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Breaking down obstacles to justice for gender-based violence in Africa

Report from a training workshop on strategic litigation for conflict-related gender-based violence in Africa

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Contents

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1. Introduction

For every case of gender-based violence reported daily to organisations at the grass roots level in Africa, many more go unreported. Some headway has been made in awareness-raising, law reform, litigation and training state officials, but gender-based violence continues unabated. Women face a multitude of challenges to access justice, and in practice the social, economic, evidential and procedural obstacles allow culprits to walk free and victims to go unrepaired, constituting a conspiracy of impunity.

The ***Workshop on strategic litigation for conflict-related gender-based violence in Africa*** organised by REDRESS and FIDA-Uganda in Kampala in 2012 brought together lawyers from seven selected countries, including Burundi, Central African Republic (CAR), Democratic Republic of Congo (DRC), Ethiopia, Kenya, Sudan and Uganda. Lawyers participated in training on definitions of gender-based crimes and analysis of justice mechanisms available at the sub-regional, regional and international levels to provide victims of these crimes with a remedy and reparations. Participants discussed practical examples and case studies from their work regarding impediments in accessing domestic remedies or regional mechanisms and shared expertise of how to overcome these. The purpose of the meeting was to encourage the sharing of expertise between lawyers working on sexual violence cases in various legal systems and to explore avenues for overcoming specific obstacles.

This report summarises access to justice issues raised by participating litigants at the April 2012 workshop, reflecting major impediments for victims of gender violence in the region. Challenges include deficient domestic legislation that fails to adequately criminalise gender crimes such as rape and sexual violence, unwillingness of officials to prosecute such crimes, difficulties in obtaining necessary evidence, and the emphasis placed in many communities on traditional or informal justice systems. The report includes recommendations to governments, national judiciaries and civil society, addressing these obstacles with a view to improving access to justice for all victims of gender crimes.

2. Inadequate definitions of rape and sexual violence as a barrier to justice

Sexual violence is an attack upon a person. This concept was introduced in the case of *Prosecutor v. Akayesu* before the International Criminal Tribunal for Rwanda, where the judge described sexual violence as "any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."[1] Of particular importance, the Rwanda Tribunal clarified that "coercive circumstances need not be evidenced by a show of physical force."[2] The Tribunal adopted a contextual analysis of whether a situation was coercive, using a definition that focuses on coercion rather than the issue of actual consent which facilitates proving the crime, for instance if the incident took place in the context of an attack on civilians during armed conflict. The jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda indicates that multiple crimes can be charged concurrently so as to reflect the specificities of certain crimes, such as gender based crimes, without infringing up on the principle of double jeopardy, a) where separate violations are designed to protect different values, b) where each requires proof of a legal element not required by the others,[3] and/or c) to reflect the totality of the accused's criminal conduct.[4]

[1] International Criminal Tribunal for Rwanda, *Prosecutor v. Jean-Pierre Akayesu*, Case No. ICTR-96-4-T, para. 688.
[2] *Ibid*.
[3] See judgements from the International Criminal Tribunal for the Former Yugoslavia (ICTY) and for Rwanda (ICTR) on cumulative charging which allow charges within one indictment where a) the articles are designed to protect different values, b) where each article requires proof of a legal element not required by the others and/or c) in order reflect the totality of the accused's criminal conduct, *Kupreskic et al*, ICTY, 15 May 1998.

Participants discussed how legal definitions and social understandings of rape and other forms of sexual violence in their countries differed from the international definitions, leading to difficulties in proving and remedying such violence. This report covers definitions of rape and sexual slavery only, though other gender based violations were also discussed at the workshop.

2.1 Rape

Concept in International Law

There is a basic understanding that rape is the forceful penetration of a woman without her consent. However, the definition of rape in national legislation differs from one jurisdiction to another, and includes varying aspects and elements. Rape is a crime of power, which denies the ability of the victim to consent, or renders her ability to consent ineffective or non-existent. It is one of the most humiliating forms of abuse of power, constituting the deprivation of sexual autonomy or independence. In the context of gender violence, it is important to remember that what has been violated is the victim's ability to say no. This report focuses on sexual violence against women committed by State actors without prejudice to the broader question of rape by non-state actors as a form of torture.

Following international best practise, the main elements of the crime of rape are:

- **Invasion by one person of another person.** This is gender neutral, in that it can be committed against a man or a woman. The invasion requires an element of penetration, although it need only be "however slight."[5] The invasion is not limited to penis-vagina penetration, but may involve penetration by any object in any sexual organs or the mouth.

- **Invasion committed by force**. The threat of force or coercion may be caused by fear of violence, duress, detention, psychological oppression or abuse of power against the victim or a third person. It also includes taking advantage of a coercive environment or where it is committed against a person incapable of expressing genuine consent (e.g. a person under the influence of drugs, mentally challenged, a minor, a detainee).

The following three arguments are often raised by the defence or persons accused of sexual violence, in the context of domestic investigations and prosecutions:

1. The victim's **consent**. The issue of consent is often the main focus of the defence. However, if domestic laws and practice reflected international best practice, consent should not be relevant where a person is rendered incapable of consenting in a coercive context. Building on international best practice, the International Criminal Court (ICC) enshrines this concept in its statute, rules of procedure and the elements of the crime. The process is extremely restrictive: consent cannot be raised in questioning unless allowed by the judge.[6] Similarly, situations of detention or abuse of power are *per se* coercive

[4] See Akayesu Trial Judgement, 1998, para 468. In the *Celebici* case, the ICTY Appeals chamber held that: "[c]umulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties' presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence. In addition, cumulative charging constitutes the usual practice of both this Tribunal and ICTR." See *Celebici* Appeals Judgement, 20 February 2001, para 369.

[5] Ibid.

[6] See Rules 70-72 of the Rules of Procedure and Evidence of the International Criminal Court.

environments where consent cannot be argued.[7] Outside of coercive contexts, the definition of rape in international law does not require evidence of physical violence to show lack of consent. According to the ICC Elements of Crimes, a person may also be incapable of consenting if affected by natural, induced or age-related incapacity.

2. The **character** of the victim, based on ideas that certain women are 'unrapeable.' In other words, the notion that if a woman is sexually active, has had sexual experiences or is considered of "loose character," she cannot claim to be raped because she must necessarily have invited the rape. This kind of defense is completely prohibited in the Rome Statue. The character of the victims and her previous or subsequent behavior is totally irrelevant.[8]

3. The need for **corroboration** of the victim's statement or testimony. Rape is often committed behind closed doors (in secret) or in the presence of collaborators, and therefore, it is increasingly recognized that a rape victim's testimony in court needs no corroboration. This is explicitly provided for under Rule 96 of the Rules of Evidence and Procedure (RPE) of the International Criminal Tribunals for Rwanda and the Former Yugoslavia, and Rule 63(4) of the RPE of the International Criminal Court.[9]

Deficiencies in Domestic Legislation & Practice

In many of the countries considered, the definition of rape is very restrictive or inadequate, creating major obstacles to accessing justice. In some countries, only penis-vagina penetration is considered rape and any other penetration (e.g. of an object) is not included in the definition. In others, rape is only against women; so the crime is not gender neutral. In some national laws, the force element is clearly included in the definition but often the element of coercion is missing. Some laws do not fully define the crime and it is left to the discretion of the Courts to determine it on a case-by-case basis.

In many countries, rape legislation reflects social misconceptions about rape and rape victims. Rape is among the few crimes where the victim is often put on trial by society rather than the accused; the woman is held responsible for the rape and her behaviour, appearance (eg. that she invited rape by wearing certain types of clothes) and speech is scrutinised.

Participants reported that, victims of rape are often considered inherently unreliable and unstable and their statements are not taken at face value. These prejudiced views are reflected in litigation processes starting with reporting the violation to police, to the hearings in Court. Victims are often re-traumatised during proceedings, for example when cross-examined and required to recount the incident before a court room, which can lead to secondary victimisation. Judges frequently question the laws that should apply in cases of rape—for example, when there is more than one violation, such as rape and assault, judges will ask victims which charges they want to pursue, insinuating that the crime of rape is not considered adequately grave. As mentioned above, there is also a common conception in many societies that some women are "inherently unrapeable."

In some countries, such as Uganda, rape is considered a crime against morality. Similarly, in Ethiopia, rape is an offense against morality covering forceful sexual intercourse outside of marriage; however marital rape is not

[7] See for instance the *Elements of Crimes,* accompanying the ICC Rome Statute, *Article 7(1)(g)(1), Crime against humanity of rape,* which stipulates that "the invasion was committed 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 another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent."

[8] See Rules 70(d) and 71 of the ICC Rules of Procedure and Evidence in particular.

[9] ICC Rules of Procedure and Evidence, Rule 63(4): "[A] chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence."

included. The legislation against rape was recently reformed to include rape against men, and removing the provision stating that if a perpetrator marries his victim, he will not be prosecuted. In Burundi, progressive anti-rape legislation criminalises marital rape since it entered into force 2009,[10] which also added rape of minors as a separate, aggravated offence. Interestingly, the new legislation also includes as rape a situation where a woman forces a man to introduce, even superficially his organ in hers. She would now be considered to be the author of rape while before it was only molestation or gross indecency ("*un attentat à la pudeur*").

In Sudan, the victim is legally victimised because the definition of rape and adultery are linked. A victim of rape could be accused of adultery if she alleges that she was raped. This applies to both women and men, and carries a punishment of stoning where the "offender" is married. Furthermore, if a rape victim were to become pregnant as a result of the rape, this would be considered an "aggravating factor against the victim," and proof of the adultery. In Kenya, victims are reluctant to bring rape cases because of a lack of faith in the justice system, and a culture that tends to accord less weight to women's accounts.

2.2 Sexual Slavery

Concept in International Law

Slavery is one of the oldest crimes under international law, and its prohibition is a *jus cogens* norm.[11] Slavery is the crime of one person attaching powers of ownership over another person. Traditionally, slavery was narrowly understood to be a crime where one person was bought or sold; and was thus perceived to be less common. However, slavery is a broader crime, with human trafficking potentially being a form of slavery, depending on the circumstances.[12]

Key elements of slavery:

- **Ownership**. A key element of the crime of slavery is a person exercising any or all of the rights of ownership over one or more persons. Ownership can be expressed by buying or selling the person, but sometimes it does not involve money at all. For example, using physical violence to exert control over a person, "lending," imposing some form of detention or deprivation of liberty including forced labour or

[10] Loi N°1 / 05 du 22 Avril 2009 portant Révision du Code Pénal [Burundi], Loi N°1 / 05, 22 April 2009. Article 554 of the Penal Code now reads: [...] *Le viol domestique est puni d'une servitude pénale de huit jours et une amende de dix mille francs à cinquante mille francs ou d'une de ces peines seulement*. Available at: http://www.refworld.org/docid/4c31b05d2.html, accessed 20 May 2013.

[11] Special Rapporteur on contemporary forms of slavery, its causes and consequences, *Report on systematic rape, sexual slavery and slavery-like practices during armed conflict,* 22 June 1998, UN Doc. E/CN.4/Sub.2/1998/13, para. 46:"Indeed, prohibitions against slavery and slave-like practices were among the first prohibitions to achieve the status of peremptory norms of customary international law or *jus cogens*," See also International Committee for the Red Cross, *Customary International Humanitarian Law,* Rule No. 94.

[12] See the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956*, which obligates States to abolish the following practices, whether or not they are covered by the definition of slavery in article 1 of the *Slavery Convention of 25 September 1926*: (a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined; (b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status; (c) Any institution or practice whereby: (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or (iii) A woman on the death of her husband is liable to be inherited by another person; (d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

otherwise reducing a person to a servile status[13] can be considered slavery. The person will be treated as an object, and her "owner" will attach commercial value to, obtain commercial benefit from and/or restrict the fundamental rights and freedom of the enslaved person.

- **Sexual acts.** If the person having ownership engages in acts of sexual nature, then it becomes sexual slavery. Acquisition of ownership may be achieved by various means including forceful capture, recruitment, acquisition through commercial or non-commercial means, forced recruitment, or abduction, among others, with the intention to control all aspects of the person's survival so that the owner is considered as a master.

There are some important distinctions between sexual slavery and rape, though also similarities in that a victim of rape is effectively under the custody of the perpetrator who has power. The difference between the two crimes is that with sexual slavery, the victim is already enslaved. There is some idea of continuum: in the course of enslavement, the victim is forced to engage in sexual acts with the perpetrator and/or with other persons.

There has been some inconsistency in the international jurisprudence relating to the crime of slavery. Apart from enslavement, cases of sexual slavery should entail multiple charges such including sexual slavery, rape and torture, in order to reflect the full scope of harm suffered by victims and the responsibility of the accused. While this had been the approach at the International Criminal Tribunals, some jurisdictions are reluctant to endorse the same. For example, at the ICC, in the case of *Prosecutor v. Jean-Pierre Bemba* (Central African Republic) judges opposed the qualification of rape as both a crime against humanity of rape and the crime against humanity of torture, finding in that case that torture was fully subsumed in the crime against humanity of rape. In the Kenyatta case, judges qualified penile amputation as inhuman and degrading treatment only, rather than also as sexual violence. One of the problems that arises when one crime is subsumed under another crime (i.e. rape under torture or sexual slavery under slavery), is that it can remove any reference to sexual crimes from the procedural records which is unhelpful in terms of ensuring justice for survivors, as it fails to accurately reflect the nature of the crime and victimisation, as well as in terms of developing jurisprudence.

Domestic Legislation

The lack of adequate domestic legislation for the crime of sexual slavery is a major obstacle, compounded by problems of implementation where such laws do exist. In Burundi, legislation was adopted in 2009 to criminalise sexual slavery,[14] though there are problems with its implementation; as of April 2012, there was no jurisprudence on this issue. Similarly, the 2006 law against sexual violence in the Democratic Republic of the Congo (DRC)[15] criminalises sixteen stand-alone offences of a sexual nature, including the crime of sexual slavery, however there have not been any judgments relating to this provision. In Congo, the law applies to crimes committed in order to facilitate other crimes (i.e. abduction), and in practice sexual slavery often consists of three crimes: abduction, rape and sexual slavery, though perpetrators are only charged with sexual slavery. As noted by one participant, limiting the charges to sexual slavery does not fully encapsulate the full extent of the violations endured by the victims who were also forced to work and physically abused. In Sudan, the crime of slavery is not explicitly prohibited by law. However, the penal code criminalises kidnapping,[16] as well as "seduction,"[17] which includes abduction.

[13] See the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, op. cit., which defines the reducing of a person to a servile status. It is understood that trafficking in persons, particularly women and children is covered by the convention.
[14] Burundi Law No. 1 / 05 [Law No. 1 / 05] Revision of the Penal Code [Penal Code Revision] of April 22, 2009
[15] Law 6/018 of July 20, 2006 on sexual violence.
[16] Penal Code, article 162.
[17] Penal Code, article 156.

In Kenya, the Constitution prohibits sexual slavery and recognises trafficking for the purpose of sexual violence. While the Ethiopian Penal Code also includes provisions prohibiting sex trafficking,[18] enslavement[19] and labour trafficking,[20] these lack a clear definition and, as a result, have only been applied in rare instances, in spite of numerous reported cases mostly concerning domestic and sex workers. In Burundi, trafficking is reported to be mostly for the purposes of sexual exploitation.

3. Practical challenges to accessing justice at the local level

In addition to the challenges posed by inadequate domestic legislation, there are also a number of practical obstacles that impede victims' ability to access justice. These include difficulties faced by victims of mass violations in filing complaints collectively; a general lack of willingness to prosecute perpetrators; difficulties in gathering evidence, including obtaining medical reports; lack of protection for victims and witnesses; social and cultural barriers; and re-traumatisation and secondary victimisation resulting from proceedings. Lack of resources is also a significant challenge, for both victims and judicial systems. Furthermore, even where victims have been awarded compensation or reparation measures, in many cases these are not enforced with limited recourse or services available for victims.

3.1 Addressing mass violations

Participants discussed challenges and litigation strategies related to sexual violence committed on a massive scale and following similar patterns. Participants considered how to litigate such cases effectively within domestic legal frameworks that may not have clear procedures enabling collective approaches.

Class action or collective complaints are the exception in the countries considered. In Kenya, the new Constitution adopted in 2010 provides for class action-type litigation which has opened the door for individuals and groups to pursue justice collectively before the Constitutional Court. In addition, organisations can bring a claim on behalf of the victims.

In DRC, the judicial system does not allow for collective complaints and even in cases of mass violations, victims must bring their complaint individually. This applies both for civil party submission in criminal proceedings and civil cases. It was also pointed out that the ability of NGOs to file complaints on behalf of individuals in military courts is a recent development, and this is as yet not permitted in civil cases. There are also obstacles with regard to the establishment of victims' associations, which may take years. Indeed, for an association to be officially recognised, the victims must first apply to the Ministry of Justice who in turn must seek the opinion of another Ministry. In the meantime, the association is compelled to work on the basis of a temporary authorisation which does not give it standing to appear before a court. In practice politicians are also reluctant to recognise such associations, which they understand to be lobby groups. In cases where there are a large number of victims, mobile courts have at times been set up to enable individual cases to be heard in a timely way, however the funds for their effective implementation are lacking.

In Burundi, legislation also fails to expressly permit collective complaints. Participants discussed an on-going case involving a massacre in which the victims have established a victim's association and are exploring possibilities for filing their complaints collectively. Similarly, in CAR, legislation only provides for individual complaints in civil cases and in civil party applications in criminal proceedings.

[18] Criminal Code, Article 635.
[19] Criminal Code, Article 596.
[20] Criminal Code, Article 597.

3.2 Challenges to pursuing avenues under the law

While victims of rape and sexual violence in several of the countries considered have a number of avenues to seek remedy in theory, they face many obstacles most notably in the form of lack of financial resources to access these procedures. Furthermore, many victims are unaware of the options available to them in cases where the prosecutor or police have failed to move their complaint forward, or those procedures are themselves prohibitively costly. Participants agreed that there was yet much work to be done in terms of ensuring that all cases of rape and sexual violence are investigated and prosecuted in line with international human rights standards.

In a number of countries, the unwillingness of prosecutors to move rape cases forward, or their inability to do so as a result of ineffective investigations by police, are major obstacles to justice. Participants discussed ways for tackling the problem, including the role of lawyers or NGOs in investigating and documenting rape and making the same available to prosecution authorities. In some countries, it is also possible for victims to initiate their case as a "private prosecution."

In Ethiopia, if the prosecutor refuses to institute proceedings in a criminal case, as permitted under article 42 of the Code of Criminal Procedure, victims can appeal to the courts. If the Court finds in their favour, it can issue an order for the prosecutor to institute proceedings. Victims or their representatives can also initiate a private prosecution under article 47 of the Code of Criminal Procedure, though this is quite rare in practice for a number of reasons, including lack of financial resources. According to one participant, even when NGOs propose to assist victims financially, many choose not to pursue this form of legal action due to a profound lack of confidence in the judicial system. Victims and NGOs can submit evidence to police and prosecutors to try and move a case forward where there are delays, however the police and the prosecutor are not obliged to act on this information.

In DRC, there is a similar procedure of private prosecution. However, victims face obstacles, including lack of financial resources and difficulty accessing evidence, and, in many cases, they require significant financial support and assistance in order to be able to engage in proceedings that are often very costly For example, in a recent case, an NGO incurred costs amounting to $2,000 to assist a victim in the appeals process. In addition, there is a major problem regarding the enforcement of judgments, including awards of reparation. Victims in this situation can access a separate legal procedure to pursue enforcement, however this is very complicated and costly as victims must pay up to 8 per cent of the compensation awarded to initiate the process. In practice, the costs attached to a legal action are an effective barrier to justice and reparation. Furthermore, in cases where judicial officials create unnecessary delays or impose other obstacles to prosecution, lawyers are often unwilling to strongly challenge or oppose as these might put their legal career in jeopardy.

In Burundi, if the examining magistrate is unnecessarily delaying a case, the case can be brought directly to the Supreme Court. In terms of financing, some victims are supported directly by the bar association, and others by local NGO-appointed lawyers. In Sudan, the lawyers and the victims have the right to ask a Prosecutor to follow-up on a situation, however as most of the complaints are brought against the police, which enjoy immunity, they usually lead to no result and there is no follow-up. This is reportedly a common practice, in particular in cases involving torture.

In Kenya, there is the option of judicial review should the Prosecutor fail to proceed with a case. Victims can apply to courts to issue an order for the Prosecutor to proceed, or they can pursue private prosecution. One participant noted that previously, the Attorney General had the capacity to take over a case, which in most cases ended in dismissal, however this power has since been removed from this office. Most of the cases involving private prosecution concern situations where the police have refused to proceed to an inquest. One of the

challenges, however, is that victims are often unaware of their rights in such proceedings, or what evidence to bring.

3.3 Evidentiary issues

Participants discussed issues relating to evidence in cases of rape and sexual violence. One of the problems identified is the lack of evidence to reach the criminal threshold required, i.e. "beyond reasonable doubt." When this is an insurmountable obstacle in a criminal case, victims can consider bringing a civil case which may require a lower evidentiary threshold, i.e. "the balance of probabilities test". Participants also discussed how to collect evidence, who is responsible for doing this and who is responsible for paying, as well as how evidence is transmitted to the parties in a case. For example, in many countries victims face difficulties in accessing a medical examination for the purpose of obtaining a medical report, which can sometimes take months, by which time physical injuries may be less apparent.

In Kenya, there has been considerable progress in recent years regarding victims' access to medical examinations and reports for use as evidence. Previously, medical documentation of all assaults (sexual and otherwise) was done using a P3 form, which is a police form that is completed by a health practitioner or police surgeon, and which serves as the main form of medical evidence used in cases of assault. However, a new form, the Post Rape Care form or PRC 1, has been introduced which is specific to sexual violence and significantly more detailed than the P3 form. The PRC 1 form facilitates the completion of the P3 form, and doctors, clinical officials or nurses must complete the same during their initial contact with victims. Victims should attend a medical facility within 72 hours of the incident so that a doctor, clinical officer or nurse can complete the form. Many courts have been accepting these forms as evidence for the past two years. However, some judicial officers are still not aware of it and may refuse them. The main challenge is that many victims do not understand the 72 hour period and rely instead on witnesses. Furthermore, many victims live far from medical facilities and may be unable to undergo a medical examination for an extended period following the violation. Another challenge is the ability of clinical officers to effectively document cases of rape from a medico-legal perspective. In addition, administrative problems can create obstacles to obtaining essential evidence—for example, when a clinical officer is transferred, he or she takes the evidence with him. Furthermore, though the form is free and can be downloaded it from internet, there is only one doctor in Nairobi qualified to complete it who does so without charging fees. Other doctors request to be paid, on the basis that if they complete the form they will be required to go to Court for a day to give evidence.

There are similar problems in Burundi. There is no access to DNA testing, and cases of rape and sexual violence are therefore very difficult to prove. Even in cases where testimonies and medical evidence have been obtained, this is considered insufficient to prove guilt. As in Kenya, there is only one centre providing services for victims of sexual violence. It is located in Bujumbura, and for those victims living outside of the surrounding area, it is very difficult to access, creating challenges in obtaining medical reports. NGOs are advocating for expanding these services to other government hospitals so that victims can have easier access to a medical examination and obtain a medical report.

In DRC, thanks to the awareness-raising of NGOs, people are informed that they must present themselves to a medical facility within 72 hours of the crime. Because of the distance many victims must travel to get to medical centres, they sometimes arrive late. In some cases, victims are also prevented from pursuing justice as families attempt to resolve the issue within the community, and only come forward after several months. In addition, in many cases victims are often unable to identify an individual perpetrator.

Another problem is the fact that in some cases, witnesses refuse to testify before the court. There are legal procedures in place to address defaulting witnesses. Yet those procedures are not available during the preliminary investigation and there are hardly any options to deal with uncooperative witnesses. There were

reports of witnesses simply not responding to queries and of others working hand in hand with perpetrators. The only solution is to make sure the witnesses' names clearly appear in the police report. When the case reaches the court the victim can then ask the judge to summon the individuals named in the report – a defaulting witness will incur condemnation. Fear of retribution remains a common deterrent for witnesses. Furthermore, in DRC, family members' testimonies are heard simply as an additional piece of information as opposed to testimony under oath.

There is also the problem of preservation of evidence in some parts of DRC. As a result of advocacy initiatives, there is now a special police unit to protect women and children (PSPEF). All female and child victims who present themselves to the police must be referred to this specialised unit, which has a centralised software system for maintaining evidence in Goma. While the implementation of this system and specialised unit is notable, it only exists in Goma and though it is still in the pilot/trial stage, one challenge is that it relies on the police to function, who are still prone to corruption. Moreover, victims must still arrive in Goma within the required time frame.

In Sudan, the link between adultery and rape presents a significant challenge. Many women are afraid to go to medical centres to undergo a medical examination, and others are unaware of the benefit of having a medical report. There are two NGOs in Sudan working with victims of rape who face adultery charges, providing them with legal aid and rehabilitation. In cases of child rape, the 2010 Child Act imposes criminal responsibility if the victim of rape is under the age of 18. However, there have been a number of rape cases involving girls under the age of 18 who have become pregnant as a result of the rape, in which judges have not applied the Child Act 2010, holding that that where a victim is pregnant she is no longer considered a child. In cases of domestic violence, victims often face challenges in even getting their case registered. In many cases women, are told by police that domestic violence is a "family matter, we don't get into it."

In Ethiopia, the high evidentiary threshold needed to convince the Prosecutor in cases of rape and sexual violence poses a major problem. As a result, most cases are closed before charges are formulated. Another problem is that there are very few forensic doctors and nurses, and medical examinations are therefore quite basic. The Ethiopian Society of Obstetricians and Gynaecologist (ESOG) has developed guidelines for the examination of sexual abuse victims and a more detailed documentation form. However, that form has never been used. In fact, once the medical examination has been conducted, the medical report will only say whether the victim's hymen has torn, and whether this was recently or not. The other problem is that in almost all cases, the medical certificates needs to be translated and the translation costs must be covered by the victim. There are also problems with poor translations, which can result in discrepancies between the victim's account and the medical report. If the statement in the report does not correspond to the victim's statement, the prosecutors or judges will usually consider her statement to be false and close the file. Furthermore, age determination of the victim can be difficult as there is no effective civil registration system, which makes it very difficult to allege the victim's child status as an aggravating factor for the sentence. If there is no official documentation certifying a victim's age, three doctors are required to certify the age, and even then only provide a range and not an exact age.

Secondary victimisation is also a widespread problem in the Ethiopian justice system. Victims are required to repeat their statement several times. There is no comprehensive service aimed at victims of rape that a victim can access, which leads many to withdraw their complaint and the case does not go to the trial stage leading to dismissal on grounds of lack of evidence.

In CAR, when time has elapsed since the violation occurred, it can be very difficult to prove rape and sexual violence. There are no specialised hospitals or medical facilities for victims of such crimes. Sometimes it is a nurse or other hospital staff who complete the medical certificate documentation rather than a doctor, and this is then questioned by the Court. Another problem is that though witnesses who are called to testify are legally

required to do so, the police lack the resources necessary to physically ensure that witnesses do come to court to testify.

In Uganda, victims of rape face further trauma when their case works its way through the justice system. One major problem faced by victims with regard to collection of evidence is that medical documentation forms are not readily available in all medical facilities. This situation has improved somewhat and following advocacy efforts by NGOs, there are now more doctors capable of carrying out medical examinations of victims of rape and sexual violence.

To sum up, there are a number of diverse challenges relating to the collection and storing of evidence in cases of rape and sexual violence, including delays in obtaining medical evidence from victims following a violation and high costs. There are often also almost insurmountable evidential requirements at either the charging or trial stage. The meeting also highlighted some ad hoc ways that NGOs working in these contexts have employed to overcome these issues.

3.4 Lack of protection for victims, witnesses and lawyers

Participants discussed the issue of lack of protection, both physical and psychological, for victims, who in many rape cases are not prepared for the possible re-traumatisation that can result from trials, and the availability of mechanisms to protect victims who bring a case and who are threatened with reprisals. There are very few countries in Africa that have witness protection legislation in place (including South Africa, Kenya, Ethiopia and Sierra Leone).

One of the difficulties from a human rights perspective is that in many cases, witness protection legislation has been based on the model used in organised crime cases at the international level. Typically, witness protection is arranged when the prosecutor decides that it is important for a particular case, but not on the basis of the protection needs of the individual. It is the Prosecution who decides whether the witness' evidence is worth protecting, and the concerns are not necessarily the same as those of the victims and witnesses NGOs working with victims. This is why it is important that legislation moves towards the establishment of an independent protection agency. Another important point discussed by participants are measures to ensure protection of lawyers and human rights defenders working on behalf of victims, who are equally under threats of violence in many cases.

Victims and witnesses

In Kenya, the Witness Protection Agency, established in November 2009, is mandated to provide protection to victims and witnesses, but is hampered with problems. First, the threshold for qualifying for such protection is high, requiring a severe threat, and there is no clear criteria for admittance into the programme, leaving it to the discretion of the Director of the Agency, which can give rise to abuses and manipulation.[21] The Kenyan government has also failed to ensure the Agency is adequately funded. Civil society organisations work with victims of sexual violence to help them prepare for court hearings and manage their expectations. The Constitution provides for protection of vulnerable witnesses, meaning that an intermediary may come to speak on behalf of such a victim (i.e. when the victim is a child, disabled person, or severely traumatised). When children testify before the Court, they are allowed to sit in a separate witness room where they cannot see the person who has assaulted them. In sexual violence cases, victims have the right to attend hearings *in camera.*

[21] "Criticism of the WPA and lack of structural integrity (deficiencies linked to the Agency)," see ICJ Kenya's Critique of the Witness Protection (Amendment) Bill, 2010, available at http://www.iccnow.org/documents/Critique_of_the_WitnessProtection_Act_and_Amendment_Bill.pdf, accessed 20 May 2013.

The Sexual Offenses Act 2006[22] makes provisions for vulnerable victims, including allowing *in camera* hearings and ensuring victims do not enter or exit through the same door as the alleged perpetrator.

A case in Kenya involving two women who suffered commercial sexual exploitation and abuse received a significant amount of public attention. Their case took four years to progress through the Courts, and during this time they faced threats and harassment. One participant explained that her NGO created a support group around the victims to assist them. The group included a counsellor and other individuals to work with family members of the victims to ensure that their children were being cared for and to provide the family with other forms of support during a difficult and trying time. The participant expressed scepticism about the ability of the State to provide such protection and support in similar cases.

In DRC, while protection measures are provided for by law, these are not implemented and in practice there is no system of protection for victims. In many cases of sexual violence and rape, victims have faced threats from perpetrators and their families. Some NGOs have tried to ensure that such victims are protected by relocating them and their families. NGOs have also sought protection assistance from the authorities and the UN, but these requests were not met.

In CAR, there are no laws providing special protection to victims of rape, but once the complaint is taken up by the Prosecutor, the victim can request the police to search for the alleged perpetrator and detain him in preventive custody ('*garde a vue*') during the investigation period. If the charges are serious, the person can be placed in remand custody. Generally, if the judge considers that it is in the public interest or if the victim is a juvenile, the court hearings may be closed. When a person agrees to testify in cases of rape and face threats, he or she has the right to inform the Prosecutor about these facts, and the Prosecutor can conduct an investigation. Such threats, even if made via telephone, if repeated more than once can constitute a crime.

In Ethiopia, there are legal provisions to ensure protection of victims and witnesses. There law also provides for special institutions such as the Child and Women Protection Unit and the Victims' Friendly benches within the judiciary, and special mechanisms at the prosecution level. However none of these institutions are formally established. In practice, measures such as allowing victims to give testimony from a separate room out of view of their alleged attacker are not accessible to victims who are not children. There is a Ministry of Justice initiative aimed at establishing a centre for victims of sexual abuse, providing a range of services and protection. However, although the dialogue on this initiative began three years ago, there has been no progress to date.

In Sudan, the only protection that can be provided in practice must be ordered by a judge. For some victims of sexual violence who face threats, especially in cases of rape, NGOs provide some level of protection including accommodation in safe houses. In Uganda, when the family court was established, civil society advocated to ensure that every vulnerable witness is protected. Judges have recently been very creative in the measures adopted to ensure such protection, which have included modifying Court rules to protect the identity of the victim.

Human rights defenders and lawyers

In Kenya, Civil society organisations have worked to ensure that members of the Witness Protection Agency (WPA), receive adequate and appropriate training, with a view to developing the WPA into a comprehensive unit mandated with protecting witnesses, victims and human rights defenders. Though the Witness Protection Act 2006 states that the Agency will be independent, the Act does not provide for any structure to ensure this in

[22] Act No3 of 2006 available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php (or http://www1.chr.up.ac.za/undp/domestic/docs/legislation_40.pdf), accessed 20 May 2013.

practice, and there a number of outstanding concerns about its independence. These include concerns regarding the makeup of the WPA Advisory Board, which includes the Minister of Finance, Minister of Justice, Commissioner of Police, and the Director of Prosecutions, among other senior governmental figures.

The Kenyan NGO Independent Medico-Legal Unit (IMLU) has facilitated the protection of human rights defenders and lawyers, through ad hoc protection provided by various institutions. There is also a network that ensures protection of human rights defenders in Kenya and the broader region. For example, there are some human rights defenders in DRC who have faced threats and other challenges and who were to be brought to Nairobi for protection. The biggest challenge is the paucity of financial resources to fund such protective measures. Another challenge is the difficulty faced by those who have relocated in an effort to seek protection to maintain anonymity. In addition, in some cases victims who have relocated as a result of the need for protection have disclosed their location unwittingly through social networking, for example updating their Facebook profile. Often this is the case when victims do not grasp the gravity of the threats they face. One participant recounted that there have also been instances where ICC witnesses' social networking accounts have been hacked and used to threaten victims as far away as in Europe.

In recent years, there have been many threats against human rights defenders. At this time, there is no system of protection in place and this is an on-going problem. As soon as a complaint concerning sexual violence or rape is brought before the Court, the victim or the firm representing her will face constant threats. One participant explained that many of her colleagues have expressed concern or hesitation about taking cases because of the danger to their lives and the risks they may face. There are efforts to bring this problem to the attention of the media so that it will be highlighted amongst the public.

In DRC, there are serious problems of protection for human rights defenders. Recently, a member of one of the NGOs present at the meeting was threatened. Officials decided to provide police guards to secure his home and his family's safety, however the organisation he worked for decided to relocate him as they did not trust the police, many of whom were at one time in the military. In another case, the mother of a victim of rape who complained received threats and harassment from the alleged perpetrator who was at large. Activists and the police in the area failed to take her complaints seriously, and the mother was eventually raped and killed by her daughter's rapist. There is currently a centre in Kinshasa providing protection for activists, though its location makes it inaccessible to many human rights activists living far from the city.

The protection needs of victims of rape or sexual violence may be greater and more particularised due to their vulnerability, and therefore all protection regimes should take into consideration the specific needs of all categories of victim. While the protection needs of victims and witnesses will vary from case to case, real fears of reprisals by perpetrators play a significant role in preventing victims of torture from coming forward and the lack of victim and witness protection is a serious barrier to justice for many victims of sexual and gender crimes.

3.5 Challenges posed by traditional justice systems and social perceptions

Participants also discussed the issue of the informal justice system, i.e. "dispute resolution mechanisms falling outside the scope of the formal justice system,"[23] and its approach to gender-based violence, as well as its connection with the formal justice system. In some countries, victims must go through the informal justice system as a starting point before using the formal one.

[23]Peace Building Initiative, *Traditional and Informal Justice Systems*, available at: http://www.peacebuildinginitiative.org/index.cfm?pageId=1875, accessed 12 June 2013.

In DRC, the law does not recognise the informal justice system for cases of sexual violence. However, one participant explained that in cases where the female victim has suffered other forms of violence (i.e. domestic violence), the police will often try to convince the victim to address the problem informally, and only if this is unsuccessful should they access the formal justice system. He explained that in cases of marital rape, the NGO he represents will explain to the perpetrator (husband) what the law says and what charges he may be facing. In cases where the husband acknowledges his wrongdoing and agrees to respect the rights of his spouse, the NGO will arrange for a mediation process to take place. This involves the husband and other village elders, who will all sign a document confirming the mediation agreement. If the husband refuses to engage in the mediation, the case will be taken to court. One of the difficulties posed in the traditional or informal justice system is that a husband's dowry payment, which consists of the prospective husband giving the family of his prospective bride a certain amount of money or goods, is often seen as a license for abusing his spouse.

The participant described the case of a 14 year old girl who was raped by a Congolese village chief and became pregnant. Initially, the chief proposed to take the girl as his third wife; however the girl's mother refused. The discussions went on for five months and eventually, after seven months, the victim approached the NGO and they decided to bring a case against the perpetrator. Tragically, the girl died in child birth before the case was filed to court The NGO continued with the case but lost on the grounds of lack of sufficient evidence, even though witnesses testified he had wanted to take the victim as his third wife.

The situation in Burundi is similar in that the informal justice system is not recognised for cases of sexual violence. It is possible for a victim and perpetrator to reach a friendly settlement, although this rare in practice. The Burundian Code of Criminal Procedure stipulates that the public prosecutor must initiate proceedings in all crimes that come to the attention of this office, including sexual violence.[24] In CAR, if a case is brought to the attention of the Prosecutor, criminal proceedings will be initiated regardless of whether or not the victim and the perpetrator have resolved the matter informally or reached a friendly settlement. In Kenya, the Constitution does recognise the informal justice system and the there is a specific section within the formal justice system dealing exclusively with sexual violence.

Furthermore, victims of rape or sexual violence are at risk of secondary victimisation and re-traumatisation which serves as an impediment for many victims to come forward and complain about the violation. Rape and sexual violence are some of the rare crimes in which the victim is put on trial by society, judged for their possible role in attracting the violence. The role of the community in resolving cases of rape and sexual violence through traditional processes also means that in many cases, the privacy of victims is not protected, which results in many being ostracised from their communities and facing severe stigmatisation. This can be compounded in cases where victims have decided to make a formal complaint, often against the wishes of community elders, but who have not been able to access justice and reparation because of the many barriers described herein.

Recommendations[25]

To governments:

Legislation

- Review compatibility of domestic definitions of crimes of sexual violence with international law, and amend laws to bring them in line with international standards. In relation to rape, consider revising evidentiary standards, such as the requirements of corroboration of the victim's testimony and the applicability of the character, and the consent of the victim, where he/she is unable to express her free will, as defence.

[24] Burundi Code of Criminal Procedure (as amended April 2013), Article 64.

[25] These are REDRESS' recommendations derived from the discussions that took place during the April 2012 workshop.

- Reform laws which impose unreasonably high or discriminatory evidential hurdles on proving rape or sexual assault.
- Ensure criminal law definitions have sufficient clarity to guard against interpretation in line with discriminatory personal or institutionalised attitudes of police, prosecutors and judges.
- Adopt legislation or legislative amendments to:
    - Exclude recognition of the traditional or informal justice system in cases of rape and sexual violence in countries where this does not yet exist.
    - Introduce procedural and non-procedural protective measures for victims and witnesses, where these do not exist.
    - Allow for collective complaints in cases involving large numbers of victims.
    - Ensure that victims whose cases have been stalled by prosecutors or the judiciary have alternative avenues for legal recourse, such as the possibility of judicial review or bringing cases to higher courts.
- Allow the formation of victims' groups, and remove undue restrictions on the operation of such groups and civil society organisations assisting victims.
- Allow victims' groups and NGOs standing before the courts for amicus/third party interventions, and in relation to collective complaints, subject to necessary safeguards to ensure individual victims' rights.

Policies

- In those countries where no victim and witness protection mechanisms are in place, assess the challenges faced by victims and witnesses and those engaged in the administration of justice in respect of protection, and draw up policies on victim and witness protection following consultations with experts and victims/NGO representatives, taking into consideration international standards and best practices.
- Ensure where complaints of rape and sexual assault are brought to the attention of state officials that the allegations are dealt with through the criminal justice process, and are victims are not forced to undergo a traditional justice process.
- Adopt policy guidelines and frameworks for prosecutors and judges that clearly set out how cases of rape and sexual violence are handled by the prosecution and judiciary (as applicable), including appropriate timeframes for collecting evidence and concluding cases.
- Ensure there are sufficient numbers of doctors located in all government hospitals who are qualified to medically examine victims of sexual violence and complete the necessary documentation, and that victims are not required to travel long distances from their homes or pay in order to have these forms completed in a timely way.

Programmes

- Ensure education of police, prosecutors and the judiciary on new laws introduced to combat gender-based violence, as well as international laws and norms that should be considered in cases of rape and sexual violence, as well as training in how to handle such cases, including how to question victims.
- Ensure training of police and prosecution services on best practices for the protection of victims and witnesses.
- Ensure training for clinical officers, doctors and nurses to complete medical forms documenting from a medico-legal perspective, for the purpose of being used as evidence, and ensure that medico-legal forms are easily accessible and free of charge in all medical facilities and police stations.
- Train police, prosecutors and the judiciary on the use of medico-legal documentation, including psychological evidence, in cases of rape and sexual assault.

To National Judiciary:

- Be mindful of the needs of victim and witness protection and order adequate measures where requested or required, taking into account defence rights and fair trial standards. Such measures may

include closed hearings, use of pseudonyms, redaction of documents to expunge victim/witness identity from public records; shielding testimony through the use of a screen, curtain or two-way mirror; allowing testimony to be given via closed-circuit television or audio-visual links, voice and face distortion; presence of an accompanying person as support for the witness;
- Monitor the effectiveness of protection measures and recommend institutional reforms where systemic failures become apparent.

To non-governmental organisations:

Undertake advocacy initiatives, informed by international standards, aimed at promoting:
- The repeal/amendment of discriminatory and inadequate laws on gender-based violence, including through strategic litigation, so as to reflect international standards;
- The enactment of robust laws to protect victims and witnesses, as well as the establishment of protection mechanisms, where these do not exist;
- Legislative or procedural amendments that would allow for collective complaints.

Raise awareness amongst vulnerable populations on a number of themes' including:
- Victims' rights to have their complaints considered by the formal justice system;
- The importance of undergoing a medical examination within a short timeframe following the violation for the purpose of obtaining a medical report as crucial evidence.;
- The need for victim and witness protection.

Use available avenues (domestic, regional and international) to seek protection in individual cases, including:
- to have incidents of threats, harassment or intimidation investigated, prosecuted and punished, or otherwise remedied locally, or before regional or international bodies where possible;
- Familiarise with standards and build own capacity on protection of victims, witnesses and staff;
- Engage with victim and witness protection programmes with a view to instituting best practices;
- Inform victims about the possibility of bringing a civil case where there is insufficient evidence to meet the threshold of 'beyond a reasonable doubt' that applies in most criminal jurisdictions;
- When assisting victims, formally or informally, in pursuing legal actions in cases of rape and sexual violence, gather and maintain evidence which can be submitted to the police, prosecutor and/or courts if there are undue delays or an apparent unwillingness to move the case forward.

Training and monitoring:
- Provide training for lawyers in the domestic and international standards and norms that should be invoked in cases of rape and other forms of sexual violence, as well as in strategies for overcoming obstacles that arise in litigating such cases (i.e. delay by magistrates or prosecutors);
- Lobby governments and seek to work collaboratively to ensure high quality training for police, prosecutors and judicial officials in domestic and international standards regarding the prohibition of rape and sexual violence, as well as in sensitisation and best practices when dealing with cases of sexual violence.
- Carry out an assessment to measure the impact of training of prosecutors and judicial officers (in human rights norms as well as more specifically with regard to cases of sexual violence) in terms of case management, length of prosecutions, success rates, etc. in cases involving rape or sexual violence;
- Monitor legal proceedings and the enforcement of judgments in cases of rape and sexual violence.

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