to freely access a court to institute a legal proceeding they must possess a standing or capacity to appear before a court of law as a party to the litigation.³⁰² This suggests that access to court is not absolute to all human beings and is a preliminary issue courts usually address, without which the substantive case may not proceed. *Locus standi* is also referred to as ‘standing to sue’ or ‘title to sue’³⁰³ and has been described as ‘the right of an individual to have a court adjudicate a dispute brought before it and instituted by the individual or group’.³⁰⁴

In theory, in effect, standing is ‘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 a dispute ought to be resolved.³⁰⁵ In practice, they are intertwined.³⁰⁶ The issue of standing has been denoted to be strictly applicable in private law, for instance in intermediary recipient disputes.³⁰⁷ 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 bias.³⁰⁸ The issue of standing also surfaces in cases of the common law of public nuisance, in actions where declarations and injunctions are required and in situations where a person is authorised by law to take part in a decision made by way of a trial by objections or appeals.³⁰⁹

For a person to possess *locus standi* the person must have a legal interest in the relevant relief sought,³¹⁰ as declared in *Dalrymple and others v Colonial Treasure* where a group of taxpayers wanted to stop the members of the Transvaal parliament from pronouncing ‘an extraordinary

³⁰² E Legere ‘*Locus Standi* and the public interest: A hotchpotch of legal principles’ (2005) *Judicial Review* 128; see also U Huber *Hedendaegse Rechtsgeleerdheyt* 4.15.39 (Gane's translation) cited in A Beck ‘*Locus Standi* in *Judicio* or *Ubi Ius Ibi Remedium*’ (1983) *South African Law Journal* 278.

³⁰³ LA Stein ‘The theoretical foundation bases of *locus standi*’, in LA Stein (ed.) *Locus standi* (1979) 3.

³⁰⁴ As above.

³⁰⁵ L Baxter, *Administrative Law* (1984) 647.

³⁰⁶ As above, 644.

³⁰⁷ *Vandervell Trustee Ltd. v White* [1970] All E.R. 16 A at 31 (H.L.).

³⁰⁸ Stein (n 303 above) 3.

³⁰⁹ Stein (n 303 above) 3.

³¹⁰ C Loots ‘*Locus Standi* to claim relief in the public interest in matters involving the enforcement of Legislation’ (1987) *South African Law Journal* 131; see also *Attorney - General Federation v Attorney-General of the 36 States of Nigeria* (2001) 9 SCM 45 59; see also *Dalrymple and others v Colonial Treasure* 1910 TS 372.

session to be an ordinary session'³¹¹ in order to increase their wages.³¹² The court decided that, 'the general rule of our law is that no man can sue in respect of a wrongful act, unless it constitutes the breach of a duty owed to him by the wrongdoer, or unless it causes him some damage in law'.³¹³ In addition, the applicant must possess the 'capacity to sue';³¹⁴ it entails that the claim must be grounded on a lawfully enforceable right and the applicant is entitled to enforce that right.³¹⁵

For 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'³¹⁶ where the claimant must demonstrate that he has an adequate interest both in fact and in law in relation to the suit.³¹⁷ A victim of sexual violence, for instance, is thought to have sufficient interest because she has directly suffered harm and as a result the public has indirectly suffered. It is argued she should be conferred with *locus standi* to co-prosecute the perpetrator.

The originator of the proceeding may also be required to succeed with the 'person aggrieved' test.³¹⁸ For instance, an applicant who owns a land in a particular location who has been affected by a decision of the authorities is a person aggrieved and has every right to institute an action against the order of an authority.³¹⁹ This provision has been challenged in court. For instance, in *Morbaine Ltd v (1) Secretary of State (2) Stoke on Trent City Council*³²⁰ 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. It is submitted that a victim of sexual violence is the person directly affected by the crime, therefore, is a person aggrieved and should be joined to the prosecution of the assailant.

³¹¹ *Dalrymple and others v Colonial Treasure*, as above.

³¹² *Dalrymple and others v Colonial Treasure* (n 308 above) 379.

³¹³ *Dalrymple and others v Colonial Treasure* (n 308 above) 379.

³¹⁴ Beck (n 302 above) 278, 283.

³¹⁵ Beck (n 302 above) 278, 283.

³¹⁶ *Rescue Committee, Dutch Reformed Church v Martheze* 1926 CPD 298; see also *Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd.* 1933 AD 87.

³¹⁷ Legere (n 302 above) 126.

³¹⁸ Town and Country Planning Act 1990 (TCPA) s. 288.

³¹⁹ Legere (n 302 above) 129.

³²⁰ *Morbaine Ltd v (1) Secretary of State (2) Stoke on Trent City Council* [2004] EWHC 1708 (Admin)

In order to establish standing a litigant must pass the ‘victim’s’ test. This requirement is provided for under article 34 of the European Convention on Human Rights³²¹ and the United Kingdom Human Rights Act, a victim of an unlawful act has standing in legal proceedings.³²²

In *R v (1) Secretary of State for the Home Department (2) Lord Chief Justice of England and Wales (ex p. Ralph Bulger)*³²³ the father of a murdered toddler, Jamie Bulger, applied for review of the lord chief justice’s decision on the fee fixed by the court. The court of appeal held that the father does not have an interest and, thus, has no standing.³²⁴ Rose LJ³²⁵ is of the view that if the family of a victim can contest the sentencing process, then the family of the defendant also can do so. In that light the decision is a violation of the right to a fair hearing and contrary to the principles of equality before the law and human rights as it robs the victim of their rights. The criminal justice system gives perpetrators of crime the opportunity to plead their case and even appeal against the decision of a court, it is submitted that victims of crime should not be deprived of the right to equality and a fair hearing. The victim should be able to assert their rights against their assailant as co-prosecutor and be able to appeal against the sentence.

The court took the view that in criminal cases there is no need for a third party to intervene to uphold the rule of law.³²⁶ This aspect of the judgment, it is argued, is ironical, because the rule of law is meant to promote, equality, impartiality and the rights of an individual. It is submitted that the rule of law without the promotion of the rights of individuals, who constitute the public, is a chimera. The option Mr Bulger challenging the decision on the impact of his son’s death in a civil suit is inhumane, degrading, a waste of time and resources and amounts to an infliction of a fresh injury. It is a further violation of his right to access the courts.

The argument is that if a victim were to be accorded this right under a human rights act, then a victim of sexual violence would be accorded legal standing in criminal proceedings so that she

³²¹ 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.

³²² Human rights Acts 1998 chapter 42, sec 7 (1) (a).

³²³ *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.

³²⁴ As above.

³²⁵ *Ex p. Ralph Bulger* (n 321 above) paras 21 - 22.

³²⁶ *Ex p. Ralph Bulger* (n 321 above) paras 21 - 22.

can enforce her rights and would constitute a paradigm shift from the usual proceedings. The reasons which support this view are that the crime of sexual violence is directed against the victim and indirectly against the rule of law,³²⁷ so the victim of sexual violence should be authorised to protect their individual rights during the criminal proceedings and the state prosecutor defend the rule of law. The victims of crime should not merely stand as witnesses against their violators in domestic courts, or join the criminal proceeding as a civil participant, but should have an equal opportunity to be represented themselves and defend their rights by filing a criminal suit in court directly as an injured party alongside the prosecutor acting on behalf of the state. This opportunity is desirable particularly in light of the reality of weak investigation, inept prosecution and tardiness on the part of public prosecutors.³²⁸

Constitutions establish equality before the law and the right to a fair hearing³²⁹ although the latter is in relation only to perpetrators of crime. It is argued equality before the law can be achieved only if the right is in relation to victims of crime as well. Since a state prosecutor are to defend the interest of the public, for the victim to enjoy equality with the right accorded the accused they should have standing before the court.

11 Conclusion

This chapter interrogated how to facilitate access to justice for victims of sexual violence in refugee camps. The chapter critically examines the concept of access to justice, the types of access required and sketched the ideal type of access. It investigated and identified general and specific problems that constitute obstacles to accessing justice by victims of SV. In a bid to promote accessibility and accountability for the crime of SV against refugees the chapter discusses various mechanisms that can be established to make accessing justice easier for victims. These include establishing state responsibility, a one-stop facility located in refugee camps comprising

³²⁷ *Ex p. Ralph Bulger* (n 321 above) paras 21 - 22.

³²⁸ *Mabuwa* (n 126 above) 40 - 47.

³²⁹ The Constitution of the Republic of South Africa (1996) (South African constitution) art 9(1) & 34; see also The Constitution of the United Republic of Tanzania 1997 (Cap 2) (Tanzania Constitution) art 13 (1), (6) (a); see also Constitution of the Republic of Uganda, 1995 (Uganda Constitution) art 21 (1) & art 28.

a health facility, effective policing (police stations in camps), a law clinic and an effective formal justice facility.

The chapter critically appraises the concept of complicity to a crime as a means of holding accountable all participants in sexual violence against refugees. Further, it analysed the subject of customary international law as a means of compelling states to fulfil their international obligations to refugees who are victims of SV in their territories. It concluded with the examination of *locus standi* as a means of empowering victims with the legal capacity to enjoy full participation in criminal proceedings so as to balance the inequality in situation between the accused and victims of crimes in criminal proceedings and to enforce their rights against the assailant.

Chapter 7

Conclusion and recommendations

1 Introduction

The refugee issue has become a perennial problem which is aggravated by human rights violations. It is clear that female refugees have not been adequately protected against SV and the apprehension and prosecution of offenders has been limited. They may be acquitted for want of evidence and as a consequence of inept prosecution. However, where convictions and victims are left to live with the consequence, without a remedy or reparation to ameliorate their plight.

2 Synopsis of findings

2.1 Chapter 1

Chapter 1 discusses the implications of the topic of the study, captures the research questions, provides the thesis statement and outlines the objectives. The chapter exposes the problem of sexual violence against female refugees in camps and the struggle to access justice, using South Africa, Tanzania and Uganda as case studies. It indicates where there are gaps in accessing justice by victims of sexual violence. In order to be unambiguous the various concepts used throughout the investigation are defined and discussed, including access to justice, human rights, sexual violence, victim, refugee and reparation. The limitation of the study is specified, as well as describing the research method and the significance of the study and offering an overview of the chapters.

2.2 Chapter 2

Chapter 2 laid the foundation for the study by analysing the major legal theories which are the building blocks that underpin the investigation. The theories are of relevance when explaining why the female refugees are violated and assist in finding reasons why the refugees must secure access to justice. The theories also provided justification for the punishment of the perpetrators,

the motivations for reparations for the victims and the principles to be adopted in the curbing of the current culture of impunity were all shared.

2.3 Chapter 3

Chapter 3 presents a historical overview of the refugee problem, presenting its evolution over time. The chapter narrates the effects of migration on females, delineating the problem of sexual violence, the host of offenders, the typology of the violence and the consequences for victims. Chapter 3 examines the dynamics of SV in order to seek to explain why the perpetrators commit the crime and how the international community deals with perpetrators of SV in war through an examination of the jurisprudence of sexual violence in armed conflict. The investigation revealed that victims do not have access to justice, often the perpetrator escapes responsibility but the victim lives with the consequences.

2.4 Chapter 4

Chapter 4 critically examines the provisions of international and regional refugee instruments and legal frameworks in the African Union, the European Union and the Inter-American Organisation to determine the protection offered female refugees against sexual violence or the manner in which acts of sexual violence are addressed. It found that the protection clause in the international and regional conventions dealt with the issue of non re-fouler as the legal basis for refugees residing in the host state but offer no explicit protection against crime or human rights violations.

With regard to access to justice it is observed that under the UN Refugee Convention and its Protocol there is no specific provision for accessing justice for victims of sexual violence in refugee camps. Article 16 of the UN Refugee Convention, 1951 provides in general for access to court in contracting states, but the provision is too vague to conceptualise the rights of refugees who are victims of human rights violations to have access to court in the host states. It is trite to submit that access to court is not absolute, especially in respect of the victim because they do not have the requisite legal standing to access the court directly in their own right. Crime is viewed as against the state and a challenge of the rule of law and not against the individual, thus this provision is of little value to victims of sexual violence. On the possibility

of the victim obtaining a fiat to hire the services of a private prosecutor, it is found the prosecution of the perpetrator remains on behalf of the state and the rights of the victim are not protected or enforced.

Article 16 of the UN Refugee Convention, 1951 confers jurisdiction for dealing with legal issues relating to refugees on the domestic courts of the contracting state. This provision causes a complication in that offenders who are covered by immunity such as peacekeepers or humanitarian workers who commit crimes in a territory where they are serving cannot be prosecuted in the country where the crime was committed but have to be repatriated to face prosecution. This is a cumbersome process and it is unlikely their victims will travel to testify against them. The three regions have adopted the non-refouler clause, but have not addressed the problem of human rights violations in relation to SV against female refugees. Sexual violence is outlawed in various other legal instruments, such as the Convention on preventing and combating violence against women and domestic violence, which provides for asylum and the protection of refugee women against SV in Europe.

With regard to access to court and to justice the OAU refugee convention has no provisions for access to court but other human rights instruments provide access and even use the phrase 'access to justice'. The European Union Treaty Establishing the European Community orders state parties to legislate on refuge but has no reference to access to court and to justice. The issue is dealt with implicitly or explicitly in other human rights legal instruments. With regard to the OAS there are no clause dealing with access to court and to justice in the Cartagena declaration, which is a soft law. However, access is provided for in other Inter-American legal instruments.

2.5 Chapter 5

Chapter 5 examines the legal framework for addressing sexual violence in the jurisdiction of contracting parties, using South Africa, Tanzania and Uganda as case studies. The aim was to discover whether these frameworks applied to refugees, per article 16 of the UN Refugee Convention. The investigation reveals that countries signatory to the UN Refugee Convention, 1951 and to the OAU Refugee Convention domesticated the provisions of these conventions.

Therefore they are bound to fulfil their international obligations to protect refugees and to enforce their rights.

The enquiry indicates that cases of SV against citizens are prosecuted, but the victim is not an active participant in the criminal proceedings but is merely a prosecution witness. It was detected that documentation of prosecuted cases of SV against female refugees is scarce. For example, female refugees who are victims of SV have no recourse to the justice system in South Africa because of xenophobia, the lack of documentation and discrimination. They are a soft target. It was observed that some perpetrators of SV against female refugees have been prosecuted in Tanzania but the cases were dismissed for want of evidence and tardiness on the part of the prosecutors or for inept prosecution. On the rare occasion when there is a conviction the perpetrator is gaoled but the victim is not compensated. Uganda has a mobile court that visits one of the refugee camps, but there is yet to be documentation of prosecuted cases of sexual violence against female refugees.

2.6 Chapter 6

Chapter 6 focuses on the mechanisms in place to facilitate access to justice for victims of SV in refugee camps. It exposes the general and specific obstacles to accessing justice and discusses the principles underlying ascribing responsibility for crime. The doctrine of complicity and the practices of customary international law were examined as basis for holding accountable all participants in crime and are the basis for suggested models that advance victims' access to justice. Customary international law was presented as an avenue compelling states to fulfil their international obligations to refugees. The chapter concludes with an examination of *locus standi* as a means of conferring on victims of SV full participation in criminal proceedings so that they enjoy the full benefits of article 16 of the Refugee Convention 1951.

3 Conclusion

The research embarked upon in the course of this study led to these conclusions emerging from the work.

- ❖ Female refugees are not adequately protected against sexual violence in refugee camps and they are highly vulnerable to SV. Thus, various forms of sexual violence in camps occur with impunity.
- ❖ Refugees do not always report cases of SV for fear of discrimination, a lack of documentation, the fear of not being believed and of detention and repatriation and a lack of confidence in the state judicial system. Sometimes, the dearth in reporting is due to an inadequate facility for reporting.
- ❖ Perpetrators seldom are arrested. If an arrest takes place, prosecution is rare because of unwillingness on the part of state authorities to prosecute cases of crime against refugees.
- ❖ The UN Refugee Convention, 1951 and its Protocol, 1967 do not protect refugees in camps located in host states against human rights violations such as SV. It is submitted that the convention is not conceptualised to cover human rights violations in the case of refugees.
- ❖ The jurisdiction for addressing the legal needs of refugees is the domestic court of host state according to article 16 of the UN Refugee Convention, 1951, where there is access to court in the contracting state. Article 16 is unclear on the subject of access to court. Additionally, victims of crime in the current criminal dispensation in domestic courts do not possess the capacity to assert their rights as they are not directly a party to the criminal proceeding, but mere prosecution witnesses.
- ❖ Under international criminal law victims of crime do not also have free access to court, instead they are conferred with limited participation in the ICC at certain stages of the litigation but not as a full party to the litigation, as discussed in chapter 4.
- ❖ The domestic jurisdiction for accessing a court with regard to criminal proceedings is a challenge because not all perpetrators of crimes against refugees can be held accountable for the crime committed in the state of refuge. For instance, the jurisdiction for the prosecution of peacekeepers is the domestic courts of the troop-contributing state. The domestic courts of the state of commission do not possess jurisdiction to try perpetrators who are covered by immunity.
- ❖ In South Africa cases of sexual violence against citizens are treated seriously and prosecuted, although it has been stated that the majority of such cases go unreported. There is no record of reported, documented and prosecuted cases of

sexual violence against refugees, as is shown in chapter 5. Refugees who report cases to police are discriminated against and are not taken seriously. Thus, in South Africa refugees who are victims do not report cases of SV so the perpetrators are not prosecuted. It is trite to conclude that South Africa is in breach of article 16 of the UN Refugee Convention, 1951 by not prosecuting cases of sexual violence against refugees in the way cases of sexual violence against citizens are prosecuted. Refugees do not have the opportunity to testify against their assailants as do citizens in a criminal proceeding.

- ❖ Tanzania deals seriously with crimes of sexual violence against its citizens. A few cases of sexual violence against refugees have been prosecuted although the documentation of such cases is scant. It is reported that majority of cases are not properly investigated and consequently they may not get to the stage of prosecution. In addition, there are complaints of a lack of adequate qualified personnel and materials for the effective prosecution of the cases. Though Tanzania has tried to comply with the provisions of article 16 of the UN Refugee Convention, 1951 by the prosecution of a few cases, this minimal compliance is insufficient. Tanzania also fails to fulfil their obligation under a right of access to court since cases of SV against refugees are not prosecuted with the same rigour as cases involving citizens. Refugee victims will not have an opportunity to testify against their offender during a criminal proceeding.
- ❖ Uganda too is hard on sexual violence against its citizens. It established a mobile court solely for the purpose of prosecuting sexual violence against refugees in one of the camps, yet there is no record of a prosecuted case of SV. Uganda demonstrates willingness to prosecute cases of SV against refugees in camps by the establishment of a mobile court, but this effort has yet to yield the desired result. It is submitted that an unfruitful effort is a failure of compliance. Uganda can be said to be in breach of article 16 of the UN Refugee Convention, 1951 because cases of SV against citizens are prosecuted and victims are allowed to testify against the offender, whereas refugees are not treated in the same way.

It is submitted that the current UN refugee regime cannot facilitate access to justice for these victims of sexual violence because access was not adequately conceptualised in the UN Refugee Convention 1951 and its Protocol 1967 and in the conventions of the African Union, the

European Union and the Inter-American Organisation. Other instruments deal with SV, some are not binding and others do not relate to the peculiar nature of the problem in respect of refugees. There is a need for a legal instrument that is binding and compels states to address the problem of sexual violence in relation to their citizens and to and to refugees. The various instruments, whether soft or hard law, must be harmonised and guidelines provided in a single binding instrument.

Article 16 of the UN Refugee Convention 1961 provides for access to court. The investigation indicates refugees do not have access to court and access to court is not tantamount to access to justice but could lead to access to justice. It is submitted that the states examined are in breach of article 16 of the UN Refugee Convention 1951 in that refugees do not have access to justice. The failure to prosecute cases of SV committed against refugees or grant access to court to female refugees who are victims of sexual violence is a breach of the state's obligation, under treaty law and under customary international law. It is state practice in the criminal justice system that perpetrators of sexual violence are prosecuted. Consequently, states not prosecuting the crime of sexual violence against refugees are complicit and should be held accountable.

The analysis of cases in chapter five revealed that victims of crime are not a party to criminal proceedings in domestic courts. They have not even the limited opportunity to participate as is enjoyed in the ICC. The opportunity available to victims of crime in a criminal proceeding in domestic courts is to obtain a fiat for a private prosecution. However, the private prosecution is still in behalf of the state and not presentative of the victim as the injured party. The victim is given a voice during sentencing when the victim impact statement is considered and results in strengthening the sentence or offers mitigation. These facts indicate the magnitude of the problem under which victims of crime are ignored, excluded and illtreated. This treatment is a further violation of the rights to be free from torture, degrading treatment, the right to a fair hearing, the right to equality before the law and equal protection under the law. The exclusion of victims as being a party to criminal proceedings is discriminatory, the rights of the accused person are over-protected and those of the victim ignored.

In order to deal with the consequences of the limited participation of the victim in criminal proceedings in domestic courts, this research embarked on an analysis of the concept of *locus*

standi as accommodating the legal need of victims to act as individuals in criminal proceedings whose rights have been violated and not as a passive witness whose rights are subsumed under those of the public and of the state.

In order to facilitate access to justice for female refugees who are victims of sexual violence in refugee camps so that they enjoy the full benefit of article 16 of the UN Refugee Convention, 1951 the research recommends the following.

4 Recommendations

The recommendations are both general and specific and tailored in accordance with criminal responsibility, types of perpetrators and law reform providing for mechanisms in camps to address sexual violence. Specific recommendations will be made in reference to the countries of the case studies.

- **First Recommendation**

States are to ensure that refugees in their territories are protected against sexual violence by law.

Motivation

This recommendation rests on the doctrine of equality and equal protection before the law as provided under the Universal Declaration of Human Rights and the various international and regional human rights conventions. As well as by the constitution and various domestic laws.

- **Second Recommendation**

States are to create a congenial environment that encourages refugees to report cases of sexual violence by the inclusion of refugees in the processes addressing sexual violence. To achieve this goal a special unit should be created under the supervision and collaboration of the police force and comprising refugees (especially females) who will be trained by the police for the sole purpose of receiving reports and investigating the crime of SV against refugees.

Motivation

Refugees are discriminated against and are afraid to report crimes. The inclusion of refugees will restore a level of confidence in the state criminal justice system.

- **Third recommendation**

States are to guarantee that cases of sexual violence against refugees are investigated with due diligence and prosecuted competently so that refugees receive justice as do citizens who are victims of crime under the domestic criminal regime.

Motivation

Granting the opportunity to testify creates a level of trust on the part of the refugees toward the criminal judicial system and the domestic courts.

Fourth recommendation

States should be held accountable for the crime of sexual violence against refugees by denying victims access to justice.

Motivation

Article 16 of the UN Refugee Convention, 1951 provides for free access to court for refugees in host states. The failure to fulfill this obligation is a breach of international obligations. Secondly, as a customary international norm it is the duty of states to prosecute crime, thus failure to do so constitutes a breach of customary international law, and denotes state complicity.

- **Fifth recommendation**

Victims of sexual violence should be accorded *locus standi* as co-prosecutor in criminal proceedings in domestic courts. From the investigatory stage they should participate fully throughout the proceeding. To achieve this aim a special unit should be created in the attorney-general's office that grants the victim permission in their own right as an injured party to participate in the criminal proceeding so they represent their interest, and the state prosecutor represents the interests of the state and the public.

Motivation

This recommendation strives to create balance in terms of the inequality of representation between the prosecution, the victim and the accused person. In addition, since the personal interests of victims are present throughout their involvement empowers them to be in a position to clarify facts, to have those responsible punished and to seek reparation for the harm suffered. If they are accorded legal standing, they will be able to represent their interest, enjoy the facility of legal aid and gain free access to court as prescribed by article 16 of the Refugee Convention 1951. The involvement of the victim as second prosecutor enhances the effectiveness of the criminal process.

- **Sixth recommendation**

A draft Protocol to the UN Refugee Convention 1951, addressing the problem of sexual violence against refugees with the provisions of access to justice in refugee camps and clauses for holding states accountable is recommended. (See appendix A).

Motivation

The purpose of such a protocol is to fill a gap in the law. The absence of an instrument promotes the culture of impunity and a lack of consistency in handling issues. The protocol could establish a one-stop facility for addressing access to justice for victims of sexual violence in refugee camps.

- **Seventh recommendation**

States should be held liable for harm suffered by victims of SV in refugee camps so that they hold the perpetrators accountable.

Motivation

It is an obligation of the state under international refugee law to provide refugees in their territory access to court. They are bound to comply by any treaty to which they have ratified. In addition, states are responsible for the prosecution of crime.

- **Eighth recommendation**

States are to ensure that all perpetrators are held accountable through the effective prosecution

of offenders.

Motivation

This will check the current culture of impunity.

- **Ninth recommendation**

States are to increase the level of security in camps through effective policing.

Motivation

Proper policing intimidates prospective offenders and creates a feeling of safety in the refugee camps.

- **Tenth recommendation**

States are to promote effective access to justice for the victims of SV in refugee camps. An all-encompassing facility which provides that service should be created either in the camp or in close proximity. The researcher recommends a one-stop facility consisting of the following:

- A health facility, containing an emergency room, a mini-operating room, a doctor's office specialising in obstetrics and gynecology, a mini laboratory for sample collection, a six-bed ward staffed by nurses for the observation of the condition of victims and a mini pharmacy.
- A law clinic close to the health facility.
- A police station.
- A court.

See appendix B, B1, B2, B3, B4 for a model of the one-stop facility.

Motivation

A victim of SV is able to report to a hospital for medical, surgical and psychological therapy, and in the process the medical report on the assault is filled in and specimens collected and preserved. The police are informed while the victim is still receiving care. The victim is then sent to the law clinic for legal advice and the police take her statement and investigates the case and hands over to the state prosecution.

- **Eleventh recommendation**

It is recommended that reparation should be a part of the court's ruling. Victims should be provided with reparation measures in acknowledgement of the lifelong consequences of the violence suffered. First, the state should provide reparation for the victim, as should the perpetrator pay reparations to the victim and her family.

Motivation

This recommendation aims to promote a victim-oriented criminal justice system and offer inclusive access to justice and ameliorate the injury suffered.

- **Twelfth recommendation**

Perpetrators who are covered by immunity from prosecution in the country of service should be regarded as having waived immunity as a result of committing a crime of sexual violence. This waiver automatically confers on the domestic courts jurisdiction to prosecute.

Motivation

The prosecution of an offence in the country where the offence is committed promotes ease of access to court for the victim. It removes logistical obstacles and creates the opportunity for an effective investigation and prosecution. It is cost effective and is safer for the victim.

This chapter offers a synopsis of the findings on providing access to justice for victims of sexual violence in refugee camps. It draws conclusions and makes recommendations to facilitate access to justice for victims of sexual violence.

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Appendix A

A Draft Protocol, Additional to Protocol to the Convention relating to the Status of Refugees 28 July 1951 on Protection of refugees against Sexual violations and access to Justice in Refugee camps

Preamble

The State parties to this Convention

Considering that, the principles asserted in the Charter of the United Nations, recognises the equal and inalienable rights of all members of the human family is the basis for freedom, justice, and peace in the world,

Bearing in mind also that the Universal Declaration of human rights protects all human beings against violation without distinction

Noting that despite the fact that the Four Geneva Conventions, and Protocol I and II Additional to four Geneva Convention protects women which includes refugees against sexual violations

Confessing that refugee camps are breeding places for crime

Accepting the fact that the current refugee convention does not protect refugees against human right violations especially sexual violence

Acknowledging the fact that the current refugee convention does not address the needs of victim's sexual violence in refugee camps;

Affirming that violence against females constitutes a violation of their human rights and fundamental freedom, and prejudices or invalidates the compliance, gratification, and exercise of such rights and freedoms;

Admitting that sexual violence against females is a crime against human dignity and a demonstration of power and dominance against females and the emasculation of the men in society;

Considering the ambiguity of article 16 of the UN refugee convention of 1951;

Recognising the scale of the problem of sexual violence against refugees in camps and the lifelong consequence on the victim;

Bearing in mind the need for access to justice for the victims of sexual violence in refugee camps as supported by all human rights instruments;

Noting the current culture of impunity of the act of sexual violence against refugees and the need to curb the culture; and

Appreciating the importance of a binding instrument;

Agrees as follows

Citation

A Protocol Additional to 1951 Refugee convention on Access to Justice for victims of Sexual violence in Refugee Camps.

Article 1

Definitions of terms

For the purposes of this protocol, the following definition of words will apply

(a) **Refugees** will be defined as refugees under UN Refugee Convention and its Protocols, including as defined under the OAU Convention governing the specific aspects of refugee problems in Africa

(b) **Refugee camps** mean camps, settlements, detention, repatriation facility and all facilities hosting refugees, including in informal places and Urban refugees.

(c) **Victims of sexual violence will mean:**

(i) A refugee who has suffered sexual violations individually or as a group, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through the act of sexual violence.

(ii) A refugee may be considered a victim of sexual violence under this protocol, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The word ‘victim,’ also includes where appropriate, the immediate family or their dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

(d) **Perpetrator means:**

(i) anyone who sexually violates a refuge in camps, such as peacekeeper, NGO Staffs, UN staffs, fellow refugees, locals from the host states, policemen etc.;

(ii) Anyone who procures, encourages, exchanges favors for sex, who organised child marriage, the husband of the child bride and pimping of refugees or an accomplice;

(iii) Individual, Non-governmental Organisations, and the government of a host country charged with the duty to protect and either failed to protect refugees against sexual violations or was complicit to the crime.

(iv) Anyone or organisations or agents the government of a host country, who has failed to act appropriately in response to victims.

Article 2

General Principles

- (a) There should be respect for dignity, autonomy, and independence of the person.
- (b) Fairness.
- (c) Nondiscrimination.
- (d) Equal access.
- (e) The official must empathise with the victims.
- (f) Accountability.

Article 3

Access to refugee status

States should accord refugees with refugee status in accordance with the UN refugee Convention and the regional conventions.

Article 4

Protection against violations in Camps

States are to ensure that refugees camps are secured against all forms of human rights violations, especially sexual violence, through adequate policing.

Article 5

Preservation of evidence

There shall be established a health facility accessible to refugees in camps, with competent experts to meet the psychological and medical care of victims of sexual violations, and for the documentation and reporting of the incidence and for the medical specimen to be collected and evidence preserved.

1. There should be established a police station with a holding cell in the camps or in close proximity and easily accessible to refugee camps.
2. The state should ensure that in reporting a sexual violation, that perpetrators should be arrested and brought to account for the crime.
3. There should be a law clinic located in a close proximity and accessibility to every refugee camps, settlement, reception and detention centers in countries of refuge.
4. Or in areas accessible to refugees or asylum seekers.

Article 6

Access to Justice

1. A Refugee should have access to courts in compliance with article 16 of the UN Convention 51.
2. Procedural and substantive barriers to accessing justice should be removed.
3. A victim of sexual violence should be accorded with a *locus standi* as a co - prosecutor in the criminal proceeding against the predator.

Article 7

Perpetrators

1. Peace keepers and all other perpetrators who possess immunity from prosecution, should consider the sexual violation of a refugee as a waiver of that immunity and should be prosecuted in the jurisdiction of the crime.
2. All perpetrators must be prosecuted in the jurisdiction of the crime and not subjected to administrative discipline by their employers.
3. There should be no option of fine or parole for the perpetrators.

Article 8

Protection of victims

1. States are to create a fair and effective legal procedure for victims of SV that will incorporate, among others, protective measures, a timeous hearing, and effective access to such procedures.
2. States are to establish the necessary legal and administrative mechanisms to guarantee that victims of sexual violence have effective access to restitution, reparations or other just and equitable remedies.

Article 9

General obligations

1. States are to provide;
 - (a) Facilities for Justice Systems.
 - (b) Trained staff for the purposes of helping the victims.
2. The Police

- (a) Should be gender sensitive in gathering evidence, Female police should prepare female victims for evidence, while male victims should be handled by male police.
- 3. The courts are to;
 - (a) ensure there should be a well - trained judge specialised in dealing with sexual violations
 - (b) include victim oriented approach in the handling of cases.
 - (c) incorporate the principle of reparation in their decisions.

Article 10

Victims with disability

1. Their disability must be accommodated in the court, structure, processes, and proceedings.
2. There should be no discrimination because of their disability.
3. Victims with intellectual disability must not be declared as unfit to give evidence, except a comprehensive medical assessment is done to ascertain the level of incapability

Article 11

Duties of Contracting Parties

Contracting parties are to:

1. Condemn sexual violence against female refugees and agree by all means to create policies to check, penalise and possibly eliminate sexual violence against female refugees.
2. Ensure that, they and their representatives do not engage in sexual violence against refugees
3. States are amend the criminal laws and procedure to reflect victim oriented criminal justice systems

Appendix B

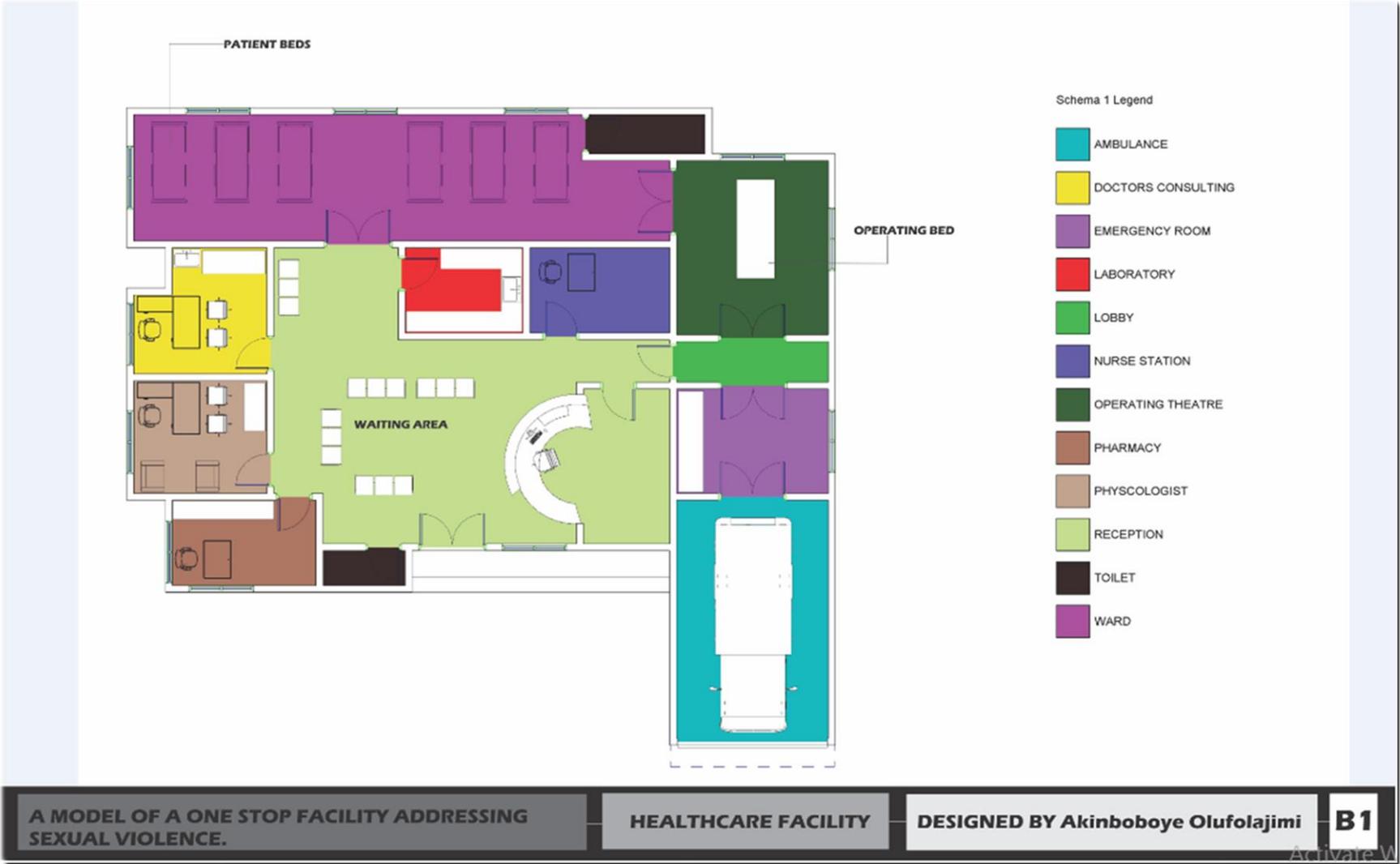


Schema 1 Legend

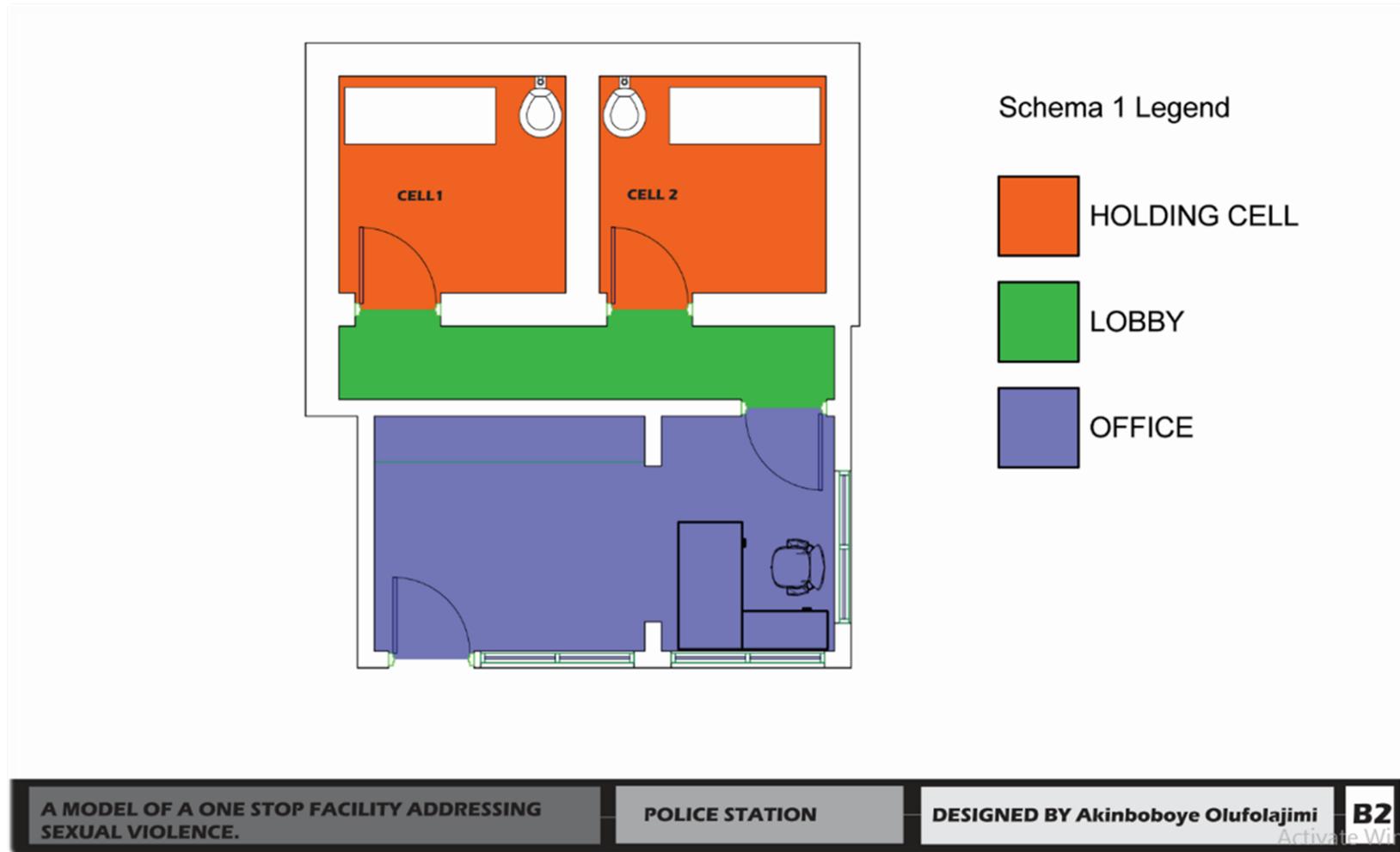
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- ARCHIVES
- COURT ROOM
- DOCTORS CONSULTING
- EMERGENCY ROOM
- HOLDING CELL
- JUDGES OFFICE
- LABORATORY
- LIBRARY
- LOBBY
- NURSE STATION
- OFFICE
- OPERATING THEATRE
- PHARMACY
- PHYSICOLOGIST
- RECEPTION
- TOILET
- WARD

A MODEL OF A ONE STOP FACILITY ADDRESSING SEXUAL VIOLENCE. **SITE PLAN** **DESIGNED BY Akinboboye Olufolajimi** **B**

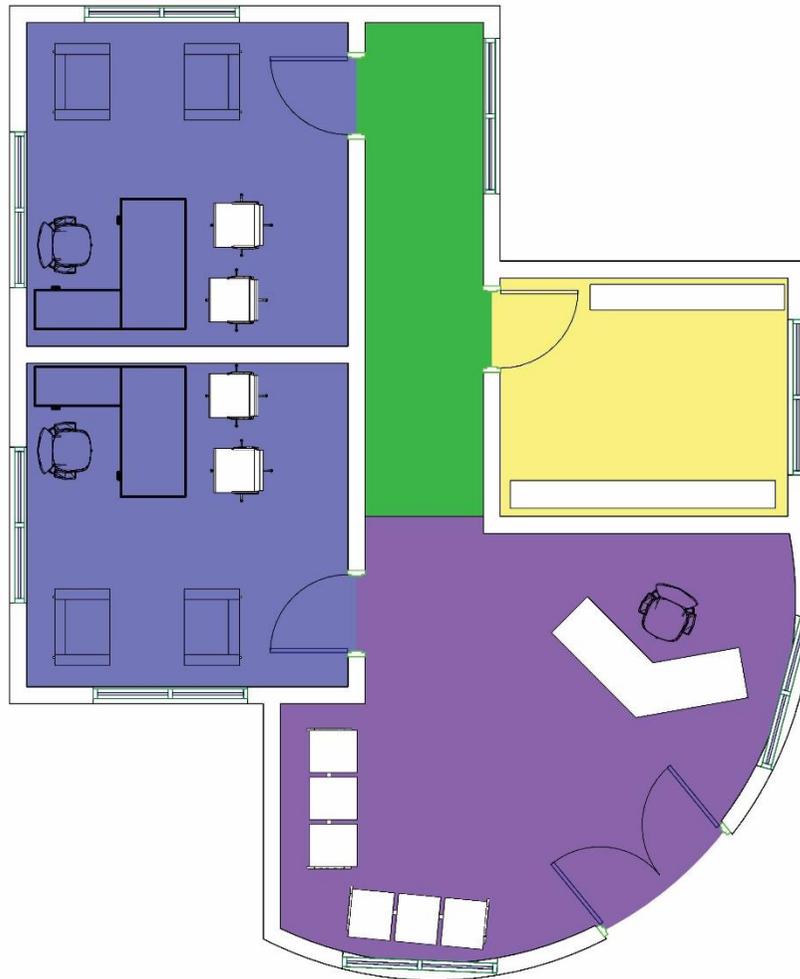
Appendix B 1



Appendix B 2



Appendix B 3



Schema 1 Legend

-  LIBRARY
-  LOBBY
-  OFFICE
-  RECEPTION

Appendix B 4

