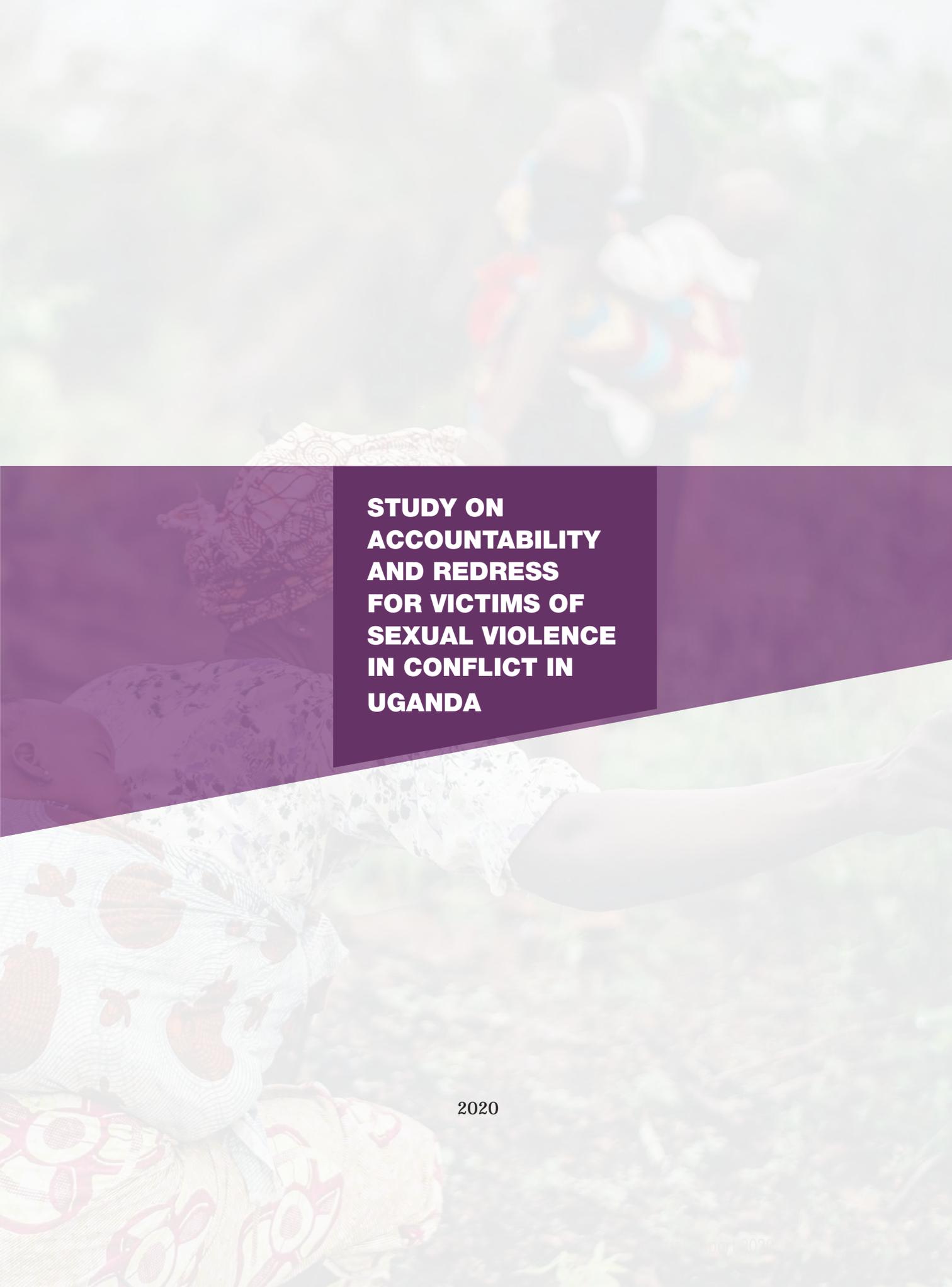


**STUDY ON
ACCOUNTABILITY
AND REDRESS
FOR VICTIMS OF
SEXUAL VIOLENCE
IN CONFLICT IN
UGANDA**



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2020

FOREWORD

The Uganda Law Reform Commission (ULRC), in partnership with FIDA Uganda, the Law Development Centre (LDC) Uganda, and the MacArthur Foundation undertook a study to inform the development of a model law to redress Conflict and Atrocity Related Sexual Violence (CARSV) in Uganda. The purpose of the study is to develop the necessary interventions for accountability and justice for the victims. It is anticipated that the study and model law will contribute to the national transitional justice legislative framework.

The question of legal redress for victims of CARSV has largely been relegated to the background in spite of the multitude of incidents of sexual atrocities committed in recent political upheavals and wars in Uganda. Where legislation does exist in Uganda to criminalize certain aspects of sexual violence, it is unfortunately limited in scope and cannot be specifically applied to prosecute CARSV. The principal statute dealing with sexual offences committed against others remains the Penal Code of Uganda, a law which was 'received' in Uganda during the colonial period by virtue of the Foreign Jurisdictions Act 1890.

The Africa Union Transitional Justice Policy (AUTJP), to which Uganda is a signatory, prohibits any limitation to the full investigation and prosecution of serious violations, as specified under Article 4(h) of the Constitutive Act of the African Union. These include sexual and gender-based violations. The principle is that prosecution should, while following due process, lead to conviction and imposition of punishment ordinarily applied in national and international criminal processes.

In this report we make recommendations for reform of the law relating to sexual offences to cater for CARSV. Our consideration focuses primarily on those sexual offences which amount to war crimes, crimes against humanity, and genocide. To date, the legal definitions and principles on CARSV remain under international customary law and international humanitarian law and most are yet to be domesticated. We further state that there is need for greater certainty and clarity concerning the content of each crime of CARSV, and that the lack of clarity of these crimes impedes prosecution at the domestic level.

Uganda has developed a victim-centered national Transitional Justice policy framework to enable redress for crimes, reintegration of victims, and accountability for perpetrators following the widespread abuses occasioned by the decades of civil strife in Uganda. This report therefore makes proposals for a model law that will provide specific redress for CARSV.

We would like to thank everyone who took the time to participate in our consultations. We also thank Lillian Kiwanuka and her team who assisted us in the process of preparing this report.

TABLE OF CONTENTS

FOREWORD--	ii
CHAPTER ONE: INTRODUCTION AND BACKGROUND	1
1.1 Introduction	1
1.2 Background and context	1
1.2 Statement of the problem	3
1.3 Justification for the Study	4
1.4 Scope of the Study	4
1.5 Objectives of the study	5
1.6 Methodology	5
1.6.1 Study design	5
1.6.2 Study areas	6
1.6.3. Study population	6
1.6.4 Study methods	6
1.6.5 Data analysis and validation	7
CHAPTER TWO: EVOLVING STANDARDS FOR HANDLING CARSV UNDER INTERNATIONAL AND REGIONAL LEGAL FRAMEWORKS	8
2.1 Introduction	8
2.2 Background	8
2.3 The historical development of international law criminalizing sexual violence during armed conflicts	9
2.3.1 Early codification prohibiting CARSV	10
2.3.2 Prosecution of CARSV at the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East	10
2.3.3 The 1949 Geneva Convention and the 1977 Additional Protocols	12
2.3.4 Developments in jurisprudence on CARSV	13
2.3.5 The International Criminal Court	15
2.3.6 Substantive and Procedural Laws on CARSV under the Rome Statute	17
2.3.7 Cases tried at the International Criminal Court	18
2.3.8 Conclusion	18
2.4 Table to demonstrate the evolving legal standards on CARSV under key International Instruments and leading jurisprudence in international tribunals	19

CHAPTER THREE: SITUATIONAL ANALYSIS OF UGANDA’S DOMESTIC LEGAL AND POLICY FRAMEWORK IN RELATION TO CARSV **32**

3.1	Introduction and Background	32
3.2.	States obligations to redress CARSV	33
3.3	Uganda’s domestic legal and policy framework in relation to International Law and practice on CARSV	36
3.4.	Other measures and interventions to support the redress of CARSV	45
3.4.1.	Measures to protect child victims and witnesses of CARSV	45
3.4.2.	Measures pertaining to witness protection and support	46
3.5.	Conclusion	50

CHAPTER FOUR: FIELD FINDINGS AND ANALYSIS **51**

4.1	Introduction and Background	51
4.2	Knowledge and awareness of forms and nature of sexual violence	51
4.3	Community awareness about CARSV	52
4.3.1	Key informant’s knowledge and awareness of CARSV	54
4.3.2.	Perpetrators of Sexual Violence in conflict	55
4.4	Reporting of CARSV	56
4.5	Institutions where cases were reported	58
4.6	Evaluation of the services/assistance given to victims of CARSV	60
4.7	Conclusion	61

BIBLIOGRAPHY **62**

Journal articles and reports	62
Policy Documents	71
Statutes and Acts	71
Cases	71

List of Charts

Chart 1: Levels of awareness of CARSV among research participants	52
Chart 2: Perpetrators of CARSV	55
Chart 3: Institutions where cases of CARSV were reported	58
Chart 4: Evaluation of essential services to CARSV survivors	60
Chart 5: Views on redress and response to reported cases on access to assistance	60
Chart 6: Views on redress and response to reported cases on adequacy of assistance	61

CHAPTER ONE

INTRODUCTION AND BACKGROUND

1.1 Introduction

The Uganda Law Reform Commission, partnering with FIDA Uganda, the LDC and the MacArthur Foundation undertook a study to inform the development of a model law to redress CARSV in Uganda. The purpose of the study was to develop interventions for accountability and justice for CARSV. The study is intended to contribute to the national transitional justice framework. In this chapter, we highlight the background to the conflict and CARSV in the nation and trace its impact on the society.

1.2 Background and context

For centuries, rape and other forms of sexual violence have run rampant during times of armed conflict.¹ The consequences of these acts are immense, with effects that last beyond the pain, humiliation, and fear felt at the time of the attack.² Sexual violence spreads incurable diseases such as HIV and the trauma severely impacts the mental health of the victims for years following the attack. In certain communities, cultural norms exclude victims of sexual violence during conflict from entering into marriage. Children born due to CARSV serve as a constant reminder of the brutal destruction that disrupted the mother's life. Mass rape has even been used as a form of ethnic cleansing, with the objective of changing the ethnic makeup of a population by killing all of the males in a community and forcing women to bear children of 'the enemy.'³ Further, once the attacks end, the needs of survivors post-conflict, including medical care, psychological support, and economic assistance, are seldom met.⁴

The term 'CARSV', refers to rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage, and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict.⁵ The term also encompasses trafficking in persons when committed in situations of conflict for the purpose of sexual violence or exploitation.⁶ Victims of CARSV face various ongoing challenges including disease, social stigma, unemployment, powerlessness and poverty. This is aggravated by the fact that the perpetrators usually go unpunished.

1 K Askin 'Sexual Violence in decisions and Indictments of the Yugoslav and Rwandan Tribunals' 93(1) *American Journal of International Law* (1999) 97-123. See also C Chinkin 'Rape and Sexual Abuse of Women in International Law' 5(3) *European Journal of International Law* (1994) 326-341.

2 As above.

3 University of Leeds *Responsibility to Protect Student Journal* (2020) 'R2P is Unable to protect the Stateless; It is Time For the United States Security Council to Step Up' <http://r2pstudentjournal.leeds.ac.uk/blog/>

4 MC Parisi 'Sexual Violence and the Law of Armed Conflict' University of Leeds *Responsibility to protect Student Journal* (2017) <http://r2pstudentjournal.leeds.ac.uk/2017/11/25/sexual-violence-and-the-law-of-armed-conflict/as>

5 United Nations 'Conflict-Related Sexual Violence' Report of the United Nations Secretary General (2020).

6 Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict: Eighth Annual Report of the Secretary General on Conflict Related Sexual Violence (2017) 3.

The use of CARSV is recognized, codified and prosecuted as one of the most serious violations of international law.⁷ CARSV can be defined as a war crime, a crime against humanity and, in some cases, as a component of genocide.⁸ As defined in the International Criminal Court (ICC) Statute, the phenomenon is multifaceted and besides rape includes sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage and any other form of sexual violence of comparable gravity.⁹ While women and girls are often the primary targets of CARSV, it is also strategically perpetrated against men and boys to destroy entire communities by tearing the social fabric.¹⁰

In armed conflict, civilians (especially women and children), are often the largest group targeted for abuse, and remain the most vulnerable to exploitation, violence, and abuse simply by virtue of their gender, age, and status in society. During periods of armed conflict, militants often use rape to humiliate and demoralize a population, or to facilitate ethnic cleansing by impregnating women against their will. Women and girls seeking refuge, traveling without male protection and with very few resources can be coerced into sex in exchange for food or safe passage.¹¹ Sexual violence in conflict is not restricted to rape, nor does CARSV end when violent conflicts do. During conflicts, reports of intimate partner violence are often higher than those of rape and sexual violence perpetrated by individuals outside the home.¹²

The threat CARSV poses to global peace and security was first recognized in United Nations Security Council Resolution (UNSCR) 1325, adopted on 31 October 2000.¹³ This Resolution became the foundation of the Women, Peace and Security (WPS) agenda, in terms of which 8 subsequent resolutions have been adopted that illustrate the link between peace and security and the disproportionate impact armed conflict has on women and girls.¹⁴ An important clarification in these resolutions is that men and boys are also targeted.¹⁵ Some of these resolutions link CARSV to other related topics such as human trafficking and violent extremism.¹⁶

CARSV has been used as a tactic of war across the globe for centuries. Evidence of its use and impact on societies has been broadly documented in more than nineteen (19) countries across Africa, Asia, Europe and South America.¹⁷ In Uganda, CARSV was widespread in the Northern Uganda conflict, allegedly mainly perpetrated by the Lord's Resistance Army (LRA) soldiers who engaged in acts of systematic rape and conscription of women and children.¹⁸ However, the overwhelming majority of victims of sexual violence

7 See generally, S Song 'The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law' available at <https://www.un.org/en/chronicle/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law>

8 United Nations Office of the High Commissioner on Human Rights *Democratic Republic of the Congo 1993-2003 UN Mapping Report* available at https://www.ohchr.org/Documents/Countries/CD/FS-2_Crimes_Final.pdf

9 The ICC Statute defines the elements of the crime of sexual violence as a Crime against humanity under Article 7(1)(g) as follows: 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.

10 NATO review magazine 'Combating Conflict-Related Sexual Violence' (2017) <https://www.nato.int/docu/review/2017/also-in-2017/combating-conflict-related-sexual-violence>; C Dolan 'Into the Mainstream: Addressing Sexual Violence against Men and Boys in Conflict' A briefing paper prepared for the workshop held at the Overseas Development Institute, London, 14 May 2014.

11 ARC International 'Gender – Based Violence Legal Aid: A participatory Toolkit' (2005) 6.

12 WA Tol et al 'Sexual and gender-based violence in areas of armed conflict: a systematic review of mental and psychosocial support interventions' 6 *Conflict and Health* (2013) 3.

13 RES/26/10/201.

14 After the adoption of UNSCR 1325, eight additional resolutions have been adopted by the Security Council as part of the WPS agenda, of which four focus specifically on CARSV: UNSCR 1820, UNSCR 1888, UNSCR 1960 and UNSCR 2106.

15 As above.

16 UNSCR 2331.

17 United Nations 'Conflict-Related Sexual Violence' Report of the United Nations Secretary General (2020).

18 JTD Kelly et al 'Abducted children and youth in the Lord's Resistance Army in Northeastern Democratic Republic of the Congo(DRC): Mechanisms of indoctrination and control' 11 *Conflict and Health* (2016).

have never received justice and face considerable challenges in accessing medical, psychosocial and economic support. The failure to remedy the crimes of sexual violence in conflict promotes impunity.

To date, there has been no comprehensive response for accountability and redress of the CARSV victims in Uganda.¹⁹ Accountability for CARSV in countries that have domesticated the Rome Statute can be accomplished through national courts which have the jurisdiction to adjudicate cases of sexual violence committed as an international crime – that is, as a war crime, crime against humanity or act of genocide.²⁰

1.2 Statement of the problem

A significant number of victims of CARSV continue to suffer the health and socio-economic consequences of the violations years after the conflict has ended, including landlessness, poverty, family breakdown, poor community relations and untreated mental and physical disease like Post Traumatic Stress Disorder, vaginal fistula and HIV. The initiatives that have so far been employed to redress victims of sexual violence are partial, sporadic, unsystematic, short-lived and not specifically designed for sexual violence.²¹ As such, many of the foregoing challenges remain largely unaddressed.

In Uganda some legislation exists to criminalize certain aspects of sexual violence, however, it is limited in scope and cannot be specifically applied to prosecute CARSV.²² Whereas Uganda domesticated the Rome Statute and the Geneva Conventions with the enactment of the ICC Act, 2010 and the Geneva Conventions Act respectively, the international prosecution of CARSV may only be applied to those most responsible for the commission of sexual violence atrocities.²³ To date, the legal definitions and principles on CARSV remain under international customary law and international humanitarian law and have not been translated into domestic law.²⁴ There is need for better certainty and clarity concerning the content of each crime of CARSV as the lack of clarity impedes domestic prosecution of perpetrators of CARSV. Additionally, the protracted delay in prosecution of the perpetrators promotes impunity.

The law enforcement institutions in Uganda also face several capacity challenges which collectively hamper effective prosecution of sexual violence in conflict. Victims of CARSV lack knowledge on where to report, there are limited safe and secure environments for reporting and the police lack the required investigative capacity.²⁵ With limited facilities and capacity to support evidence collection it is difficult to provide substantial evidence to secure a conviction. Additionally, the prosecutors, police and medical personnel lack the skills and the coordination required to conduct an effective prosecution. The Police are also limited in their capacity to protect witnesses, victims and survivors.²⁶

19 Refugee Law Project, SaferWorld & International Alert 'Northern Uganda Conflict Analysis: Advisory Consortium on Conflict Sensitivity (ACCS)' (2013) 56.

20 K Seelinger 'Domestic accountability for sexual violence: The potential of specialized units in Kenya, Liberia, Sierra Leone and Uganda' *International Review of the Red Cross* 96:894 (2014) 539-564. doi:10.1017/S181638311.

21 Refugee Law Project, n 19 above.

22 The Constitution; the Domestic Violence Act 2010; the Penal Code Act, Cap 120; the Female Genital Mutilation Act 2010; Prevention of Trafficking in Persons Act 2009; the Children Act, Cap 59; the Probation Act, Cap. 122; and the Local Council Courts Act 2006; among others.

23 See Art 28 of the ICC Statute on the doctrine of command responsibility.

24 The Extra-ordinary Chambers in the Courts of Cambodia (ECCC) and the Special Court of Sierra Leone (SCSL), have comprehensively applied principles of customary international law to acts of sexual violence.

25 As above.

26 The Office of the Director of Public Prosecutions has identified among its challenges, the limited capacity of law enforcement agencies and other State organs to detect and adequately respond to cases of CARSV. These include logistical challenges hampering evidence collection and challenges in handling these crimes and establishing their elements. See Seelinger, n 20 above.

The foregoing challenges informed the study, which aims at developing a comprehensive initiative to provide justice delivery and accountability to victims of CARSV in Uganda.

1.3 Justification for the Study

Sexual violence is a particularly dehumanizing form of violence. Many of its consequences are brutal and bring about a deep destabilizing effect on communities and populations as a whole.²⁷ After a conflict which lasted more than 20 years between the Ugandan Government and the LRA as well as other conflicts in Kasese, Teso and West Nile, victims of serious human rights violations are yet to obtain redress for the harm suffered. This has the potential to hamper the progress being made to achieve reconciliation.²⁸ The study will investigate possible interventions to redress the harm suffered by the victims of CARSV in Uganda.

Uganda has developed a victim-centered National Transitional Justice policy framework to enable redress for crimes, reintegration of victims and accountability for perpetrators following the widespread abuses occasioned by the decades of civil strife in Uganda. However, the legal regime on sexual violence in Uganda is limited in its scope as it lacks specific provisions to enable the redress of CARSV.²⁹ Sexual violence in conflict varies according to local circumstances and requires local solutions. With the exception of the ICC Act³⁰ and the Geneva Conventions Act, the jurisprudence regarding sexual violence in conflict is limited to the principles of international humanitarian law and international customary international law in the various international instruments Uganda has ratified.³¹ The absence of enabling laws that prescribe jurisdiction, actors, definitions, processes and procedures for the management of cases of CARSV domestically, impedes efforts at accountability. Uganda is obligated to translate its commitments into national law to facilitate the domestic prosecution of these crimes. The study will develop a model law for this purpose.

Responding to sexual violence requires a strong, multi-sectoral approach involving the coordinated provision of health services, protection, psychosocial support and access to justice for survivors.³² The provision of these services is hampered by limited financial and human resource capacity both within Government and among civil society actors. This study will propose multi-sectoral approaches to provide the victims of sexual violence in conflict with much-needed support within our domestic context.

1.4 Scope of the Study

The study considered CARSV under domestic and international law. Particular consideration was made to investigating whether or not national laws adequately provide for accountability and redress for crimes of sexual violence in conflict and whether the redress offered is in tandem with our international commitments.

The study also evaluated Uganda's policy and institutional frameworks to establish whether specific measures are available to support victims of CARSV to enable them to access justice and to obtain physical

27 UK Foreign and Commonwealth Office *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* (First Edition). (2014). https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/319054/PSVI_protocol_web.pdf

28 The International Protocol on the Documentation and Investigation of Sexual Violence in Conflict acknowledges the growing realization on the international scene that a lack of accountability and justice results in lack of reconciliation.

29 Refugee Law Project, n 19 above.

30 The ICC Act, 2010.

31 The ICC Statute: Geneva Convention with the enactment of the ICC Act 2010; and the Geneva Conventions Act, Cap 363.

32 As above.

and psycho-social support and reparations. Particular focus was placed on establishing legislative and policy gaps and institutional challenges. The study also reviewed approaches to redress sexual violence in other conflict-affected countries. The study covered the various regions of Uganda in which CARSV was prominent, particularly, Northern Uganda and North-Eastern Uganda in the Teso sub-region.

1.5 Objectives of the study

The overall objective of the study is to develop proposals for a model law to redress CARSV.

The specific objectives of the study are:

- a. To review and examine the policy, legal and institutional frameworks for the redress of CARSV to determine the gaps therein and propose necessary interventions;
- b. To establish the experiences of the victims of CARSV;
- c. To identify best practices from international law and jurisprudence and post-conflict societies in redressing CARSV;
- d. To establish an accountability mechanism for CARSV victims;
- e. To develop a comprehensive model law for accountability and redress for CARSV;
- f. To develop effective standards for the investigation and prosecution of CARSV.

1.6 Methodology

1.6.1 Study design

The methodology used for this research was a combination of documentary research and field research. Documentary research was employed to evaluate legal rules as espoused in international instruments, judicial decisions, academic commentary, policy documents and independent reports. The primary sources included the decisions of international courts and tribunals as well as regional and domestic courts as referred to throughout the report. The research also considered primary sources by critically analyzing and evaluating a number of secondary legal sources either as hard copies and electronic materials. These included textbooks, journals, electronic journals, policy documents, independent reports, academic commentaries, online research guides and many other relevant websites.

Field research was conducted using both the qualitative and quantitative methods. The qualitative methods included interviews with members of affected communities and victims of CARSV; religious, traditional and political leaders; civil society organizations, law enforcement officials, the judiciary and members of district leadership and local government. Quantitative methods were used to illustrate the magnitude of CARSV in Uganda among categories of affected persons and to measure the effectivity of available response mechanisms in order to present a situational analysis of the phenomenon of CARSV in Uganda.

1.6.2 Study areas

The study was undertaken in Northern and North-Eastern Uganda, in the districts of Gulu, Kaberamaido, Lira and Soroti.³³ This is the area where victims of sexual violence from the most recent conflict in Northern Uganda – the LRA rebellion – could be easily traced. Whereas several parts of Uganda have suffered the effects of sexual violence in conflict, the element of sexual violence and more specifically of abduction and forced marriage was prominently experienced in the Lango, Acholi, and Teso sub-regions of Uganda during the LRA war and the study therefore focused on these areas. The study investigated the victims' experiences, challenges and expectations.

1.6.3. Study population

The respondents interviewed during the main study field consultations included Community Development Officers (CDOs), Probation and Social Welfare Officers (PSWOs), district leaders, local leaders, teachers, Chief Administrative Officers (CAOs), Resident District Commissioners (RDCs), District Internal Security Officers (DISOs), education officers, the family and child protection units of the Uganda Police Force, health workers, councilors, religious leaders, victims and forcer camp leaders. Twenty (20) respondents were interviewed as Key Informants and a total of 407 persons participated in Focus Group Discussion (FGDs) comprising traditional leaders, women leaders, youth, CARSV survivors and religious leaders. One regional feedback and consensus building workshop was held with 50 persons.

Stakeholder Engagements

The study engaged specific stakeholders to guide and inform the study:

1. Law Development Centre (LDC), Kampala
2. FIDA Uganda
3. First Parliamentary Counsel, Ministry of Justice and Constitutional Affairs (FPC)
4. The Judiciary
5. Members of Parliament
6. The Uganda Police
7. NGOs and Civil Society Organizations
8. The Uganda Law society
9. The Academia

1.6.4 Study methods

Both primary and secondary information was used through a number of techniques, including:

Desk/ Documentary review

This entailed a review of national and international literature relating to the subject, including policy documents, individual research reports, position papers, minutes of meetings and workshop documents and regional and international instruments relevant to Uganda. A comparative analysis with other jurisdictions was also done.

³³ The Greater North of Uganda includes the districts of Gulu, Lira, Apac, Oyam, Nwoya, Abim, Alebtong, Agago, Amolatar, Amuru, Gulu, Lira, Otuke, and North-Eastern Uganda includes the districts of Serere, Kaberamaido and Soroti.

Key Informant Interviews (KIIs)

KIIs were conducted with selected policy makers and implementers of the law including representatives from civil society organizations, district and community leaders, political leaders and religious leaders in order to obtain information on initiatives in the area of addressing CARSV and to establish policy and legislative gaps as well as challenges in implementation.

Technical Working Group

A special technical working group was constituted to do all the preliminary work and fast track the study process. The working group provided the technical expertise required for the accomplishment of the objectives of the study.

Focus Group Discussions (FGDs)

FGDs were used to enlist the experience, challenges and expectations of the victims of sexual violence during the conflict. A total of 70 persons were targeted for FGDs in each of the five districts of Lira, Gulu and Adjumani in Northern Uganda and Soroti and Amuria in Eastern Uganda. In each district, the aim was to include the views of 20 women, 20 men, 20 youth and 10 community leaders through victim groups. A total of 407 people participated in the study in the five districts.

Total number of respondents	407	100%
No. of male respondents	205	(50.4%)
No. of female respondents	202	(49.6%)

1.6.5 Data analysis and validation

The data was analyzed both manually and through the use of the Social Sciences (SPSS) to manage the complex information into the identified thematic and specific areas of concern. Upon analysis, the data formed the basis for the study report and the recommendations. Regional workshops were conducted to reach consensus on the research findings and recommendations among stakeholders and to promote ownership of the project within the various regions. A national validation workshop was held to validate both the draft study report and draft model law prior to finalization.

CHAPTER TWO

EVOLVING STANDARDS FOR HANDLING CARSV UNDER INTERNATIONAL AND REGIONAL LEGAL FRAMEWORKS

2.1 Introduction

This chapter generally highlights the milestones, international developments and jurisprudence relating to CARSV. It discusses the evolving legal standards and leading jurisprudence under the Geneva Conventions, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for Yugoslavia (ICTY), Statutes and Jurisprudence from the Extraordinary Chambers in the Courts of Cambodia, the Rome Statute and the UN Security Council Resolutions. The chapter further discusses the regional legal instruments on CARSV including the International Conference on the Great Lakes Region (ICGLR), The Goma Declaration, Maputo Protocol and Kampala Declaration among others. The discussion is centered upon the legal and human rights standards and best practices that will inform the development of the model law to redress CARSV in Uganda. A summary of the international and regional legal frameworks on CARSV and key jurisprudential developments is provided in two tables at the end of this chapter.

2.2 Background

Although there are no precise statistics on wartime sexual violence due to inaccurate reporting and the unwillingness of victims to come forward, there is no doubt that sexual violence rates during times of war are shockingly high.³⁴ In the 20th century, countries with reports of mass rapes include Belgium, Russia, Japan, Italy, Korea, China, the Philippines, Germany, Afghanistan, Algeria, Argentina, Bangladesh, Brazil, Burma, Bosnia, Cambodia, Congo, Croatia, Cyprus, East Timor, El Salvador, Guatemala, Haiti, India, Indonesia, Kuwait, Kosovo, Liberia, Mozambique, Nicaragua, Peru, Pakistan, Rwanda, Serbia, Sierra Leone, Somalia, Turkey, Uganda, Vietnam, Zaire, and Zimbabwe.³⁵

Despite the atrociousness of these acts, wartime sexual violence was largely ignored by international law for centuries, leaving victims with no methods of prevention or recourse. It was not until the last two decades that significant steps were taken to hold perpetrators legally accountable for sexual attacks during times of armed conflict.³⁶ Abuses in Rwanda, the former Yugoslavia, Sierra Leone, and the recent exposure of the mass rape and sexual enslavement of about 200,000 so-called 'comfort women' by Japanese military personnel during World War I clearly placed the issue of sexual violence on the international agenda.³⁷ In spite of repeated calls for justice within the international community, the demands of the 'comfort women' have hardly been met by the Japanese government except for a statement made in 1993 by the Prime Minister's Office officially acknowledging Japan's moral responsibility for military sexual slavery. The Japanese government continues to deny legal responsibility.³⁸

34 J Gottschall 'Explaining wartime rape' *The Journal of Sex Research* 41(2) (2004) 130. <https://doi.org/10.1080/00224490409552221>

35 As above.

36 Parisi, n 4 above.

37 DS Mitchell 'The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine' *Duke Journal of Comparative & International Law* 15 (2005) 219.

38 Y Matsui *Women's International War Crimes Tribunal on Japan's Military Sexual Slavery*. Global Action on Aging (2000) <http://globalag.igc.org/elderrights/world/women.htm>

Eight lawsuits have been filed by ‘comfort women’ in Japanese courts demanding that the Japanese government pay state reparation. In three out of the four cases, the courts have dismissed claims of the plaintiff, citing the following three reasons: international law during the period in which the crimes were committed did not recognize an individual victim’s right to claim compensation against the state; the case was filed more than twenty years after World War II, allowing the case to be dismissed on the grounds of statutory limitations and according to Japanese law, the State was not held liable for compensation until the end of World War II. According to female scholars, among the various reasons why the systematic sexual slavery committed by the Japanese Imperial Army evaded prosecution at the Tokyo Trial is the fact that all judges and prosecutors of military trials were men who minimized the seriousness of war crimes against women.³⁹ Also, wartime rape was not classified in international law as a violation of a victim’s human rights, but as an issue of dishonor to a victim’s community or family.⁴⁰ Unfortunately, the ICC does not have jurisdiction over crimes committed before it was established.⁴¹

After witnessing such large-scale atrocities, the international community recognized the need to prohibit crimes of sexual violence by establishing adequate legal authority through systematic codification and prohibition of CARSV.⁴²

2.3 The historical development of international law criminalizing sexual violence during armed conflicts

The prohibition of sexual violence during times of war dates back to the first century.⁴³ Prior to the 1800s, the prohibition of sexual violence was embedded in custom, warrior codes, and religious instruction.⁴⁴ At that time, the prohibitions were not grounded in human rights concerns, but economic ones.⁴⁵ The laws were meant to guarantee that non-military segments of communities remained protected. Subsequently, prohibitions against sexual violence were codified as part of international humanitarian law.⁴⁶ The ways in which these prohibitions against sexual violence have been defined and adjudicated has developed over time, with significant advances in enforcement not being made until the last two decades.⁴⁷

39 As above.

40 As above.

41 As above.

42 Mitchell, n 37 above.

43 A Koenig, R Lincoln & L Groth *The Jurisprudence of Sexual Violence*, Human Rights Center, University of Berkeley (2011) <https://humanrights.berkeley.edu/publications/jurisprudence-sexual-violence>

44 KD Askin ‘Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles.’ *Berkeley Journal of International Law* 21 (2003) 288.

45 PS Sellers *The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation* (2008) http://www.ohchr.org/Documents/Issues/Women/WRGS/Paper_Prosecution_of_Sexual_Violence.pdf

46 Koenig et al (n 43 above) 3.

47 Parisi, n 4 above.

2.3.1 Early codification prohibiting CARSV

In 1907, Article I of the Annex to the II Hague Convention of 1899 and Article I of the IV Hague Convention of 1907 warned aggressors to ‘conduct their operations in accordance with the laws and customs of war’ and that ‘family honor ... must be respected’.⁴⁸ At the turn of the twentieth century, a violation of ‘family honor’ was generally understood to describe sexual assault”⁴⁹

Subsequently, in the decade after World War I, the drafters of the 1929 Geneva Convention provided in Article 3, that, ‘prisoners of war have the right to have their person and their honor respected. Women shall be treated with all the regard due to their sex’. This portion of Article 3 was understood as a prohibition against rape and other forms of sexual violence.⁵⁰ Notably, Article 3 shifts the language of respect for ‘family honor’ found in Article I to respect of the person and their honor. This difference symbolizes a shift from the patriarchal notion that the rape of a woman is a violation against her family’s honor, to the view that rape is a violent act towards the woman herself.⁵¹

As noted by some feminist scholars:

the implication is that honor or dignity is something lent to women by men and that a raped woman is thereby dishonored. It directly reflects and reinforces the trivialization of such offences ... the provisions appear to be more about the role of the “male warrior” during armed conflict than about recognizing sexual violence as a violation of the rights of women and prohibiting it.⁵²

Uganda continues to categorize rape as an offence against morality,⁵³ which has the overall effect of trivializing the seriousness of an act of rape. Rape is defined as an attack upon the honor of a woman instead of as a gross violation of the bodily integrity of a person, regardless of their sex or gender. This categorization is problematic and should be urgently redressed through domestic reforms targeting alignment with international law.

2.3.2 Prosecution of CARSV at the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East

At the conclusion of World War II, the Allied powers drew up the Nuremberg and Tokyo charters which would govern adjudication before the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East in Tokyo. The tribunals were established to prosecute those most responsible for crimes against peace, war crimes, and crimes against humanity.⁵⁴ The legacy of the trials after World War II is one of lack of attention to sexual violence.⁵⁵

The International Military Tribunal for the Far East (IMTFE) issued convictions to General Iwane Matsui, Commander Shunroku Hata, and Foreign Minister Hirota for ‘failure[s] to prevent atrocities at the command level’ under the absorbed category of the war crimes of murder, rape, and other cruelties⁵⁶

48 Sellers, n 45 above.

49 As above.

50 C Chinkin ‘Gender and Armed Conflict’ Oxford Handbooks Online (2014) 4. <https://doi.org/10.1093/law/9780199559695.003.0027>

51 As above.

52 UN Women *Sexual Violence and Armed Conflict: United Nations Response* (1998) <https://www.unwomen.org/en/digital-library/publications/1998/4/women2000-sexual-violence-and-armed-conflict-united-nations-response>

53 Sec 123 of the Penal Code Act Cap 120, Part XIV ‘Offences against morality’.

54 Askin (n 44 above) 288.

55 Sellers, n 45 above.

56 As above.

after the rape of prisoners and female nurses.⁵⁷ Under this theory of vertical liability the commanders were found guilty because rapes were continuously committed by their troops while the commanders knew they were occurring and had the power to stop them.⁵⁸ Although the convictions for these rapes were commendable, the IMTFE Prosecution failed to pursue charges on behalf of countless women from Korea, Indonesia, China, Burma, and Japan who were placed in rape camps by the Japanese Army.⁵⁹

The International Military Tribunal at Nuremburg did not specifically mention rape among its enumerated list of prohibited acts in its charter and no prosecutions for rape took place during the Nuremburg Trials.⁶⁰ However, Minor Axis criminals were tried for crimes of sexual violence in Allied military proceedings that followed the Nuremburg trials.⁶¹ These subsequent trials prosecuted military personnel for rape as a war crime in the Asia-Pacific war.⁶² In the Nuremburg trials, few, if any, crimes of sexual violence were prosecuted despite the common occurrence of sterilization experiments and castration by the Nazi regime.⁶³ Nonetheless, a framework to prosecute the crimes was made available under Control Council Law No. 10 as a crime against humanity.⁶⁴

Specifically, the law set forth three significant principles: “(1) that rape on a wide scale could be prosecuted as a war crime; (2) that crimes of sexual violence committed during peacetime could constitute crimes against humanity; and (3) that responsibility for such crimes could not be limited to military personnel and...liability could attach to persons occupying other key positions.⁶⁵ Although there were no convictions for rape in these subsequent trials using Control Council Law No. 10, the framework laid out in the law would lay the groundwork for subsequent law prohibiting sexual violence.⁶⁶

As highlighted in the foregoing discussion, CARSV was largely a blind spot in Nuremburg and Tokyo tribunals.⁶⁷ Whereas the International Military Tribunal Charter did not contain any explicit reference to rape or other sexual offences, Control Council Law No. 10 included rape as a crime against humanity.⁶⁸ Notwithstanding that rape was not charged in the indictments, several convictions were returned that included sexual offences as the factual basis for inhumane acts as crimes against humanity.⁶⁹ In addition, although the Charter for the International Military Tribunal for the Far East (IMTFE) did not include sexual offences, rape was included in several indictments as war crimes and persecuted.⁷⁰

This discussion shows that it is imperative for states parties to the Rome Statute to provide sufficient protections by institutionalizing the CARSV crimes proscribed by international law by way of domestic statutory reform; refocusing prosecution strategies to accentuate CARSV as a serious violation apace

57 Koenig (n 43 above) 6.

58 D Kos (Unknown). Command Responsibility. Supreme Court of the Republic of Croatia. http://www.vsrh.hr/CustomPages/Static/HRV/Files/DKos_CommandResponsibility_Zapovjedna_EN.pdf

59 As above.

60 Koenig (n 43 above) 5.

61 Sellers (n 45 above) 8.

62 As above.

63 As above.

64 As above.

65 Koenig (n 43 above) 6.

66 As above at 5.

67 J Gardam 'Women and the Law of Armed Conflict: Why the Silence?' *International and Comparative Law Quarterly* 46:1 (1997) 55. <https://doi.org/10.1017/s0020589300060115>

68 Control Council Law No. 10, Punishment of persons Guilty of War Crimes, Crimes Against Peace and Crimes Against Humanity. 29th December 1945. Official Gazette, Control Council for Germany 1946 vol. 3 pp. 50-55. (Control Council Law No. 10.)

69 Control Council Law No. 10 Article II (1) c listing rape committed against the civilian population as a crime against humanity.

70 R Pritchard & S Zaide (eds.) *The Tokyo War Crimes Tribunal, The Complete Transcripts of the Proceedings of the IMTFE* (1981) 111-117.

with traditional war crimes and; the urgency of creating a common consciousness about CARSV as a human rights violation.

2.3.3 The 1949 Geneva Convention and the 1977 Additional Protocols

Due to the mass violence that occurred during World War II, it became apparent that the original Geneva Conventions lacked sufficient protections.⁷¹ Thus, the Geneva Conventions were amended with the universally ratified four Geneva Conventions of 1949.⁷² Article 27 of the Fourth Geneva Convention of 1949 was the first multilateral international agreement to both explicitly mention and prohibit rape.⁷³ The protections were made available not only to individuals participating in armed conflicts, but also to those who were temporarily out of action and civilians who took no part in the hostilities.⁷⁴ This development marked a new phase of universal acknowledgement of the state's obligation to explicitly condemn wartime rape and sexual violence in its various forms and provide salient regulations to prohibit the act.

Institutionalizing CARSV in the Fourth Geneva Convention signified the growing consciousness of rape as a gross violation of physical integrity and was a step in the right direction that served to enhance protections against rape. By specifically listing special protection for women as a vulnerable category and enumerating the actions of rape, enforced prostitution and indecent assault, the Convention spearheaded an enhanced protection from CARSV. The Convention grants special protection to women, stating that 'women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault'.⁷⁵ A notable omission, however, was the failure to explicitly include rape and other forms of sexual violence among the grave breaches, which would bind parties to 'pursue and prosecute those persons within the territory of a contracting state who violate those specific prohibitions'.⁷⁶

Grave breaches of the Geneva Conventions, crimes against humanity and genocide are crimes of universal jurisdiction. They are universally recognized as abhorrent and it is viewed as the interests of the entire international community to suppress such crimes. As a result, any nation may prosecute the perpetrators, regardless of their nationality, the nationality of victims or where the crime took place.

However, International Humanitarian Law has several limitations in its protective capacity. In order for the provisions of the Geneva Conventions and the Additional Protocols to apply, a situation of violence must amount to an 'armed conflict' in the legal sense. Additionally, grave breaches only arise from international armed conflicts. As conflicts are increasingly non-international, rights violations cannot be classified as 'grave breaches', which in turn means that universal jurisdiction (in the obligatory form of requiring investigation and prosecution) does not apply.⁷⁷

In 1977, Additional Protocols I and II of the Geneva Conventions of 1949 entered into force, expanding on and making changes to the permitted methods of warfare. Additional Protocol I, regulating international armed conflicts, recognizes in Article 75(2)(b) 'outrages upon personal dignity, in particular humiliating

71 Sellers (n 45 above) 9.

72 Askin (n 44 above) 288.

73 Koenig (n 43 above) 7.

74 As above.

75 Askin (n 44 above) 293.

76 As above.

77 AM La Rosa; M Rees; M Purdasy & P Scolland *Sexual Violence in Conflict: What Use is the Law?* (2015) Chatham House. https://www.chathamhouse.org/sites/default/files/field/field_document/20150123SexualViolence.pdf

and degrading treatment, enforced prostitution and any form of indecent assault.⁷⁸ Furthermore, Article 76(1) states that women are especially protected from ‘rape, forced prostitution and any other form of assault’, and Article 77(1) that children are protected against ‘indecent assault’. Additional Protocol II Article 4, relating to non-international armed conflicts, forbids ‘outrages against personal dignity, rape, enforced prostitution and any form of indecent assault at any time and any place when committed against persons who do not take a direct part or have ceased to take part in hostilities’. However, unlike Additional Protocol I, Additional Protocol II is restricted in force due to the limited number of states that have ratified the treaty.

In the context of an international armed conflict, fundamental assaults on human health, physical integrity and dignity are grave breaches of the Geneva Conventions. The Conventions explicitly require nations to prosecute persons of any nationality who commit acts such as ‘torture or inhuman treatment’ and ‘willfully causing great suffering or serious injury to body or health’ against any person.⁷⁹

Thus, by the 1990s, International Humanitarian Law prohibited acts of sexual violence perpetrated against civilians, combatants, and prisoners of war; although the parameters of the law were ill-defined and actual prosecution of such crimes was tentative. Unfortunately, despite these increased codified protections, sexual violence during times of armed conflict continued to increase in the years to follow.⁸⁰

2.3.4 Developments in jurisprudence on CARSV

a) The International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia

While no other international humanitarian law conventions addressing sexual violence and armed conflict have been developed since the Additional Protocols of 1977, there has been advancement in wartime sexual violence jurisprudence through the application of international humanitarian law in international criminal courts.⁸¹ Acts of sexual violence were within the jurisdiction of the ICTY and the ICTR. The statutes of the two international criminal tribunals include jurisdiction over grave breaches of the Geneva Conventions, other war crimes, crimes against humanity and genocide. Both specify rape in the definition of acts which may constitute crimes against humanity.⁸² In addition, the reports leading up to the adoption of their respective statutes make it clear that sexual assault was contemplated as part of the ‘inhuman treatment’ that is an element of each crime.⁸³

The International Criminal Tribunal for Rwanda (ICTR)⁸⁴ and the International Criminal Tribunal for the former Yugoslavia (ICTY) served as the driving forces behind the prohibition of sexual violence in international criminal law as various forms of sexual violence were successfully prosecuted against numerous perpetrators.⁸⁵ The United Nations Security Council gave the ICTY and ICTR authority to

78 Sellers (n 45 above) 9.

79 Human Rights Watch *Sexual Violence as International Crime*. (1999) <https://www.hrw.org/legacy/campaigns/kosovo98/seviolence.shtml>

80 Parisi, n 4 above.

81 Sellers (n 45 above) 5.

82 The Rwanda tribunal statute enumerates ‘outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault’ as war crimes, following the formulation of Common Article 3 of the Geneva Conventions and Article 4(2)(e) of Protocol II.

83 Human Rights Watch, n 79 above.

84 Established in the 1994

85 JR McHenry III ‘The prosecution of rape under International Law: Justice that is long overdue’ *Vanderbilt Journal of Transnational Law* 35 (2002) 1269.

‘prosecute individuals accused of committing grave breaches of the Geneva Conventions of 1949 and violations of the customs of war, genocide, and crimes against humanity’.⁸⁶ These tribunals advanced the jurisprudence of acts of sexual violence by developing the legal doctrine under international humanitarian law and by zealously prosecuting these crimes.⁸⁷

With limited case law to rely on, the tribunals struggled to establish legal doctrine and procedures, but were eventually able to define rape and sexual violence, listing specific elements that must be satisfied to prosecute the acts as crimes of genocide, war crimes, and crimes against humanity.⁸⁸ Between 1 January 1994 and 31 December 1994, the ICTR delivered verdicts against persons responsible for committing genocide. The ICTR was also the first institution to recognize rape as a means of perpetrating genocide.⁸⁹

Some of the highlights of the jurisprudence of the international criminal tribunals are summarized below:

1. **Rape recognized as torture:** In *Celebici*, the ICTY characterized the rape of Bosnian Serb women prisoners at the Celebici prison camp as acts of torture.⁹⁰ The tribunal found Hazim Delic, a Bosnian Muslim deputy camp commander, guilty of a grave breach of the Geneva Conventions (torture) and war crimes (torture) for the rapes he committed. Zdravko Mucic, the Bosnian Croat camp commander, was found to have command responsibility for crimes committed at Celebici, including crimes of sexual assault. The landmark decision underscored that rape inflicts the severe physical and psychological pain and suffering that characterizes torture. The judges held that sexual violence, ‘strikes at the very core of human dignity and physical integrity’.⁹¹ The trial Chamber emphasized that when such violence is committed against a woman because of her gender the perpetrator’s intent triggers the prohibited purpose of discrimination as an element of the crime of torture, just as discrimination based on ethnicity does.⁹²
2. **Rape recognized as a crime against humanity:** In *Akayesu*, the ICTR found the defendant guilty of crimes against humanity based on evidence that he had witnessed and encouraged rapes of Tutsi women while he was a communal leader with words such as: ‘don’t ever ask again what a Tutsi woman tastes like’.⁹³ The tribunal found that the rapes were both systematic and carried out on a massive scale.⁹⁴ In *Tadic*, the ICTY also considered the charge of rape as a crime against humanity.⁹⁵
3. **Rape prosecuted as genocide:** In *Akayesu*, the ICTR found Jean-Paul Akayesu guilty of genocide. The tribunal’s decision was based in part on evidence that he had witnessed and encouraged rapes and sexual abuse of women in the course of a genocidal campaign against the Tutsi population while he was a communal leader.⁹⁶
4. **Rape recognized as a violation of the laws or customs of war:** In the *Furundzija* decision, the ICTY found Anto Furundzija, a local Bosnian Croat military commander, guilty of aiding and abetting a war crime, the rape of a Bosnian Muslim woman. Furundzija was found to have provided ‘assistance,

86 As above at 1279.

87 As above.

88 Koenig (n 43 above) 9.

89 United Nations International Residual Mechanism for Criminal Tribunals The ICTR in Brief (2015) <https://unictr.imct.org/en/tribunal>
90 *Celebici* case: The judgment of the Trial Chamber The Hague, 16 November 1998 CC/PIU/364-E.

91 As above.

92 As above.

93 *The Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T.

94 As above.

95 *Tadic* (IT-94-1).

96 *The Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T.

encouragement, or moral support which ha[d] a substantial effect on the perpetration of the crime' when his subordinate orally, anally and vaginally raped a Bosnian Muslim woman Furundzija was interrogating.⁹⁷

5. **Command responsibility for rape:** In *Celebici*, the ICTY found Zdravko Mucic guilty on the basis of command responsibility for the violations of international humanitarian law committed by guards at the camp. The tribunal stated: 'The crimes committed in the *Celebici* prison-camp were so frequent and notorious that there is no way that Mr. Mucic could not have known or heard about them.'⁹⁸ Those crimes included rapes and sexual assaults committed by *Mucic's* subordinates. Indictments against Bosnian Serb leaders Radovan Karadzic and Ratko Mladic charge them with command responsibility for rape and sexual assaults rising to the level of crimes against humanity.
6. **Rape prosecuted as a war crime in internal armed conflict:** Akayesu was charged with rape as a war crime committed during Rwanda's civil war.⁹⁹ Akayesu was acquitted of this charge as the prosecution failed to establish that he was a member of the armed forces or charged with military duties. Most recently the prosecutors of the ICTR have moved to add rape as a war crime to the charges facing Alfred Musema.¹⁰⁰
7. **Recognition of forced pregnancy as a potential crime:** In the dicta of *Akayesu*, the ICTR described a situation in which a rapist might deliberately impregnate his victim with the intent to force her to give birth to a child who would, because of patrilineal social conventions, not belong to its mother's group. The tribunal noted that such an act might be a constitutive element of genocide.¹⁰¹

In summary, the ICTR and ICTY significantly developed international jurisprudence criminalizing wartime rape and sexual violence. The cases mentioned above were only a few of the many convicting military members for sexually charged crimes in the tribunals. Overall, the tribunals helped wartime sexual violence gain prominence in international criminal law and increased the general discussion of these crimes worldwide.¹⁰² Furthermore, the tribunals set forth various forms of liability, including superior responsibility and joint criminal enterprise. The developments that were achieved in the ICTR and ICTY laid the groundwork for the prosecution of sexual violence in the ICC.¹⁰³

The jurisprudence establishing the critical elements for CARSV as well as establishing sexual violence as a crime of genocide, crime against humanity, and war crime are crucial additions to the development of the much-needed interventions and redress mechanisms for CARSV in Uganda.

2.3.5 The International Criminal Court

In the aftermath of the *ad hoc* tribunals, the push for the establishment of a permanent International Criminal Court was accelerated. This culminated in a diplomatic conference in Rome which established 'a permanent institution with authority to prosecute the most serious crimes of concern to the international community, including genocide, war crimes, and crimes against humanity.'¹⁰⁴

97 *Furundzija* (IT-95-17/1).

98 *Celebici case*: The judgment of the Trial Chamber The Hague, 16 November 1998 CC/PIU/364-E.

99 *The Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T.

100 *The Prosecutor v Alfred Musema* ICTR-96-13.

101 *The Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T.

102 Parisi, n 4 above.

103 As above.

104 Koenig (n 43 above) 16.

In 2002, the Court's founding treaty, the Rome Statute, was ratified by sixty-six states and the ICC was formed. Upon its creation, the ICC was hailed for serving as a symbol of progress and intolerance for cruelty for the world to see.¹⁰⁵ The ICC is designed to be complementary to national criminal jurisdictions. States which ratify and domesticate the ICC statute are in position to implement international humanitarian law and to bring violators before their own courts.¹⁰⁶ Though the States continue to have the primary role to play in prosecuting war criminals, the ICC is set up to step in for national courts when these are unwilling or genuinely unable to do so.

In Articles 6, 7 and 8, the Rome Statute sets out a list of crimes over which the ICC will have jurisdiction: genocide, crimes against humanity and war crimes. In order to provide greater certainty and clarity concerning the content of each crime, a document on elements of crimes was prepared for guidance on the interpretation of the provisions on crimes. The Rome Statute of the ICC and the rules contain various provisions designed to ensure the effective investigation and prosecution of sexual and gender-based violence crimes and to protect the interests of victims and witnesses of these crimes. The sexual crimes that fall under the subject matter jurisdiction of the court are listed under Articles 7(1)(g), 8(2)(b) (xxii) and 8(2)(e)(vi) and are elaborated upon in the elements in relation to sexual violence.

The Statute's expansive list of CARSV crimes relates to both international and non-international armed conflict. It also expands the list of sexual and gender-based violence crimes as crimes against humanity to include not only rape but other forms of sexual violence, as well as persecution on the basis of gender. Sexual and gender-based violence crimes committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group may also constitute acts of genocide. The elements of crime developed pursuant to Article 9 of the Rome statute, assist the Court in the interpretation and application of Articles 6, 7 and 8, of the Statute. These elements consolidate important advancements with respect to the definitions of the identified crimes.

In order for a crime to be prosecuted in the ICC, several requirements must be met. First, the court must have jurisdiction to admit the case: the court 'can only prosecute individuals accused of committing or assisting in the commission of genocide, crimes against humanity and/or war crimes.' Additionally, the individual on trial must be 'a national of a country that has accepted the Court's jurisdiction, or the crime must have taken place within the borders of a country that accepts the Court's jurisdiction, or the UN Security Council must have referred the situation to the Court Prosecutor.' Second, the ICC is not meant to replace domestic courts but to supplement them. Thus, in order for the case to be tried in the ICC, the principle of complementarity needs to be met. The principle of complementarity cannot be satisfied if 'the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to carry out the investigation or prosecution'.¹⁰⁷

The ICC significantly contributes to the adjudication of matters of CARSV. In addition to charging 'torture or inhuman treatment' as grave breaches of the Geneva Conventions, the statute lists other crimes including 'committing rape, sexual slavery, enforced prostitution, forced pregnancy...enforced sterilization, or any other form of sexual violence' as matters that can be prosecuted as grave breaches of the Geneva Conventions in the context of international armed conflict or as violations of Common Article 3 of the Geneva Conventions in the context of internal armed conflict. The broadened scope of

¹⁰⁵ Parisi, n 4 above.

¹⁰⁶ International Committee of the Red Cross Elements of War Crimes under the Rome Statute of the International Criminal Court – sources and commentary (2003) <https://www.icrc.org/en/doc/resources/documents/publication/p0-521-81852-4.htm>

¹⁰⁷ Art 17(1)(a) of the Rome Statute.

grave breach provisions to include internal armed conflict enhances available protections for victims of CARSV in Uganda.

2.3.6 Substantive and Procedural Laws on CARSV under the Rome Statute

The ICC refined the definitions of rape and sexual violence in order to provide for a wider range of accountability for victims. The Rome Statute defines rape as:

‘1)The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or 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 and 2) The invasion was committed by force, or by the 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.’¹⁰⁸

This advances the legal framework presented in *Akayesu* and *Furundzija* by ‘recognizing that coercion can be demonstrated where the individual who perpetrated the crime took advantage of coercive circumstances...signaling an additional step away from the historic assumption of implied consent by recognizing that in certain coercive situations, consent cannot be implied.’¹⁰⁹

Broadening the definition of CARSV by redefining rape firstly by making it applicable to both men and women and then enhancing the definition beyond the basic “penetration” and lack of consent will avail victims of CARSV with enhanced interventions. However, it is important that state parties to the Rome statute commit to updating their domestic legislation to align their protections with those in the Rome Statute. Building on the tools that emerged in the ICTR and ICTY, the Rome Statute extends liability to more than just direct perpetrators by recognizing command responsibility claims. Article 25(3)(d) states:

A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible... [or that] (d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.¹¹⁰

Moreover, Article 28 recognizes that the ICC can impose criminal responsibility on military commanders where they ‘knew or... should have known that their [subordinates] were committing or about to commit such crimes’ and then ‘failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation or prosecution.’ This extended liability is a notable development that is key in redressing impunity for CARSV.¹¹¹

The ICC also developed several procedural protections for its courtroom, with numerous laws detailing how to handle cases involving crimes of sexual violence. When drafting the Rome Statute, particular

108 Koenig (n 43 above) 20.

109 As above at 21.

110 As above.

111 As above.

attention was paid to the involvement and protection of victims who participate in the trials to document the sexual harm they experienced. Rule 71 prohibits the introduction of prior or subsequent sexual conduct of the victim during trials.¹¹² The Court guarantees confidentiality in proceedings to shield victims from the public as it is unlikely that most victims will testify without that protection in place. Furthermore, the ICC created the Gender and Child Unit in the Office of the Prosecutor 'to help the prosecution adequately address issues faced by victims of sexual violence'.¹¹³

Finally, a significant advancement the ICC has set into place in its focus on victims is a broad reparations provision. Unlike in the ICTY and ICTR, which provide no reparations for victims, the ICC is able to determine the extent of damages suffered by victims, including restitution, compensation, and rehabilitation.¹¹⁴ The Trust Fund for Victims is responsible for implementing court orders and assisting victims in coordination and managing reparations awards.¹¹⁵

These developments are key in advancing the redress of CARSV and have significantly served the purpose of bringing to book those that have been tried at the ICC. However, such trials have been significantly fewer in comparison to the perpetrators at the domestic level. It is thereby imperative for Uganda as party to the Rome Statute to translate these progressive developments into their national laws to level the ground for the domestic judicial systems to intervene using tried and tested, relevant and modern jurisprudence.

2.3.7 Cases tried at the International Criminal Court

To date, charges for SGBV have been made against several individuals in the ICC. In Northern Uganda, charges were sought against Joseph Kony, Vincent Otti and Dominic Ongwen for rape and sexual slavery.¹¹⁶ Similarly, charges have been sought against Omar Hassan Ahmad Al' Bashir, Ali Muhammad Ali Abdal-Rahman, Ahmed Harun, and Ali Kushayb for rape and other crimes committed in Darfur.¹¹⁷ In the Democratic Republic of Congo, charges were sought against Germain Katanga and Mathie Ngudjolo Chui for sexual slavery and rape, but Ngudjolo was acquitted in full in 2012, and Katanga partially acquitted of the sexual violence charges in 2014.¹¹⁸

On March 21, 2016, in the first ever conviction for crimes of sexual violence under command responsibility in the ICC, Jean-Pierre Bemba Gombo, the Commander-in-Chief of the Movement for the Liberation of Congo, was found guilty of over 1,000 rapes of men and women that took place in the Central African Republic as war crimes and crimes against humanity.¹¹⁹ On Appeal, it was held that he be acquitted of all charges and subsequently released from detention.

The foregoing cases point towards a growing consciousness and intolerance for CARSV. They further serve as a standard that can be successfully replicated in the domestic courts, where the law has been updated to reflect the positive developments in the Rome Statute.

112 Koenig (n 43 above) 25.

113 As above at 26.

114 As above at 23.

115 As above.

116 International Criminal Court Situations under investigation: Uganda <https://www.icc-cpi.int/uganda>

117 International Criminal Court Situations under investigation: Darfur, Sudan <https://www.icc-cpi.int/darfur>; The Prosecutor v Omar Hassan Ahmad Al Bashir ICC-02/05-01/09 (2018) <https://www.icc-cpi.int/CaselInformationSheets/albashirEng.pdf>

118 International Criminal Court Situations under investigation: Democratic Republic of Congo <https://www.icc-cpi.int/drc>

119 The Prosecutor v Jean-Pierre Bemba Gombo ICC-01/05-01/08.

2.3.8 Conclusion

For years, many victims of sexual violence during times of armed conflict were left without a place to seek justice and perpetrators lived without fear of punishment for their actions. This chapter demonstrates the fact that the road to the ICC and its legal framework to address crimes of sexual violence was long and challenging. The ICC has implemented the best aspects of the various past attempts to address wartime sexual crimes and created a solid and progressive legal framework.¹²⁰ In spite of its weaknesses, the Court has many advantages to help in the prosecution of sexual violence. It should also be noted that the Court has the added advantage of being a public platform to deter perpetrators of crimes against humanity. Each conviction in the ICC has an impact that goes far beyond the actual verdict. The convictions hold a substantial and widespread deterrent value by sending a clear message to the world that sexual violence will no longer be tolerated. With the ICC as a complementary forum to pursue accountability for war crimes, with time the convictions have the power to significantly reduce CARSV.

2.4 Table to demonstrate the evolving legal standards on CARSV under key International Instruments and leading jurisprudence in international tribunals

The various international instruments regarding CARSV include the Geneva Conventions relative to the Protection of Civilian Persons in Time of War, The Rome Statute of the ICC and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), Convention Against Torture and other cruel, inhuman and other degrading treatment or punishment, the Beijing Platform for Action, and the United Nations Security Resolutions 1325 and 1820.

Table 1: Summarizing key articles relating to CARSV in various international instruments¹²¹

INTERNATIONAL INSTRUMENTS	
Instrument/ Article	Legal Standard
Geneva Convention IV (1949) Article 27(2)	Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault. Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.
Additional Protocol 1 to the 1949 Geneva Conventions Article 75(2)	Prohibits outrages against personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any other form of sexual assault.
Article 76(1)	Provides that women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.

¹²⁰ Chinkin (n 50 above) 3.

¹²¹ Adapted from Bastick, Hug & Takeshita (2011) International and Regional Laws and Instruments related to Security Sector Reform and Gender; Organization for Economic Cooperation and Development Security System Reform: What Have We Learned? Results and trends from the publication and dissemination of the OECD/DAC Handbook on Security System Reform (2009).

INTERNATIONAL INSTRUMENTS	
Instrument/ Article	Legal Standard
Additional Protocol II to the 1949 Geneva Conventions (1977) Article 4(2)	Prohibits outrages against personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any other form of indecent assault.
Article 3, Common to the four Geneva Conventions (1977)	Covers situations of non-international armed conflicts and requires humane treatment for all persons in enemy hands, without any adverse distinction. It specifically prohibits murder, mutilation, torture, cruel, humiliating and degrading treatment, the taking of hostages and unfair trial. It requires that the wounded, sick and shipwrecked be collected and cared for. It grants the ICRC the right to offer its services to the parties to the conflict. It calls on the parties to the conflict to bring all or parts of the Geneva Conventions into force through so-called special agreements. It recognizes that the application of these rules does not affect the legal status of the parties to the conflict.
The Rome Statute of the International Criminal Court Article 6	Provides for genocide which means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group. Sexual and gender-based crimes committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group may constitute acts of genocide.
The Rome Statute of the International Criminal Court (2002) Article 7(2)(f)	Provides for acts of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; as crimes against humanity where they are committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. 'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.
Article 8(2)(b)	Provides that rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence are war crimes respectively in international and non-international armed conflicts and also constitute a grave breach of the Geneva Conventions and a serious violation of Article 3.

INTERNATIONAL INSTRUMENTS	
Instrument/ Article	Legal Standard
<p>Convention on the Elimination of All forms of Discrimination against Women (CEDAW) (1979)</p> <p>Article 1</p>	<p>Violence against women is a form of discrimination. States parties are responsible for adopting appropriate legislation and other measures to prohibit all discrimination against women and establish legal protection of the equal rights of women including sanctions where appropriate, prohibiting all discrimination against women. States parties are also responsible to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; must refrain from engaging in any act or practice of discrimination against women and must ensure that public authorities and institutions act in conformity with this obligation;(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; and (g) To repeal all national penal provisions that constitute discrimination against women.</p>
<p>Article 6</p>	<p>States Parties shall take all appropriate measures, including to suppress all forms of trafficking in women and exploitation of prostitution of women.</p>
<p>Convention Against Torture and other cruel, inhuman and other degrading treatment or punishment (1984)</p> <p>Article 1</p>	<p>Violence committed by or with the consent of state agents is included in definition of discrimination.</p>
<p>Beijing Platform for Action (1995)</p>	<p>Governments are committed to the following strategic objectives:</p> <p>(D 1.0) To adopt laws that punish police, security forces or any other agents of the state who engage in acts of violence against women in the course of performance of their duties, and to act to investigate and punish perpetrators.</p> <p>(D.1.1) Create or strengthen institutional mechanisms so that women and girls can report acts of violence against them in a safe and confidential environment, free from the fear of penalties or retaliation.</p>
<p>United Nations Security Resolution 1325 (2000)</p> <p>Article 6</p>	<p>Stresses the importance of women’s equal participation and full involvement in all efforts to maintain/promote peace and security. Calls on the Secretary-General to ensure that civilian personnel of peacekeeping operations receive training on the protection, rights and the particular needs of women.</p>

INTERNATIONAL INSTRUMENTS	
Instrument/ Article	Legal Standard
Article 8	Calls on all actors involved in peace agreements to include measures that ensure the protection of and respect for human rights of women and girls, included the police.
Article 11	Emphasizes State responsibility to put an end to impunity and to prosecute those responsible for war crimes including those relating to sexual violence against women and girls. Encourages consideration of the different needs of female and male ex-combatants and their dependents in disarmament, demobilization and reintegration.
United Nations Security Council Resolution 1820 (2008) Article 3	Special measures taken to protect women and girls from sexual violence in armed conflict: enforcing appropriate military disciplinary measures and upholding command responsibility, training troops on the prohibition of all forms of sexual violence against civilians, debunking myths that fuel sexual violence, vetting armed and security forces for past actions of rape and other forms of sexual violence, and evacuation of women and children under threat of sexual violence to safety.
Article 4	Calls on states to end impunity for sexual violence and ensure that all victims have equal protection under the law.
Article 6	Requests the development and implementation of appropriate training programs for all UN peacekeeping and humanitarian personnel to help better prevent, recognize and respond to sexual violence and other forms of violence against civilians.
Article 7	Requests the Secretary General to strengthen efforts to implement the policy of zero tolerance of sexual exploitation and abuse in UN peacekeeping operations and urges countries contributing peacekeeping troops to take preventative action on sexual exploitation and abuse, including pre-deployment and in-theatre awareness training.
Article 8	Urges countries contributing peacekeeping troops to increase personnel responsiveness to protect civilians, including women and children, and prevent sexual violence against women and girls. Including by deploying a higher percentage of women peacekeepers or police.
Article 9	Requires the development of peacekeeping guidelines and strategies to protect civilians, including women and girls, from all forms of sexual violence.

INTERNATIONAL INSTRUMENTS	
Instrument/ Article	Legal Standard
Article 10	Requires the development of effective mechanisms for providing protection from sexual violence to women and girls in and around UN managed refugee and internally displaced people's camps, and in all disarmament, demobilization, and reintegration processes, and security sector reform efforts assisted by the UN.
Article 12	Urges women's participation in discussions related to conflict prevention and resolution, the maintenance of peace and security, and post conflict peacebuilding, and encourages parties to facilitate women's equal and full participation at decision-making levels.
United Nations Security Council Resolution 1888 (2009) Article 3	Demands that 'all parties to armed conflict immediately take appropriate measures to protect civilians, including women and children, from all forms of sexual violence, including... vetting candidates for national armies and security forces to ensure the exclusion of those associated with ... sexual violence'.
Article 6	Urges States to undertake comprehensive legal and judicial reforms to ensure that survivors of sexual violence have access to justice, are treated with dignity throughout the justice process, are protected and receive redress for their suffering.
Article 7	Requires that all parties to conflict to ensure that all reports of sexual violence committed by civilians or by military personnel are thoroughly investigated and alleged perpetrators brought to justice, and that civilian superiors and military commanders use their authority and powers to prevent sexual violence and address impunity
Article 9	Encourages States to increase capacities of law enforcement personnel with regard to sexual violence in armed conflict.
Article 19	Proposes deployment of greater numbers of female military and police personnel to United Nations peacekeeping operations, and to provide all military and police personnel with adequate training to carry out their responsibilities.
Article 20	Proposes the provision of technical support to troop and police contributing countries, in order to include guidance for military and police personnel on addressing sexual violence in pre-deployment and induction training.
Article 21	Requires ongoing requests to strengthen efforts to implement the UN policy of zero tolerance of sexual exploitation and abuse and urging of troop-contributing countries to take actions such as pre-deployment and in-theatre awareness training.

INTERNATIONAL INSTRUMENTS	
Instrument/ Article	Legal Standard
United Nations Security Council Resolution 1889 on Women Peace and Security (2009) Article 3	Highlights state responsibility to put an end to impunity and to prosecute those responsible for all forms of violence committed against women and girls in armed conflicts, including rape and other sexual violence.
Article 10	Requires states to design concrete strategies to support women and girl's security needs, including through gender-responsive law enforcement.
Article 13	Requires the consideration of the needs of women and girls associated with armed forces and armed groups and their children in the planning for disarmament, demobilization and reintegration, ensuring their access to such programmes.
United Nations Security Council Resolution 1960 (2010) Article 5	Requires parties to armed conflict to make and implement specific and time-bound commitments to combat sexual violence, including issuance of clear orders through chains of command prohibiting sexual violence and the prohibition of sexual violence in Codes of Conduct, military field manuals; and parties to make and implement specific commitments on timely investigation of alleged abuses in order to hold perpetrators accountable.
Article 15	Encourages Member States to deploy greater numbers of female police personnel to United Nations peacekeeping operations, and to provide all police and military personnel with adequate training on sexual and gender-based violence.
Article 16	Encourages continued requests related to provision and deployment of guidance on addressing sexual violence for pre-deployment and inductive training of military and police personnel, and in developing situation-specific procedures to address sexual violence at the field level and to ensure provision of technical support to troop and police contributing countries so guidance is included for military and police personnel on addressing sexual violence in pre-deployment and induction training.

Regional Instruments	
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) Article 3	Requires the adoption and implementation of appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.
Article 4	Requires states parties to enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether in private or public; punish perpetrators of violence against women and implement programs for the rehabilitation of survivors; and establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims.
Article 8	Requires that appropriate measures are taken to ensure that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights and that women are represented equally in law enforcement organs.
Article 11	Requires appropriate measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities and that no child is recruited as a soldier.
The International Conference on the Great Lakes Region (ICGLR) Protocol on the Prevention and Suppression of Sexual Violence against Women and Children (2006) Article 1	Defines sexual violence as any act which violates the sexual autonomy and bodily integrity of women and children under international criminal law including but not limited to: rape, sexual assault, grievous bodily harm, assault or mutilations of female reproductive organs, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization, sexual exploitation or coercion of women to perform domestic chores or to provide sexual comfort, trafficking in persons and their exploitation, exploitation of prostitution, forced labor, slavery or practices similar to slavery, servitude or the removal of organs. Sexual violence includes gender-based violence that is directed at a woman because she is a woman or that affects women disproportionately.

Table 2: summarizing leading jurisprudence on CARSV in international tribunals

CASE NAME / CATEGORY	CASE SUMMARY
<p>Duško Tadić</p> <p>Crime against Humanity</p> <p>Cruelty/ Sexual Violence against men</p> <p>Grave Breaches of the Geneva Conventions.</p> <p>Inhumane Treatment</p> <p>Willfully causing great suffering or serious injury to the body or health.</p>	<p>In Bosnia and Herzegovina Serb forces confined thousands of Muslims and Croats in camps. In Omarska Camp one of the detainees was forced by uniformed men, including Duško Tadić, to bite off the testicles of another detainee.</p>
<p>Esad Landžo, Zdravko Mucić, Zejnil Delalić, Hazim Delić</p> <p>a) Rape as a form of torture,</p> <p>b) Rape as a grave breach of the Geneva Conventions and a violation of the laws and customs of war.</p>	<p>Bosnia and Herzegovina.</p> <p>Esad Landžo, a camp guard, forced two brothers to commit fellatio on each other in full view of other detainees, and placed a burning fuse around their genitals. He also placed a burning fuse around the genitals of another male detainee and forced him to run between rows of prisoners.</p> <p>Deputy camp commander Delić raped two women detained in the camp during interrogations. The judges ruled that the purpose of the rapes was to obtain information, punish the women for their inability to provide information and to intimidate and coerce them. The Trial Chamber also found that the violence suffered by the two women had a discriminatory purpose – it was inflicted on them because they were women.</p>
<p>Anto Furundžija</p> <p>Sexual Violence</p> <p>Rape as a crime against humanity</p> <p>Rape as a grave breach of the Geneva Conventions</p> <p>Rape as a violation of the laws and customs of war.</p> <p>Rape as a tool of genocide</p>	<p>The first case at the ICTY to concentrate entirely on charges of sexual violence</p> <p>The trial focused on the multiple rapes of a Bosnian Muslim woman committed during interrogations led by Furundžija who was at the time the commander of the Jokers, a special unit of the Croatian Defense Council (HVO) in Bosnia and Herzegovina. It was not Furundžija personally, but his subordinate who raped the woman in front of a laughing audience of other soldiers. Nevertheless, as the unit's commander, Furundžija was found guilty as a co-perpetrator and as an aider and abettor.</p>

JURISPRUDENCE/SENTENCE

The Trial Chamber found Tadić guilty of cruel treatment (violation of the laws and customs of war) and inhumane acts (crime against humanity) for the part he played in this and other incidents. On appeal, Tadić was additionally sentenced for grave breaches of the 1949 Geneva Conventions: inhumane treatment and willfully causing great suffering or serious injury to the body or health.

The Appeals Chamber set out that ‘through his presence, Duško Tadić aided and encouraged the group of men actively taking part in the assault. Of particular concern here is the cruelty and humiliation inflicted on the victim and the other detainees’.

Tadić was sentenced to 20 years’ imprisonment

Landžo and his superior Zdravko Mucić, the camp commander, were found guilty of these and other crimes committed in the camp.

The crimes were qualified as grave breaches and violations of the laws and customs of war.

Rape was qualified as a form of torture – the first such judgement by an international criminal tribunal. The trial Chamber considered ‘the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity.’ The judges held that acts of rape may constitute torture under customary international law.

The appeals Chamber upheld the findings of the trial Chamber and sentenced Hazim Delić to 18, Zdravko Mucić to 9 and Esad Landžo to 15 years of imprisonment. A fourth accused, Zejnil Delalić, was acquitted on all counts due to lack of evidence.

The Trial Chamber made important remarks on the qualification of rape in the context of international crimes. In the Tribunal’s Statute, the only explicit reference to rape is as one of the crimes constituting crimes against humanity. The Trial Chamber widened that scope and stated that rape may also be prosecuted as a grave breach of the Geneva Conventions and as a violation of the laws and customs of war.

Importantly, the Tribunal’s judges also confirmed that rape may be used as a tool of genocide. ‘Rape may also amount to an act of genocide, if the requisite elements are met, and may be prosecuted accordingly.’

The conviction was upheld on appeal and Furundžija was sentenced to 10 years’ imprisonment.

CASE NAME / CATEGORY	CASE SUMMARY
<p>Dragoljub Kunarac, Zoran Vuković and Radomir Kovač</p> <p>Sexual enslavement and rape as crimes against humanity</p>	<p>The three accused Bosnian Serb army officers Dragoljub Kunarac, Zoran Vuković and Radomir Kovač, played a prominent role in organizing and maintaining rape camps in the eastern Bosnian town of Foča. After the Bosnian Serb takeover of Foča, Bosnian Serbs gathered Muslim women in detention centers around the town where they were raped by Serb soldiers. Many women were then taken to apartments and hotels run as brothels for Serb soldiers. The testimonies of over 20 women gave accounts of repeated acts of rape, gang rape and other kinds of sexual assault and intimidation. The women were also obliged to perform household chores, were forced to comply with all the demands of their captors, were unable to move freely and were bought and sold like commodities.</p>
<p>Radislav Krstić</p> <p>Rape, ethnic cleansing and genocide</p>	<p>Krstić was a General Major in the Bosnian Serb Army and commander of the Drina Corps during the operation which resulted in the execution of more than seven thousand Bosnian Muslim boys and men from Srebrenica in July 1995. As Srebrenica fell under Bosnian Serb army control, about 30,000 of its Muslim residents, mostly women, children and the elderly, fled to the nearby village of Potočari. Several thousand sought protection inside the UN military camp. Serb soldiers entered the compound, mingled in the crowd and threatened, beat and killed people. The soldiers also committed many acts of rape.</p>
<p>Sylvestre Gacumbitsi v The Prosecutor</p>	<p>Sylvestre Gacumbitsi was the mayor of the commune of Rusumo in Rwanda. He led an attack on the Nyarubuye Parish during which numerous Tutsi refugees were killed. He distributed arms and organized meetings where he aided the killings of the Tutsi population. Gacumbitsi exercised authority over his subordinates and instigated and allowed numerous rapes and sexual assaults on Tutsi women to take place.</p>

JURISPRUDENCE/SENTENCE

The Judges' held that the enslavement was sexual in nature. All three accused were also found guilty of rape as a crime against humanity. In the context of a widespread and systematic attack on civilians, rape was used to implement a strategy of 'expulsion through terror', the ultimate goal of which was to drive the Muslims out of the region of Foča. Rapes became the way in which 'the Serbs could assert their superiority and victory over the Muslims'. While raping FWS-183, the accused Dragoljub Kunarac told her that she should enjoy being 'fucked by a Serb'. After he and another soldier had finished, Dragoljub Kunarac laughed at her and added that she would now carry a Serb baby."

The judgement broadened the acts that constitute enslavement as a crime against humanity to include sexual enslavement and determined the relationship of gender crimes to customary law.

This was a significant ruling, because international law had previously associated enslavement with forced labour and servitude. The definition of the crime was therefore widened to include sexual servitude.

The convictions were upheld by the Appeals Chamber in June 2002. Kunarac, Kovač and Vuković received 28, 20, and 12 years' imprisonment respectively.

The Trial Chamber found Krstić responsible for the crimes committed in Potočari, including the rapes, which were deemed as 'natural and foreseeable consequences of the ethnic cleansing campaign'. The Judges noted that, although 'ethnic cleansing' was not a legal term, it had been used in various legal analyses before. The Trial Chamber concluded that there were 'obvious similarities between a genocidal policy and the policy commonly known as ethnic cleansing'. The rapes in Potočari did not form part of Krstić's conviction for aiding and abetting genocide, as the events in Potočari were a prelude to the subsequent genocide. In 2004 the Appeals Chamber upheld the sexual violence convictions. Krstić was sentenced to 35 years' imprisonment.

In 2004, the Trial Chamber of the International Criminal Tribunal for Rwanda found Gacumbitsi guilty of genocide and of crimes against humanity for rape and extermination. He was then sentenced to 30 years in prison. In 2006, the Appeals Chamber confirmed the Trial Chamber's decision and additionally found Gacumbitsi guilty of murder as a crime against humanity. His sentence subsequently increased to life imprisonment.

CASE NAME / CATEGORY	CASE SUMMARY
<p>Édouard Karemera Matthieu Ngirumpatse v The Prosecutor</p> <p>Rape as a crime against humanity</p>	<p>The accused Mathieu Ngirumpatse as President of the Mouvement Républicain National pour la Démocratie et le Développement (hereinafter, MRND) and his co-accused Karemera as its Vice President, introduced and implemented various actions designed to specifically target the Tutsi population.</p> <p>They actively supported the Interahamwe, a Hutu paramilitary organization that acted as the youth wing of the MRND, and which was responsible for the mass killing, rape and sexual assault of innumerable Tutsi women. The accused travelled across government-controlled parts of Rwanda and espoused their anti-Tutsi policy with a view to inciting more killings. For many years, Karemera was said to have consented to, executed and partook in a plan aimed at the systematic extermination of the Tutsi population by hatred and ethnic violence, the distribution of arms to militias, and the preparation of lists of persons who were to be killed.</p> <p>In 2005, Karemera was accused of ‘conspiracy with intent to commit genocide’, ‘of direct and public incitation to commit genocide’, as well as ‘genocide’ or alternatively ‘complicity in the crime of genocide’.</p>
<p>The Prosecutor v. Pauline Nyiramasuhuko</p>	<p>The six accused in this case were all military, political or civilian authorities in Butare commune: Nyiramasuhuko was the Minister of Family and Women’s Development; Nsabimana served as the Prefect of Butare from April until 17 June 1994; Nteziryayo was a member of the Ministry of the Interior; Kanyabashi was the mayor of Ngoma commune; Ndayambaje was the mayor of Muganza commune and Ntahobali was a leader of a unit of the Interahamwe.</p> <p>Following the replacement of the former Prefect of Butare by Nsabimana on April 20th 1994, large-scale massacres and rapes of Tutsis took place in Butare commune. Thousands were killed at Mugombwe Church, Kabuye Hill, Kabakobwe Hill and Matyazo Clinic.</p>

JURISPRUDENCE/SENTENCE

In February 2012, Trial Chamber III of the ICTR found both accused guilty of genocide, conspiracy to commit genocide, direct and public incitement of genocide, rape and extermination as crimes against humanity and the war crime of killing.

Both were sentenced to life imprisonment.

Nyiramasuhuko, Ntahobali and Ndayambaje were sentenced to life imprisonment; Kanybashi, Nteziryayo and Nsabimana to 35, 30 and 25 years⁴⁴ imprisonment respectively. This case is presently on appeal before the Appeals Chamber of the ICTR.

CHAPTER THREE

SITUATIONAL ANALYSIS OF UGANDA'S DOMESTIC LEGAL AND POLICY FRAMEWORK IN RELATION TO CARSV

This chapter is a situational analysis of Uganda's domestic legal and policy framework in relation to CARSV. It discusses Uganda's legal obligations as state party to the Rome Statute and signatory to international law and human rights frameworks. The purpose of the chapter is to identify legal and procedural gaps that require reform in order to align Uganda's domestic law and practice to international standards for the redress of CARSV. It further highlights international best practices that would help to improve the existing domestic legal framework to better adjudicate matters of CARSV.

3.1 Introduction and Background

In many conflicts around the world, sexual violence has been committed against women, men, and children alike.¹²² A recent study on armed groups' involvement in CARSV reported a total of 129 active conflicts in the period 1989–2009 alone.¹²³ CARSV prominently featured in one of Uganda's biggest civil wars as abduction, forced marriage and sexual violence were incorporated into the LRA ideology.¹²⁴ The LRA preferred girls and young women because they were considered less sexually active and less likely to be suffering from sexually transmitted diseases.¹²⁵ Prepubescent girls were allocated to rebel commanders as babysitters or to help with domestic chores.¹²⁶ Upon reaching puberty, the commanders could turn them into wives.¹²⁷ Between 30%–50% of the abducted girls in Northern Uganda returned from rebel captivity with one or more children fathered by rebel commanders or soldiers.¹²⁸ Those whose 'husbands' died in battle were normally reallocated to other rebel fighters or commanders.¹²⁹

122 AM de Brouwer 'The importance of understanding sexual violence in conflict for investigation and prosecution purposes' *Cornell International Law Journal* 48:3 (2016) 4. <https://scholarship.law.cornell.edu/cilj/vol48/iss3/4/> Reported instances include conflicts that have taken place in Europe during World War I (1914–1918); in Asia and Europe during World War II (1939–1945); Bangladesh (1971); Colombia (1964–today); Cambodia (1975–1979); Uganda (1987–today); Sierra Leone (1991–2001); Bosnia–Herzegovina (1992–1995); Rwanda (1994); Kosovo (1998–1999); Democratic Republic of the Congo (1998–today); Timor-Leste (1999); Liberia (1999–2003); Central African Republic (2002–2003; 2012–today); Sudan (2003–today); Burundi (2004–2007); Syria (2011–today); Iraq (2011–today); and South–Sudan (2013–today), to name a few.

123 DK Cohen & R Nordås (2014) 'Sexual violence in armed conflict' *Journal of Peace Research* 51:3 (2014) 418–428. <https://doi.org/10.1177/0022343314523028>

124 K Amone-P'Olak, TM Lekhuthile, E Ovuga, RA Abbott, R Meiser-Stedman, DG Stewart & PB Jones 'Sexual violence and general functioning among formerly abducted girls in Northern Uganda: the mediating roles of stigma and community relations – the WAYS study' *BMC Public Health* 16:1 (2016).

125 K Amone-P'Olak 'Psychological impact of war and sexual abuse on adolescent girls in Northern Uganda' *Intervention* 3 (2005) 33–45. See also J Annan, C Blattman, D Mazurana & K Carlson 'Civil war, reintegration and gender in Northern Uganda. *Journal of Conflict Resolution* 55(6) (2011) 877–908.

126 Amone-P'Olak, as above. J Annan, C Blattman & R Horton *The state of youth and youth protection in Northern Uganda: Findings from the survey for war affected youth* (2006) UNICEF Uganda. <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.188.9011&rep=rep1&type=pdf>

127 As above.

128 As above.

129 As above.

Controlled sexual violence against girls in rebel captivity was therefore an instrument to establish a hegemony over combatants by the LRA leadership in three ways: first, being allocated a wife was a reward;¹³⁰ second, forced marriages secured dependency on the LRA as an organisation through family bonds between ‘husband’ and ‘wife’ and later children;¹³¹ and thirdly, it was hegemony over the ‘wives’ as they were controlled by and dependent on their husbands for protection and resources that were looted from communities.¹³² Finally, by allocating several ‘wives’ to rebel fighters and commanders, the LRA, had hegemony over its fighters.¹³³ Thus, the sexual violence perpetrated by the LRA was embedded in their ideology and operationalized through the structures and norms of the LRA.¹³⁴

Also, many abducted men in captivity were often forced by the LRA troops to participate in sexual violence against women in their communities. This led many males to become victims themselves because of the forced sexual violence that they had to perform on other men or women.¹³⁵ If perpetrators were not able to rape men, they perpetrated sexual violence against women and girls to humiliate their men, knowing that the stigma related to rape could affect the men’s morale.¹³⁶ Additionally, displaced women and girls in Northern Uganda had few places to turn to for protection from the various entities that sought to harm them. Women in prolonged camp situations were more vulnerable to abuse from male relatives or partners and sexual violence and exploitation by the very soldiers who were supposed to protect them.¹³⁷

One study, specifically looking at the experience of Internally Displaced Persons (IDPs) in Uganda, found that men and boys were among the victims of sexual violence in the Pabbo Camp in the Gulu District of Northern Uganda.¹³⁸ These IDPs were subjected to sexual violence by multiple parties, including Ugandan soldiers and females, as recorded by the Refugee Law Project.¹³⁹

3.2. States obligations to redress CARSV

The Government of Uganda is under an obligation to redress the abuses suffered by the CARSV victims. This obligation emanates from the 1949 Geneva Conventions and their 1977 Additional Protocols that reflect customary law of State obligations imposing an obligation on states to prevent and punish

130 As above.

131 As above.

132 As above.

133 S Kramer ‘Forced marriage and the absence of gang rape: Explaining sexual violence by the Lord’s Resistance Army in northern Uganda.’ *Journal of Politics and Society* 23:1 (2021) 11–49.

134 Amone-P’Olak, K, n 125 above; Annan et al, n 126 above; J Annan, C Blattman, D Mazurana, & K Carlson ‘Civil war, reintegration, and gender in Northern Uganda’ *Journal of Conflict Resolution* 55:6 (2011) 877–908. <https://doi.org/10.1177/0022002711408013>

135 K Lažauninkaitė *Victims of sexual violence affected by the Lord’s Resistance Army conflict: addressing sexual violence within Ugandan national law and the International Criminal Court (ICC)* (Master Thesis). Tilburg University (2016) 13. <http://arno.uvt.nl/show.cgi?fid=141594>

136 As above.

137 E Patrick *Surrounded: Women and Girls in Northern Uganda*. Migration Policy Institute (2005) <https://www.migrationpolicy.org/article/surrounded-women-and-girls-northern-uganda>

138 ‘Invisibly Displaced Persons in Adjumani District 29’ Refugee Law Project, Working Paper No. 19 (2006); C Dolan, LE Fletcher & S Oola *Promoting Accountability for Conflict-Related Sexual Violence Against Men: A Comparative Legal Analysis of International and Domestic Laws Relating to IDP and Refugee Men in Uganda* (2013) SSRN Electronic Journal. 20. Published. <https://doi.org/10.2139/ssrn.2758940>

139 As above, see also Refugee Law Project (2009) *Gender Against Men* [Video] <http://www.refugeelawproject.org/resources/video-documentaries/video/latest/gender-against-men.html>; Refugee Law Project (2011) *They Slept With Me* [Video] <https://www.youtube.com/watch?v=6dxaFqezrXg>

war crimes and grave breaches. The Geneva Conventions and Additional Protocol I explicitly set out State obligations to exercise universal jurisdiction over 'grave breaches' of those instruments.¹⁴⁰

As a signatory to the Rome Treaty, Uganda's ICC Statute is a milestone in the fight to end impunity for war crimes, genocide and crimes against humanity.¹⁴¹ Though the States continue to have the primary role to play in prosecuting war criminals, the ICC is set up as a complementary court to national courts when these are unwilling or genuinely unable to do so. States which ratify and domesticate the Rome Treaty are considered to be in position to implement IHL and to bring violators before their own courts.¹⁴² It is a basic principle of international law that a state party to an international treaty must ensure that its own domestic law and practice are consistent with what is required by the treaty.¹⁴³ States should establish jurisdiction to adjudicate and actually empower domestic courts to enforce the crime of CARSV.

The primary competence and authority to initiate investigations of international crimes rests with States national jurisdictions.¹⁴⁴ Uganda has the jurisdiction and the primary obligation to detect, investigate, prosecute and adjudicate the most serious international crimes, both under applicable international law and the Rome Statute.¹⁴⁵ Complementarity means that states have the primary obligation to investigate and prosecute those responsible for international crimes, but also that the ICC will only intervene when states do not have the genuine will or the capacities to do so.¹⁴⁶ Due to the limited resources of the ICC, it is essential that States fulfill this primary responsibility.¹⁴⁷ To this effect, the first and minimal condition enabling states to abide to this obligation of accountability for genocide, crimes against humanity, war crimes and crime of aggression is the existence of legislation that incorporates in their national law the crimes and general principles of law contained in the Rome Statute.¹⁴⁸ Uganda as a state party will therefore need to modify the laws pertaining to CARSV to meet this obligation.

The law regarding the national implementation of the ICC Statute provides for national courts

to exercise criminal jurisdiction over genocide, crimes against humanity, and war crimes, including grave breaches of the 1949 Geneva Conventions; violations of international humanitarian law (IHL) committed in international armed conflicts such as, inter alia, directing attacks against the civilian population and intentionally directing attacks against buildings dedicated to religion, education, art, or science and other cultural property; violations of Article 3 common to the 1949 Geneva Conventions; and other violations of IHL committed in non-international armed conflicts.¹⁴⁹

140 Articles 49, 50, 129, 146 respectively of the Geneva Conventions I-IV, Article 85 of Additional Protocol I; for acts constituting grave breaches, see Articles 50, 51, 130, 147 respectively of the Geneva Conventions I-IV.

141 International Committee of the Red Cross 'Elements of War Crimes under the Rome Statute of the International Criminal Court – sources and commentary' (2003) <https://www.icrc.org/en/doc/resources/documents/publication/p0-521-81852-4.htm>

142 International Committee of the Red Cross 'The Domestic Implementation of International Humanitarian Law' (2015) <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4028.pdf>

143 United Nations Enable 'Chapter Five: National legislation and the Convention – Incorporating the Convention into domestic' (2015) <https://www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the-convention-on-the-rights-of-persons-with-disabilities/chapter-five-national-legislation-and-the-convention.html>

144 Parliamentarians for Global Action 'The Challenge: Fighting Against Impunity for International Crimes' (2021) <https://www.pgaction.org/ilhr/rome-statute/>

145 This recognition is reflected in the principle of complementarity found in the Preamble, Article 1 and Article 17 of the Rome Statute.

146 International Criminal Court. (2009). *Informal expert paper: The principle of complementarity in practice*. https://www.icc-cpi.int/RelatedRecords/CR2009_02190.pdf

147 As above.

148 As above.

149 Law on the implementation of the Rome Statute No. 52-2009, was adopted on 31 December 2009.

The law also emphasizes national courts' primacy of jurisdiction over the ICC, thus reaffirming the principle of complementarity.¹⁵⁰ States continue to have the primary role to play in prosecuting war criminals. The sexual crimes that fall under the subject matter jurisdiction of the court are listed under articles 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi) and are elaborated upon in the elements in relation to sexual violence. In Uganda, the Rome Statute was domesticated by the ICC Act of 2010 to give effect to the ICC Statute and to provide for offences under the law of Uganda corresponding to offences within the jurisdiction of the ICC.¹⁵¹ The effect of this development is that the High Court of Uganda has the mandate to try crimes against humanity, international crimes and genocide. There are also the recent Rules of Procedure of the International Criminal Division of the High Court.¹⁵²

The ICC Act, Rules of Evidence and Procedure (RPE) and the Court Regulations provide a strong basis for successfully addressing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.¹⁵³ This body of law also contains various provisions designed to ensure the effective investigation and prosecution of sexual and gender-based crimes and to protect the interests of victims and witnesses of these crimes.¹⁵⁴

The rules stipulate that evidence of other sexual conduct of a victim or witness, prior or subsequent to the Act of CARSV shall not be admissible evidence.¹⁵⁵ Additionally, they also provide that in matters of sexual violence, consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent.¹⁵⁶ Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence and also that; credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.¹⁵⁷

The rules also provide for in camera procedure to consider relevance or admissibility of evidence: Where there is an intention to introduce or elicit, including by means of the questioning of a victim or witness, evidence that the victim consented to an alleged crime of sexual violence, or evidence of the words, conduct, silence or lack of resistance of a victim or witness as referred to in principles (a) through (d) of rule 70.

The implementation of the Rome Treaty provides an opportunity to re-invigorate reforms of the criminal and procedure codes, which, in the long term, will strengthen rule of law, peace, and security globally.¹⁵⁸

150 Different forms of criminal responsibility are penalized, such as complicity, ordering, inciting, and aiding and abetting, and under given circumstances even the attempt to commit certain offences. The defense of 'superior orders', as in the Statute, would be accepted in court under strict conditions, among them that the order was not manifestly illegal. Orders involving genocide or crimes against humanity would always be considered manifestly illegal. Article 7 establishes that no distinction shall be made in the exercise of jurisdiction regarding government officials, including the head of state, thus rejecting the possibility of immunities. Article 9 of the law refers to grounds for exclusion of criminal responsibility, such as self-defense and duress. The law also provides for a number of judicial guarantees, including *ne bis in idem* and the right to not testify against oneself. Finally, it establishes the available penalties for all offences, including fifteen to thirty years' imprisonment, a monetary fine, and confiscation of property.

151 Which entered into force on 25th June 2010.

152 Uganda International Crimes Division rules 2016.

153 See Secs 2, 7, 8 & 9 of the ICC Act of 2010.

154 See secs 58 & 64 of ICC Act of 2010.

155 ICC Rules of Procedure and Evidence, Rule 71.

156 As above, Rule 70.

157 As above, Rule 71.

158 As above.

The ICC Statute's expansive list of CARSV crimes relates to both international and non-international armed conflict. However, while the ICC places itself at the heart of the new international justice system to fight impunity, it also remains a 'court of last resort', leaving the primary responsibility to exercise jurisdiction over alleged criminals to national legal systems. The principle of complementarity governs the exercise of the Court's jurisdiction.

The ICC may only exercise jurisdiction where national legal systems fail to do so, including where they purport to act but in reality, are unwilling or unable to genuinely carry out proceedings.¹⁵⁹ The principle of complementarity is based both on respect for the primary jurisdiction of States and on considerations of efficiency and effectiveness, since States will generally have the best access to evidence and witnesses and the resources to carry out proceedings. Moreover, there are limits on the number of prosecutions the ICC, a single institution, can feasibly conduct.¹⁶⁰

Complementarity is premised on the guiding principles of **partnership** and **vigilance**. **Partnership** indicates the ideal of a positive relationship between the ICC and a state that is committed to investigate and prosecute an international crime. The Prosecutor can take up the role of encouraging the State to take further steps in the process or the State and the ICC can decide on how to share roles and tasks.¹⁶¹ **Vigilance** refers to the fact that, while the ICC seeks to partner with states in the prosecution of crimes, it must nevertheless diligently carry out its responsibilities under the Statute. It is the role of the Prosecutor to undertake further investigations to ensure that a national process is genuine.¹⁶²

3.3 Uganda's domestic legal and policy framework in relation to International Law and practice on CARSV

Uganda's domestic legal framework pertaining to the prosecution of CARSV is found in the ICC Act, Evidence Act, Trial on indictments Act, the Criminal Procedure Code and the Penal Code as amended¹⁶³ as well as in the Domestic Violence Act, 2010.¹⁶⁴ Whereas these laws collectively provide the legal framework for CARSV including the ingredients of sexual violence and the procedure required to successfully prosecute an act of sexual violence generally, they lack the gender-neutral and context specific definitions required for key offences for rape, uphold evidential procedures that are inapplicable in the context of CARSV and are generally lacking in the aspect of victim friendly procedures.

Overall, the existing legislation in Uganda does not reflect the progressive developments relating to the prosecution of CARSV under international criminal law and is thereby not well suited to address the prosecution of CARSV in keeping with the principle of complementarity under the Rome Treaty.

159 ICC, n 146 above.

160 As above.

161 D Robinson 'Informal expert paper: The principle of complementarity in practice' (2003) 3.

162 As above at 4.

163 Section 123-124 (rape), Section 125 (attempt to commit rape), Section 126 (abduction), Section 128 (indecent assault), Section 130 (defilement of idiots and imbeciles), Section 131 (procuration), Section 132 (Procuring of women by threats etc), Section 133 (house holder permitting defilement), Section 134 (detention with sexual intent), Section 140 (conspiracy to defile), Section 145 (unnatural offences), Section 146 (attempt to commit unnatural offences), Section 147 (indecent assault on boys), Section 148 (indecent practices), amendment of Section 129 to provide aggravated defilement and child to child sex.

164 Section 2 provides that sexual abuse is any conduct of a sexual nature that abuses, humiliates or otherwise degrades the dignity of another person. Section 4 provides for prohibition of domestic violence, Section 5 provides that consent is not a defense in the act, Section 6 (proceedings in local council courts), Section 7 (duty and role of police officers), Section 8 (duty and role of a medical practitioner), Section 9 (jurisdiction of Magistrates Courts), Section 10-16 (protection orders), Section 17 (jurisdiction of Family and Children Courts in matters relating to domestic violence).

To begin with, the definitions in the Penal Code of Uganda are much narrower compared to that which are provided in the ICC Statute and the ICC Elements of Crimes document.¹⁶⁵

The Elements of Crimes document provides a gender-neutral definition of rape while our Penal Code provides a sex-specific definition excluding men from being recognized as victims of such crimes. Rape is also categorized as a moral crime rather than a grave breach of international law as is the case under the Rome Statute. This misrepresents the seriousness of the crime.¹⁶⁶ Furthermore, the definition of rape under our Penal Code focuses on the sexual act of penetration hence narrowing the scope to sexual intercourse and yet there are many more acts of sexual violence beyond the narrow perception of sexual intercourse such as instances where men were forced to insert their sexual organs into banana plant stems to simulate sexual intercourse or where weapons are used to penetrate sexual organs.¹⁶⁷

Finally, Uganda's Penal Code Act retains a consent-based approach to rape instead of taking into account the coercive environment within which rape is perpetrated.¹⁶⁸ These significant gaps in the domestication of international law in relation to CARSV has resulted in national interventions that fall short of the standards contained in the ICC jurisprudence. The details of the gaps and anomalies in Uganda's national legislation are discussed in detail here below.

The Penal Code Act¹⁶⁹ defines rape under Section 117 as follows:

‘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.’

The phrase *carnal knowledge* refers to penetration of the male sexual organ into a woman's vagina. Thus, if a man forcibly penetrates a man or a woman's anus, or if a man or woman forcibly inserts any other object into another's vagina or anus or forces oral sex or cunnilingus on another person, such conduct does not amount to rape although it may constitute other less serious offences such as indecent assault or carnal knowledge against the order of nature under section 128 or section 145 of the Penal Code.

Thus, the elements of rape are (1) unlawful (2) carnal knowledge (3) of a female victim (4) without consent. The first element refers to the marital status of perpetrator and victim.¹⁷⁰ *Carnal knowledge* has been interpreted to mean vaginal penetration by the male organ.¹⁷¹ Indecent assault is often charged with rape, and if ‘carnal knowledge’ is not proven beyond a reasonable doubt by the prosecution, a perpetrator may be found guilty of indecent assault as follows:¹⁷²

165 Cap 120.

166 L Chappell ‘Complimenting Gender Justice at the ICC’ in *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy* (2017) 185.

167 W Storr ‘The rape of men: the darkest secret of war’ *The Guardian* 16th July 2011 <https://www.theguardian.com/society/2011/jul/17/the-rape-of-men>

168 The consideration of a coercive environment is a key development in international jurisprudence and is contained in the Elements of Crimes document.

169 Section 117 Penal Code Act Cap 120.

170 L Tibatemwa-Ekirkubanza *Criminal Law in Uganda. Sexual Assaults and Offences Against Morality (Fountain Series in Law and Business Studies)* (2005) Fountain Publishers.

171 *Uganda v Okiring* (HCT-04-CR-SC-0080-2008) <http://www.ulii.org/ug/judgment/high-court/2011/127>

172 *Uganda v Ekyorinkwasa Deus* (HCT-05-CR-SC-0074) <http://www.ulii.org/ug/judgment/high-court/2003/20>.

1. Any person who unlawfully and indecently assaults any woman or girl commits a felony and is liable to imprisonment for fourteen years, with or without corporal punishment. (2) It shall be no defense to a charge for an indecent assault on a girl under the age of eighteen years to prove that she consented to the act of indecency.

The misdemeanor of *indecent assault* is stated as follows:

Any person who, intending to insult the modesty of any woman or girl, utters any word, makes any sound or gesture or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman or girl, or intrudes upon the privacy of such woman or girl, commits a misdemeanor and is liable to imprisonment for one year.¹⁷³

Rape and indecent assault are important provisions for the prosecution of CARSV. However, both provisions exclude male victims. Under the laws of Uganda, it is an offence for a person to have carnal knowledge of a person against the order of nature.¹⁷⁴

The results of a survey of penal codes in 189 countries¹⁷⁵ reveal a widespread lack of legal protection for men who experience sexual abuse. Not only do these frameworks make justice for male victims an impossibility in many countries, they can actively deter first-instance reporting to police and service providers by male victims.¹⁷⁶ The survey focused exclusively on rape provisions in domestic legal codes. While recognizing that in some jurisdictions male victims may seek redress under sexual assault or ‘indecent assault’ provisions, these frequently fail to define rape, and generally provide lesser punishment than for perpetrators of rape of women.¹⁷⁷ This position is an obstacle to the redress of CARSV created by the legal frameworks that can make access to formal justice systems problematic for all survivors of CARSV. This anomaly could be resolved by adopting a gender-neutral definition of rape.

Rape and indecent assault as defined in Ugandan law are problematic for the prosecution of CARSV against men because the sex-specific anatomical elements that make up the crime of rape ignore the violation of a male victim’s bodily integrity.¹⁷⁸ The Penal Code provisions perpetuate the notion that men cannot be victims of sexual violence. As a formal legal matter, the Ugandan code does not recognize male rape as a crime; this means that such acts may only be prosecuted in Ugandan courts as international crimes or sodomy.¹⁷⁹

The Draft Sexual Offences Bill¹⁸⁰ proposes to redefine rape to make it broader and thereby capture more instances of violence against women and men that are currently not included in existing legislation. In order to properly redress CARSV, the body of law pertaining to sexual offences should develop provisions that set a new standard for the courts of Uganda to adjudicate cases pertaining to sexual violence against males. Prosecutors and judges in Uganda’s courts would, in this instance,

173 Section 128 of the Penal Code Act Cap 120.

174 Section 145 of the Penal Code Act Cap 120.

175 This survey, relying on web-searches to locate the relevant penal codes or equivalent legislation, reviewed 189 codes. Legislation for 4 countries could not be found. Legal regimes were placed in four categories, and combined with population statistics from the World Bank. This was combined with current characterizations of countries at conflict, sourced from the International Institute of Security Studies database. (Dolan C and Luedke A, forthcoming).

176 As above.

177 C Dolan Into the mainstream: addressing sexual violence against men and boys in conflict (2014) https://reliefweb.int/sites/reliefweb.int/files/resources/Into_The_Mainstream-Addressing_Sexual_Violence_against_Men_and_Boys_in_Conflict.pdf

178 Refugee Law Project, Working paper No. 24 (2013). https://www.refugeelawproject.org/files/working_papers/RLP.WP24.pdf

179 As above.

180 Uganda Law Reform Commission *Study on Rape, Defilement and other Sexual Offences* (2000).

have the opportunity to expound upon the emerging practice of rape against men and ensure that sexual violence is recognized in all its forms, regardless of the gender of the victim or the perpetrator.

Furthermore, the offence of rape under the Penal Code Act of Uganda is listed under the category of offences against morality.¹⁸¹ This has very negative and serious repercussions in the prosecution of such cases.¹⁸² There is therefore a need to reclassify sexual offences as offences against the person and not offences against morality.¹⁸³ The primary focus of the law should not be on morality but on a person's physical integrity. Violating a human being's physical integrity is violating one of the most fundamental rights. Thus enshrining such violations as human rights violations gives them the legal authority that they deserve.¹⁸⁴ Rape has been classified as a crime of violence, aggression and domination which affects women and girls disproportionately and has to be dealt with as such.¹⁸⁵ The laws of Uganda should re-classify the crime of rape as constituting an act of violence against the person to augment the aspect of rape as a human rights violation and align the classification of the offence of rape in Uganda with that of the international community and international human rights frameworks.

Sexual Violence is a crime that often occurs without witnesses.¹⁸⁶ For this reason, incidents of sexual violence are often difficult to corroborate. Historically, there has been a tendency to require more corroboration for sexual violence than for other types of crimes.¹⁸⁷ The experience in certain national jurisdictions has been that without corroborative evidence, rape victims are more often than not, suspected of making false allegations.¹⁸⁸ In light of this historic evidentiary hurdle, rule 96(1) ICC RPE provides that in cases of sexual assault, no corroboration of the victim's testimony shall be required. Rule 96(1) functions to accord the testimony of a victim of sexual assault the same presumption of reliability as the testimony of victims of other crimes.¹⁸⁹ It seeks to confirm that contrary to the position taken in some domestic jurisdictions, the testimony of victims of sexual assault is not as a general rule less reliable than the testimony of any other witness.¹⁹⁰

This requirement for corroboration in sexual offences is another challenge pertaining in the procedural management of sexual violence cases in Uganda. The Evidence Act provides that no particular number of witnesses shall in any case be required for the proof of any fact.¹⁹¹ Although not required by law to prove sexual offenses, in practice, the Supreme Court of Uganda had earlier stated that corroborating evidence should also be sought out and, if a judge chooses to convict without corroborating evidence, the judge must explain in the judgment.¹⁹² In a recent development, the Supreme Court in **Ntambala v Uganda** held that a conviction can be solely based on the testimony

181 Part XIV of the Penal Code Act Cap 120.

182 CE LeGrand 'Rape and Rape Laws: Sexism in Society and Law' *California Law Review* 61:3 (1973) 919.

183 As above.

184 As above.

185 As above.

186 DD Ntanda Nsereko 'Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia' in RS Clark & M Sann (Eds.) *The Prosecution of International Crimes* (1996) 50. Taylor & Francis.

187 K Fitzgerald, 'Problems of prosecution and adjudication of rape and other sexual assaults under international Law' *European Journal of International Law* 8:4 (1996). <http://ejil.org/pdfs/8/4/789.pdf>

188 W Schomburg & I Peterson (2007). 'Genuine Consent to Sexual Violence under International Criminal Law' *The American Journal of International Law* 101:1 (2007) 121–140. <https://www.jstor.org/stable/4149827>

189 *Prosecutor v Tadic* ICTY 94-1T, Trial Judgement 17th May 1997

190 *Prosecutor v Delalic et al* ICTY – 96-21, Appeal Judgement 20th February 2003

191 Section 133.

192 *Tibatemwa-Ekirikubinza* (n 170 above).

of the victim as a single witness provided that a court finds her to be truthful and reliable.¹⁹³ The requirement for corroboration is not expressly prohibited by this judgement leaving latitude for the court to determine whether or not to require corroboration for a victim's testimony. This may offer a specific challenge to the prosecution and the victim of CARSV faced with the insurmountable task of presenting a substantive testimony as a precondition to doing away with the requirement.

Advancements in International Criminal Law have done away with the requirement for corroboration. The ICC RPE explicitly state that no corroboration is required for any crime being prosecuted under the Rome Statute. In *Bemba*,¹⁹⁴ the Chamber held that:

Rule 63(4) prohibits the Chamber from imposing 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.¹⁹⁵

The extent to which a piece of evidence, standing alone, is sufficient to prove a fact at issue is entirely dependent on the issue in question and the strength of the evidence. The Appeals Chamber found that

depending on the circumstances, a single piece of evidence may suffice to establish a specific fact. However, [...] this does not mean that any piece of evidence provides a sufficient evidentiary basis for a factual finding

In the *Dordevic* Appeal Judgement¹⁹⁶ the ICTY appeals Chamber held that

Although corroboration is not a legal requirement, while corroborative evidence should be relied upon when it is available, prosecutors should refrain from creating *de facto corroboration* requirements by hesitating to raise charges of sexual violence merely because no corroborative testimony exists to bolster the victim's account. Prosecutors must also make it clear in their argument before court that any corroboration adduced is not legally required. In this way, prosecutors can ensure that perceptions do not become entrenched over time that corroboration is required.

There should be no legal requirement for corroboration in order to prove any crime within the jurisdiction of the International Crimes Division (ICD), particularly regarding crimes of sexual violence. This development will assist victims to overcome the challenge of finding additional witnesses where they are not available (because they are deceased or cannot be located), or in the common setting in which CARSV occurred in a secluded area without eyewitnesses apart from the perpetrator. This position should however be subject to the fact that a victim/witness testimony is substantive enough to establish a particular fact even in instances where it may not be corroborated.

According to the Penal Code of Uganda, the ingredients of rape include unlawful carnal knowledge of a woman or girl, the absence of consent, or consent obtained by force, threats or intimidation, 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.¹⁹⁷ The requirement for proof of non-consent necessitates the prosecution to demonstrate the perpetrator's use of force, or means of threats or intimidation of any kind or fear of bodily harm'. A woman may be raped without struggle as a

193 Supreme Court Criminal Appeal No. 34 of 2015, decided in 2018.

194 *The Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08-3343, 21 March 2016.

195 As above.

196 *Prosecutor v Dordevic* ICTY 01 87/1 Appeal Judgement (27/01/2014) Page 151-152.

197 Section 123 Cap. 10.

result of threats and intimidation.¹⁹⁸ A victim's lack of consent may be proven by the testimony of the victim, evidence of struggle, or the state of a victim when the assault was first reported.¹⁹⁹ The onus of proving a lack of consent is on the prosecution because an accused's belief that a woman consented to intercourse is a defense to rape.²⁰⁰ The requirement of proof that the victim of sexual violence did not consent places an evidentiary burden on the prosecution and raises objections that it subjects victims to unfair psychological strain. It has been replaced in international law with a focus on the use of force, coercion, or an abuse of power by the perpetrator.²⁰¹ The ICTR in ***Prosecutor v Jean-Paul Akayesu***²⁰² noted that 'coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence'.

The ICTY in ***Prosecutor v Dragoljub Kunarac, Radomir Kova and Zoran Vukovic*** held that 'force is not an element per se of rape,²⁰³ and a 'narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force'.²⁰⁴ In relation to the rape of women in de facto military headquarters, detention centers and apartments maintained as soldiers' residences, the Appeal Chamber held that 'such detentions amount to circumstances that were so coercive as to negate any possibility of consent.'²⁰⁵

It was further highlighted in ***Kunarac*** that 'consent of the victim must be given voluntarily as a result of the victim's free will as assessed in the context of the surrounding circumstances. Force or threat of force provides clear evidence of non-consent. There are factors other than force which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim. This is necessarily a contextual assessment. However, in situations of armed conflict, coercion is almost always universal. Continuous resistance of the victim and physical force or even threat of force by the perpetrator are not required to establish coercion.²⁰⁶ Sufficient evidence proving the presence of coercive circumstances negates genuine consent.

A definition of 'sexual violence' that includes non-consent unnecessarily points to the behavior of the victim and ultimately contradicts itself.²⁰⁷ The inclusion of non-consent as an element of crime of rape underscores the danger of the wholesale transfer of domestic concepts to international crimes.²⁰⁸ There are limitations in incorporating domestic law concepts to international crimes because domestic law concepts are not well suited to the distinctive framework of international criminal law. In order for the ICD to effectively prosecute CARSV domestically the new Rules and Procedure of Evidence

198 Tibatemwa-Ekirikubinza, n 170 above.

199 For example, in *Uganda v James Katumba* Criminal Session Case No. 333/97 High Court, the judge determined that the female victim's screams, which were answered by two people and the accused's subsequent flight from the scene, were evidence that the victim did not consent. An absence of struggle may lead to acquittal.

200 *Kibazo v Uganda* [1965] EA 507 Court of Appeal for Eastern Africa; Tibatemwa-Ekirikubinza (n 174 above) 9.

201 Refugee Law Project, Working Paper No. 24 (2013) https://www.refugeelawproject.org/files/working_papers/RLP.WP24.pdf

202 *Prosecutor v Jean-Paul Akayesu* (1998).

203 As above.

204 *Prosecutor v Dragoljub Kunarac, Radomir Kova and Zoran Vukovic* (Appeal) T-96-23-T & IT-96-23/1-T (2002).

205 As above.

206 As above.

207 *Schomburg*, n 188 above.

208 S Brammertz & M Jarvis 'Lessons learned in prosecuting gender crimes under international law: Experiences from the ICTY' in C Eboe-Osuji (Ed.) *Protecting Humanity* (2010) 93–117. Brill. https://brill.com/view/book/edcoll/9789004189577/Bej.9789004183780.i-882_013.xml

should depart from the prevailing Penal Code standards of establishing the absence of consent. The ICD should adopt the standard of establishing the existence of coercive circumstances and eliminate questioning of the victim/witness regarding consent except for where it may be considered necessary to do so upon considering the arguments of the parties. Any questioning of the victim/witnesses in that regard should be conducted in a closed session hearing.²⁰⁹

To date, the laws of Uganda uphold the questioning of an alleged victim of sexual violence about his or her prior sexual conduct.²¹⁰ The Evidence Act permits a person who calls a witness to put any question to him or her which might be put in cross-examination by the adverse party while the credibility of a witness may be impeached by calling witnesses to testify that he or she is not a credible witness.²¹¹ Section 137 of the Evidence Act allows for the examination and cross-examination of witnesses. Whereas the process must relate to relevant facts, the Act allows for cross-examination not be confined to the facts to which the witness testified on his or her examination-in-chief. It is at this point that the evidence of bad character may be brought up. One of the circumstances under which a witness' credibility may be impeached is in instances where a man is prosecuted for rape or an attempt to ravish. The law stipulates that in such cases evidence that the *prosecutrix* was of generally immoral character is admissible.²¹²

On the contrary, most international criminal tribunals prohibit questions relating to the prior sexual conduct of the victim. The ICC RPE also prohibit questioning on subsequent sexual conduct. These questions can be particularly humiliating and, in the context of war crimes, crimes against humanity and acts of genocide, are viewed as being irrelevant and incongruous.²¹³ They are based on patriarchal gender stereotypes that women and girls who consent to sex in a variety of contexts are more likely to have agreed to sex with the alleged perpetrator in the instant case.²¹⁴

The relevant questions concern the surrounding circumstances and whether or not they allowed for the victim to freely consent to sexual acts with the alleged perpetrator in the specific instance.²¹⁵ Questions about prior or subsequent sexual conduct are irrelevant as each sexual act must be agreed to independently and such questions do not provide any information regarding consent at the time the alleged crime was committed.²¹⁶

Evidence of the sexual history of a rape victim often has little probative value in proving consent on the occasion in question.²¹⁷ In most cases, it is a collateral issue having the potential to divert the courts attention from the facts of the charged incident.²¹⁸ Evidence of sexual history can be used to harass and embarrass victims of sexual misconduct, making them less likely to report or prosecute sexual offenses.²¹⁹ The laws of Uganda should be harmonized with international criminal law to prohibit questions pertaining to prior sexual conduct of victims of CARSV.

209 The International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (n 27 above).

210 Evidence Act Cap 6

211 Sections 153 and 154 of the Evidence Act.

212 As above.

213 The International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (n 27 above).

214 As above.

215 As above.

216 As above.

217 CB Mueller, LC Kirkpatrick & L Richter (2018) Evidence 6th ed. 59. Wolter Kluwer.

218 As above at 2.

219 As above.

Another key aspect in the trial of CARSV is the inconsistency of the victim's/witnesses' testimony. It is settled law in Uganda that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected.²²⁰ Minor inconsistencies unless they point to deliberate untruthfulness will be ignored. The gravity of the contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case.²²¹ Often victims of sexual violence have provided multiple statements. In the case of the interviews conducted for CARSV victims for the ICTY, the initial interviews were conducted by external local and international non-governmental organizations and later statements were made to the office of the prosecutor.²²² The varying level of detail between the initial interviews provided to the NGOs and those later obtained by the office of the prosecutor triggered credibility challenges by the defense based on perceived inconsistencies in the different statements.²²³ In some instances, the trial Chambers have upheld minor inconsistencies and considered them as serving to enhance a victim's reliability. For instance, in *Kunarac*, the defense challenged a rape victim's reliability because she did not testify about certain inessential details which had appeared in her statement.²²⁴ The Appeals Chamber concluded that these matters were not sufficiently significant to cast any doubt upon the victim's credibility.²²⁵

While minor inconsistencies do not necessarily undermine reliability, providing reliable and accurate evidence on the identity of a physical perpetrator will often be crucial to witness reliability.²²⁶ In *Dordevic*, the defense challenged a victim's ability to identify the perpetrators of her sexual assault. During her prior testimony in *Slobodan Milosevic*, she had described the police uniforms of some of the perpetrators but she did not describe the same uniforms during her testimony in *Dordevic*. When this inconsistency was put to the witness, she proceeded to describe the uniforms again. This satisfied the Chamber that the witness could recall the uniforms and confirmed the reliability of her description.²²⁷ The Chamber found the divergence in her evidence explainable in light of the traumatic nature of the events, the passage of ten years since the events and seven years since her testimony in *Slobodan Milosevic*. It thus found her evidence of sexual assault and her identification of the perpetrators reliable.²²⁸ Where a court believes that there are material inconsistencies in one part of a victim's account, it can reject that part without rejecting the remainder of the victim's evidence.²²⁹ In *Stacic*, although the trial Chamber expressed some reservations as to the accuracy of an aspect of a victim's testimony it found her evidence to be credible overall.²³⁰ The Trial Chamber found that one detail that on successive nights she found clothes in the house she was being held in to replace the ones ripped off her body right before she was raped did not seem credible.²³¹ However, it found that her testimony about her repeated rapes while being held in this house to be credible as a whole.²³²

220 *Uganda v Kavuma* Criminal Sessions Case No. 819 Of 2016 [2018] UGHCCRD 145.

221 As above. Section 5 of the Evidence Act of Uganda provides that facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places.

222 Brammertz, n 208 above.

223 As above at 43–44 and 88–89.

224 As above at 141.

225 *Prosecutor v Kunarac et al* ICTY – 96-23, Testimony of witness 87(4 April 2000) transcript page 1682.

226 As above at 142.

227 As above.

228 *Dordevic* Trial Judgement para 833.

229 *Kunarac* Appeal Judgement para 228.

230 As above at 238.

231 *Stacic* Trial Judgement para 796.

232 As above at paras 805-6.

The position on inconsistencies of witnesses in Uganda is quite similar to the experience of International Law. According to Justice Mubiru in *Kavuma* the gravity of the contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case. He stated that:

I find the contradictions to be the inevitable result of the passage of time and fallibility of human memory. The retention span of details of events varies from one individual to another and the mere fact that two witnesses contradict one another when relating from their memory what they recall of an event does not necessarily imply that they are untruthful.

In light of the synergy between Uganda's domestic legislation and international law on inconsistencies of witnesses, it would be important to highlight the best practices from the international scene for adoption and they are as follows:

- a. While minor inconsistencies do not necessarily undermine reliability, providing reliable and accurate evidence on the identity of a physical perpetrator will often be crucial to witness reliability.²³³
- b. Where a court believes that there are material inconsistencies in one part of a victim's account, it can reject that part without rejecting the remainder of the victim's evidence.²³⁴
- c. Whether the inconsistencies undermine the victim's reliability depends on the nature of the inconsistency. Minor inconsistencies including those relating to the date on which the incident took place, the precise sequence of events and or other peripheral details are insufficient to undermine the victim's account.²³⁵

As observed in the foregoing discussion, Uganda's domestic legislation contains provisions or procedures which de facto promote impunity and prevent victims of CARSV from accessing justice. They include: the sex-specific definition of rape, recognizing women and girls as the only victims of CARSV and thereby making justice for male victims inaccessible, criminalizing same-sex acts and thereby making a victim of a non-consensual same-sex act criminally liable, evidentiary hurdles, such as the requirement for corroboration of the testimony of a single witness and limited procedural rules to protect victims and witnesses and avoid their re-traumatization.

These legal obstacles can be challenged as a demonstration of genuine unwillingness or inability to prosecute CARSV and a denial of a victim's right to a remedy. In order to effectively prosecute CARSV in line with the principle of complementarity, Uganda would need to, among other things, harmonize the law and practice in the management of CARSV with international best practice including but not limited to the rules of procedure and evidence, victim/witness handling and participation and witness protection measures.

²³³ As above at 142.

²³⁴ Kunarac Appeal Judgement para 228.

²³⁵ As above.

3.4. Other measures and interventions to support the redress of CARSV

Each judicial system should have protective measures available for victims/witnesses. Such measures may include structural measures, physical/out-of-court witness protection, procedural/in-court witness protection and witness support among others.²³⁶

The next part of the chapter discusses the best practice measures of victim support from other jurisdictions that are employed to ensure that victims of CARSV are supported in the pursuance of their right to a remedy. They include measures for the protection of child victims, witness support, victim participation, victim compensation and the award of reparations.

3.4.1. Measures to protect child victims and witnesses of CARSV

Various provisions of the Rome Statute, Rules of Procedure and Evidence and Elements of Crimes highlight the importance of the effective investigation and prosecution of crimes against or affecting children, as well as the protection of children's rights and interests.²³⁷ Mindful of the purposes of the Statute, the Office of the Prosecutor elevated this issue to one of six strategic goals in its Strategic Plan 2012–2015, committing to 'pay particular attention to sexual and gender-based crimes and crimes against children.' This commitment was reaffirmed in the Strategic Plan 2016–2018. The Policy on Children aligns with the Strategic Plan and will contribute to achieving the strategic goals.²³⁸

In the Elements of Crimes, in relation to sexual slavery, specific reference is made to 'trafficking in persons, in particular women and children.' The Office of the Prosecutor pays particular attention to the gender-specific impact on, harm caused to, and suffering of children affected by these crimes.²³⁹ The ICC's Policy on Children²⁴⁰ recognizes the gravity of crimes affecting children and the challenges faced to date in addressing them and requires particular attention to be paid to these crimes.²⁴¹ Crimes against children can be recognized in a number of ways, for example through direct testimony of the victim or eyewitnesses in court, or introduction of other evidence such as forensics or pregnancy.²⁴²

Only a few cases in international courts and tribunals specifically refer to child victims of. In *Charles Taylor*, the Special Court of Sierra Leone (SCSL) specifically included sexual violence against girls in the charges.²⁴³ In *Akayesu* at the ICTR, witness OO was only 15 when she was raped, and 17 at the time of the trial.²⁴⁴ The *Kunarac et al* (the Foča trials) at the ICTY, included the testimony of two

236 For instance through a specific victim/witness unit, prior, during and after trial, free legal advice about the rights and duties of witnesses, explanation about the testifying process by a neutral party and visit to the courtroom before testimony, sufficient notice and time to prepare for testimony, counselling, administrative support with logistics, for example translation, travel and claiming of expenses, providing for a 'companion' to accompany the witness throughout the trial process as an additional support. It is for the practitioner to explore the scope of these measures and to advocate for their broadening for victims/witnesses of these types of crimes. Other measures may include fair representation of men and women in the judiciary, staff with trauma expertise, including trauma related to sexual violence crimes, staff with legal expertise on investigation and prosecution of gender crimes, staff with expertise in dealing with child victims and witnesses, physical/out-of-court witness protection, procedural/in-court witness protection, closing hearings to the public, remote testifying, for example by video link, testifying under pseudonym and the right to be represented by a lawyer. See the International Protocol on Investigation and Documentation of Sexual Violence (2017) 63 for examples of protective measures.

237 International Criminal Court. (2016). The Office of the Prosecutor: Policy on Children.

238 As above.

239 As above.

240 International Criminal Court. (2016). The Office of the Prosecutor: Policy on Children.

241 As above; SF Ribeiro & D Van der Straten Ponthoz (2017). International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (Second Edition).

242 As above.

243 C Aptel (2010). Children and accountability for international crimes: the contribution of international criminal courts. UNICEF Innocenti Working Papers.

244 *The Prosecutor v Jean-Paul Akayesu* Case No ICTR-96-4-T

victims who were under the age of 18 at the time of the mass rapes.²⁴⁵ In this trial, witnesses also testified to crimes against another child victim who was unavailable to testify. One of the witnesses who testified in *Bemba* was a girl of 12 when she was raped. However, she was over 18 at the time of the trial.²⁴⁶ The child-sensitive approach outlined in the UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime and in the ICC Policy on children provides a solid reference for those documenting or investigating sexual violence against children.²⁴⁷ The key principles of this approach are:

- a. Recognition of both the vulnerability and capability of a child, based on age and maturity (adherence to the principles of the UN Convention on the Rights of the Child, including non-discrimination, the best interests of the child and the right of the child to express her or his views on all matters affecting them and to have those views listened to and taken into consideration).
- b. Ensuring that all engagement with children is undertaken with due care and planning, including undertaking psycho-social assessments.
- c. Obtaining informed consent/assent and assessing the relevance of potential evidence and identifying referral pathways prior to deciding whether to interview the child, as well as ensuring interviewers are properly trained and limiting the number of individuals interacting with the children.

Applying for victim status is another means by which child victims and the crimes against them can be recognized in the criminal process.²⁴⁸ Circumstantial evidence alone can be enough to establish crimes of sexual violence and charges may be proven through other means, not involving the testimony of children. However, it is important to balance the imperative to ‘do no harm’ with a child’s right to participate.²⁴⁹

3.4.2. Measures pertaining to witness protection and support

Adequate witness protection and support mechanisms are crucial for the wellbeing of witnesses and victims of CARSV. This is particularly in view of the fact that victims of such crimes often exhibit enduring trauma that can affect their memory and the appearance of reliability and consistency at trial.²⁵⁰ The critical nature of victim-witnesses in the criminal justice process is reflected in the National Strategy for War Crimes Processing of Bosnia and Herzegovina which emphasized the ‘importance of creating an atmosphere in which witnesses will give evidence free of fear or threats or pressures that may pose a threat to their lives or lives of people close to them.’²⁵¹

The National Strategy therefore included provisions aimed at improving witness protection and support in all courts handling war crimes cases, including the fitting of courts with separate rooms for witnesses testifying under protective measures, the hiring of psychologist witness support

245 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* Case No IT-96-23-T and IT-96-23/1. This trial was also groundbreaking as it was the first case in which the accused were convicted of rape as an international crime.

246 *The Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08.

247 International Protocol supra at note 254, Box 4 Child-sensitive approach to accessing justice 251.

248 For detailed information on victim status and participation of victims at the ICC, see the International Criminal Court. (2000). *A guide for the participation of victims in the proceedings of the court*.

249 Supra at note 254.

250 Organisation for Security and Co-operation in Europe. (2016). *Towards Justice for Survivors of Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress before Courts in BiH 2014–2016*. <https://www.osce.org/files/f/documents/2/4/324131.pdf>

251 *National war crimes strategy*. (2008). http://www.nuhanovicfoundation.org/userfile/bosnian_national_war_crimes_strategy_18-12-08.pdf

officers in all prosecutors' offices and courts, and the establishment of coordinating mechanisms at the State and entity levels in order to improve extensive witness protection measures proposed by prosecutors and ordered by courts.²⁵²

These measures also included the granting of pseudonyms – including the omission of a victim's full name from public court documents – exclusion of the public from main trial hearings, and allowing vulnerable witnesses to testify from a separate room with audio video distortion and use of audio video links.²⁵³

Victims and witnesses may also require a witness support officer to assist during the investigation and at trial.²⁵⁴ The typical role of this person is to assess the mental state of the witness during the investigation, to provide an opinion to the prosecutor and the court on the individual's ability to testify and the potential need for protective and support measures; and to provide psychological support to the witness during investigation and during trial.²⁵⁵ In Bosnia and Herzegovina, the prosecutors' offices and courts relied on the services and expert opinions of these witness support specialists to ensure that vulnerable witnesses are prepared to testify and are not unnecessarily subjected to re-traumatization in the course of the proceedings. In some cases, the trial panel considered the expert assessment of a witness support officer in deciding whether to grant protective measures or other procedural motions relating to a vulnerable witness.²⁵⁶

The law and policy in Uganda do not cater for the intricacies of rendering comprehensive support to victims/witnesses of CARSV which would require among other things interventions by specialized professionals including psychiatrists and social workers to provide insights into the mental state of the victims and their capacity to participate in the trial.²⁵⁷ The rendering of such support would minimize the victim's exposure to the risk of re-traumatization as a consequence of their cooperation as a witness.

a) Victim participation

Victim participation under the ICD of the High Court of Uganda is not direct and automatic. Victims can only be included in the proceedings of the ICD after the trial judge determines their eligibility to participate. The ICD is a special court and therefore does not entirely operate under the same rules of procedure of Uganda's criminal justice system. Although the ICD was established to espouse the principles of the Rome Treaty, it is still lacking in the necessary structural requirements for proper execution of its mandate. The Court has not set up a victims' processing unit to cater to victims' special needs, to ensure their effective participation in the Court proceedings, to ensure that their views and concerns are heard on matters where their personal interests are affected, and to conduct outreach to conflict-affected communities.

Following a pre-trial hearing at the High Court of Uganda in *Thomas Kwoyelo*, the presiding judge delivered a landmark ruling on victim participation allowing victims to participate in proceedings through their legal representatives.²⁵⁸ The Court ruled that the trial Panel would determine the

252 As above.

253 As above at 56.

254 As above at 76.

255 As above.

256 As above.

257 Section 42 of the Trial on Indictments Act provides for a ballistic expert, a geologist and a pathologist.

258 *Uganda v Thomas Kwoyelo* Case No.2 of 2010.

nature and extent of their participation. In the same year (2016), the ICD adopted the Ugandan International Crimes Division Rules, which among other things, provides for victims' participation. With the adoption of the Rules of Procedure, the ICD became the first court in Uganda to give an opportunity to victims to participate in its proceedings.²⁵⁹

The ICD introduced the concept of victim counsel who would later be called friends of court. They have since offered legal support to victims/witnesses in terms of preparing them to effectively participate in proceedings. The ICD has also included victim participation in court proceedings. The adoption of provisions on victim participation in the ICD Rules of Procedure reflects the evolution of our national law to embrace involvement of those who have been most affected by the crimes triable by the Court. According to a psychosocial model developed for national jurisdictions to cope with the multiple challenges in prosecuting CARSV, the judiciary plays a central role in empowering survivors of heinous crimes to become active agents of their lives by positively contributing to the quest for justice.²⁶⁰

The model prescribes that national jurisdictions should consider potential CARSV witnesses' general lack of familiarity with the judicial framework, the intimidating aspects of sharing personal details with strangers (i.e. the court staff and judges), and the potential fear of retaliation for their collaboration with the institution. It is on this account that the model proposes that judicial actors must receive advanced training on trauma and its psychophysiological consequences.

Finally, a set of support measures should be established and coordinated among the different actors of the court, who all need to be briefed on the peculiarities of each witness so that they can tailor services as much as possible.²⁶¹

b) Victim Compensation and Reparations

On the issue of victim's compensation, there is need for the prosecution to lead proper evidence to support non-material damage claims for CARSV proceedings. A victim's right to claim such damages during criminal proceedings is guaranteed by the Penal Code Amendment Act. The Court will consider the extent of harm suffered by the victim of the offence, the degree of force used by the offender and medical and other expenses incurred by the victim as a result of the offence. It should be noted however that The Penal Code Act Amendment of 2007 limits compensation to victims of defilement.²⁶²

In Bosnia and Herzegovina, the process of computing and determining compensation claims considers the concrete and lasting effects of trauma on individuals and seeks to compensate their permanently reduced quality of life. In addition, it empowers victims during the criminal proceedings to play a role as more than just a passive witness. Victims file their own claim for compensation – although usually with the assistance of a legal representative – and give a statement before the court regarding the claim.²⁶³ These practices would go a long way in enabling the victims to enjoy the rights to an

259 Rule 3, defines a victim as someone who has suffered harm either directly or indirectly as a result of acts or omissions that constitute crimes under the ICD.

260 B Bianchini & S Rubert 'A Sustainable Psychosocial Model to Support the National Investigation and Prosecution of Conflict-related Sexual Violence Crimes'. *Journal of International Criminal Justice*, 18(2) (2020) 425–448.

261 As above.

262 Under section 129B that (1) Where a person is convicted of defilement or aggravated defilement under section 129, the court may, in addition to any sentence imposed on the offender, order that the victim of the offence be paid compensation by the offender for any physical, sexual and psychological harm caused to the victim by the offence.

263 Organisation for Security and Co-operation in Europe. (2016). *Towards Justice for Survivors of Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress before Courts in BiH 2014–2016*.

effective remedy. Compensation for victims of sexual violence is provided for in the Penal Code Amendments however it is limited to victims of defilement and only applicable to concluded cases; and it is important to note that victims of rape are not catered for.²⁶⁴

The right to an effective remedy is enshrined in international human rights law and humanitarian law as established in various international and regional instruments.²⁶⁵ Furthermore, in 2005, the UN General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law.²⁶⁶ International law establishes different forms of reparation to redress gross violations of human rights law and serious violations of humanitarian law such as restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition.²⁶⁷

Reparations should be provided by a State for acts or omissions that can be attributed to it and that violate its obligations under international human rights law or international humanitarian law, or a person, a legal person, or other entity found liable for violations of international humanitarian law and making reparations. In the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations, states should endeavor to establish programs for reparations and assistance to victims. The beneficiaries of reparations may be the injured individuals or a State on behalf of the injured individuals.

According to the UN guidance note on CARSV, all victims, including those of CARSV, shall be treated with humanity and respect for their dignity and human rights, always avoiding further harm and trauma. Their right to a remedy and reparation should be fulfilled without discrimination. A State can bring also claims by proxy against another State, if its nationals and residents were injured by that other State. For this purpose, States are required to establish channels whereby victims of violations of international human rights law and international humanitarian law can easily access the relevant government office that deals with claims against another State.

When gross violations of human rights and/or serious violations of international humanitarian law, including CARSV, take place on a large scale, administrative reparations programs have the potential of being more inclusive and accessible than courts. These programs are in fact capable of reaching a larger number of victims and are more victim-friendly as their procedures are more flexible, and evidentiary standards and costs are considerably lower. They imply recognition of the harm suffered, without subordinating it to the judicial establishment of the responsibility of the perpetrator. Nevertheless, administrative reparations programs should not preclude victims of CARSV from obtaining reparations through courts; all victims should have access to effective judicial remedies which include adequate, prompt and full reparation for the harm suffered.

Ensuring effective access to judicial remedies may require assistance and support to complainants as well as the removal of barriers to access to justice, including discriminatory barriers particularly

²⁶⁴ See n 262 above.

²⁶⁵ In particular, provisions on a right to a remedy for victims of violations of international human rights law are found in article 8 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 39 of the Convention on the Rights of the Child, article 24 of the International Convention for the Protection of All Persons from Enforced Disappearances. Regional instruments also include relevant provisions, such as article 7 of the African Charter on Human and Peoples' Rights.

²⁶⁶ A/RES/60/147.

²⁶⁷ Basic Principles and Guidelines on the Right to a Remedy and Reparation, principle 18.

affecting women.²⁶⁸ Effective judicial remedies also require that decisions of judicial bodies are executed without unreasonable delay.²⁶⁹ Sierra Leone's Truth and Reconciliation Commission recommended reparations that were comprehensive in nature and have the potential to be transformative in women's and children's lives. The recommendations included: free healthcare including mental healthcare, educational support to children of victims, skills training, micro-credit and micro projects for individual and collective groups of beneficiaries, community reparations, symbolic reparations, provision of housing and pensions, and urgent interim reparations for specific categories of individual beneficiaries, including amputees, war wounded, victims of sexual violence, war widows and children affected directly by the conflict.²⁷⁰

While reparations and development constitute two distinct and separate rights, creating linkages with development actors and programs could be beneficial for delivering sustainable and transformative reparations, in particular in a country affected by massive violations of international human rights law and international humanitarian law, and widespread poverty.²⁷¹ Uganda should design a comprehensive public policy and framework on reparations to address CARSV, including the establishment of judicial remedies and administrative reparation programs.²⁷²

3.5. Conclusion

Uganda as a signatory to the Rome Statute and other International Humanitarian Law treaties, is obligated to reflect the standards therein in national laws, policies and other frameworks to ensure complementarity. In light of progressive developments in the law and jurisprudence pertaining to CARSV, Uganda is under an obligation to ensure that legal and procedural interventions are designed to provide redress for victims of CARSV. To date, there is no comprehensive law and policy to that effect, rendering a gap in the available interventions for victims and allowing for impunity for the perpetrators.

268 See Committee Against Torture, General Comment No. 3, paras. 29-42.

269 See European Court of Human Rights *Burdov v Russia* (No. 2), App. no. 33509/04, 15 January 2009.

270 The recommendations also included a number of gender-specific legal and institutional reforms, including the repeal of all discriminatory legislation, enactment of gender-progressive laws, and ensuring that at least 30% of candidates for public elections are women. In 2010, on International Women's Day, then-President Koroma publicly apologized to the women of Sierra Leone for failing to protect them during the armed conflict and pledged to protect women's rights going forward. As a direct result of the truth commission's recommendations, three women's rights bills were passed by Parliaments addressing key aspects of gender inequality.

271 UN Guidance Note on CARSV.

272 An administrative reparations programme is an out-of-court process used by States to provide reparation to massive numbers of victims of gross violations of international human rights law and/or serious violations of international humanitarian law. In such programmes, States identify the violations and the victims to be redressed and provide them with reparation through an established procedure. Reparation can also be ordered by national or international courts against a State or against the perpetrator of the crime, as applicable.

CHAPTER FOUR

FIELD FINDINGS AND ANALYSIS

4.1 Introduction and Background

The fieldwork study was undertaken in the districts of Gulu, Lira, Adjumani, Amuria, and Soroti. The study was designed to establish the experiences of the victims of sexual violence from some of the post conflict societies in Uganda. The study also considered the policy and legislative gaps and challenges faced in implementation of sexual violence law and evaluated the recently established post-conflict reconstruction programs set up by both Government and civil society to meet the needs of victims.

While several parts of Uganda have suffered the effects of conflict, the element of sexual violence was prominently faced in the Acholi, Teso, and West Nile Regions of Uganda during the LRA war in the period spanning from 1986 to 2012. In the Eastern region the study was specifically conducted in the sub-counties of Tubur and Arapai in Soroti District, Acowa and Obalang in Amuria District. In the Northern Region the team visited Ogur and Aromo sub-counties in Lira District and Patiko and Gulu municipality in Gulu District. In the West Nile Region the study was conducted in Adjumani in the sub-counties of Dzaipi and Pachara.

Twenty (20) key informants were interviewed in each district and they included the following categories of actors: police officers, religious leaders, traditional leaders, community leadership, members of civil society organizations, government/district leaders including Chief Administrative Officers (CAO), Local Council Chairpersons and Resident District Commissioners (RDC). For the focus group discussions, a total of 70 persons were interviewed in each district from within the following categories of community members: women's victim groups (20 women); men's victim groups (20 men); youth victim groups (20 youth) and community leaders (10 persons). A total of 407 respondents were interviewed: 207 men and 205 women.

The victim's experiences and challenges were obtained during focus group discussions while the key informant interviews generally provided information on interventions by Government and Civil Society to address the needs of victims of CARSV as well as gaps in policy and legal frameworks.

4.2 Knowledge and awareness of forms and nature of sexual violence

The study sought to establish from the respondents the nature and forms of sexual violence that they were aware of generally. The respondents were asked to list the forms of sexual violence that were experienced in the communities. The community responses demonstrate that various forms of sexual violence occur. Participants explained that conflict between a man and a woman can occur that are a result of misunderstandings – usually lack of respect, lack of patience, rumor mongering, poor communication or disinterest in sex.²⁷³ It is also described as an inability to request for sex,²⁷⁴ having sex forcefully with

²⁷³ Focus Group Discussion for men in Dzaipi Sub County, Adjumani.

²⁷⁴ Focus Group Discussion for youth in Aromo, Lira District

another person,²⁷⁵ harshness or violence that takes place through sex/sexual intercourse and having sex with a woman without her consent.²⁷⁶

Whereas the community members correctly pointed out the various forms of sexual violence, there were only a minimal number of responses given in relation to CARSV. Responses from the key informants highlighted physical, verbal and emotional violence, physical assault, indecent assault, defilement, early marriages, sexual enslavement, forced marriage and pregnancy during war, marital rape, sodomy and rape of old women, sexual harassment, sexual advances, intimidation and torture.

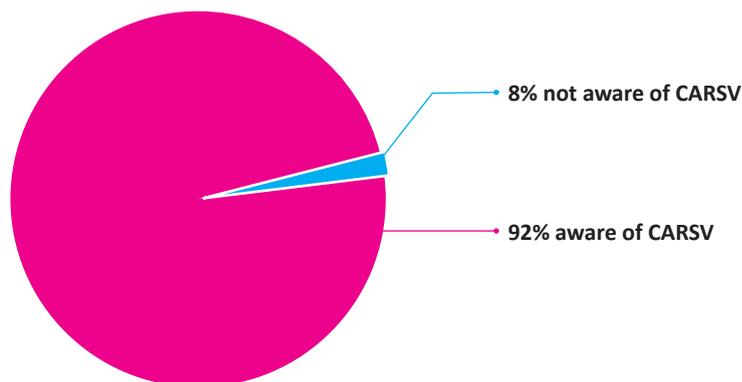
Among the key informant responses, the majority of responses highlighted rape (33%) and defilement (24%) as the most common forms of sexual violence. While the least mentioned were torture (2%), child-to-child sex (3%) and enslavement (3%). The responses specifically pertaining to CARSV were minimal in comparison to the responses on sexual violence generally as seen in the pie chart below.

The limited percentage of responses on the subject of CARSV may point to a broad range of possibilities including: low levels of awareness, indifference, the fact that sex is a taboo topic in communities or the shame and stigma faced by the victims of CARSV and their families.

4.3 Community awareness about CARSV

The study sought to establish the level of awareness about CARSV. Only a few respondents mentioned awareness of some forms of CARSV (8%) while the majority 92% mentioned domestic violence and other sexual violations not related to CARSV.

Chart 1: Levels of awareness of CARSV among research participants



The majority of respondents from the community dialogues for women and female youth were able to describe and explain the forms of domestic violence generally but did not make any mention of or highlight any incidences of CARSV in their communities.

These general definitions were also given among some male groups as follows: *'This refers to having sex forcefully with another person'*²⁷⁷ or *'harshness or violence that takes place through sex/sexual intercourse'*²⁷⁸ or *'it also occurs especially at funeral rites and ceremonies, where there is excessive merry-making and*

275 FGD for males in Patiko, Gulu District.

276 FGD for women youth in Obalang, Amuria District.

277 FGD for male youths, Ogur sub-county, Lira District.

278 FGD for women, Aromo sub-county, Lira District.

*with those who move at odd hours unaccompanied. It is a common occurrence in the communities or in the trading centres. This sexual violence happens especially in form of rape.*²⁷⁹

Some of the male participants were able to share their own definitions of CARSV: *'It involves the forceful sex, often times in this place, caused by UPDF during Kony War. UPDF forced our women to have sex with them, and they raped and defiled women and girls.'*²⁸⁰ and *'Some of the cases of rape and defilement were by the Lord's Resistance Army, the UPA²⁸¹ and with the Karamojong raiders forceful sex still happens now²⁸². UPDF soldiers took and raped people's wives. Young girls were taken by Kony and distributed among soldiers while we witnessed. Some are not yet back.'*²⁸³ *Rebels used to gang rape women²⁸⁴* and *'My wife was taken she came back mentally sick we are now separated with my wife'*²⁸⁵

The silence on issues of CARSV from the dialogues with women could be attributable to the culture of silence around rape generally that stem from the fear of stigma, shame and ostracism. Stigma fuels a culture of silence. It is also notable that there is very little mention of rape against men during conflict. This too is attributable to the culture of silence and shame.²⁸⁶ The silence of men is gendered and conditioned by socially constructed incompatibilities between masculinity and vulnerability, which disallows men to openly speak about their sexual violations and to seek services and support.²⁸⁷

When survivors of sexual violence are afraid to speak out in their communities their pathways to justice are cut off and impunity prevails.²⁸⁸ Since perpetrators know that they will not be held accountable for their terrible crimes, future violations are more likely.²⁸⁹ Such stigma and impunity pervade Uganda where victims of wartime sexual violence who were kidnapped as children continue to face rejection and discrimination upon their return home.²⁹⁰ Male victims of CARSV are also silent victims and thereby face challenges in obtaining redress.²⁹¹ It is therefore pertinent for the Government of Uganda and development partners to design mechanisms around empowering victims of CARSV to speak out and seek redress for harm suffered. It would also be important for religious and cultural leaders to design interventions to empower communities to support victims of CARSV.

However, the predominant reference to domestic and gender-based violence points towards the fact that the practice is rife in the communities and that they are in need of comprehensive interventions. Post-conflict communities consistently experience high rates of domestic violence against women and children.²⁹² An end to violence in the public sphere is widely seen to precipitate the violence in the private sphere.²⁹³ It

279 FGD for males in Patiko, Gulu District.

280 FGD for male youth and adult men, Dzaipi sub-county, Adjumani District.

281 The Uganda People's Army (UPA) was a rebel group recruited primarily from the Iteso people of Uganda that was active between 1987 and 1992. The UPA was composed mostly of former soldiers in the special forces of the Uganda National Liberation Army and opposed the National Resistance Army.

282 FGD for males, Arapai sub-county, Soroti District.

283 Mixed FGD Obalanga sub-county, Amuria District.

284 Respondent, Ajulu Camp, Lira District

285 Male Victim, Arapai sub-county, Soroti District.

286 P Schulz 'The "ethical loneliness" of male sexual violence survivors in Northern Uganda: gendered reflections on silencing' *International Feminist Journal of Politics* 20(4) (2018) 583–601.

287 As above.

288 S Kihika Kasande, (2017). In *Uganda, Confronting Stigma is Key to Preventing Impunity for Sexual Violence in Conflict*. International Center for Transitional Justice. <https://www.ictj.org/news/uganda-confronting-stigma-preventing-impunity-sexual-violence>

289 As above.

290 As above.

291 As above.

292 S Bradley 'Domestic and Family Violence in Post-Conflict Communities International Human Rights Law and the State's Obligation to Protect Women and Children' *Health and Human Rights Journal* 20(2) (2018). <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6293353/>

293 As above.

is a well-documented phenomenon that post-conflict communities experience higher rates of domestic and family violence when hyper-masculinized and traumatised male combatants leave the battlefield. For a myriad of reasons, their homes become new stages for violence.²⁹⁴

Compounding this experience is the fact that post-conflict communities are predominantly poorly equipped to combat domestic and family violence in any way that meaningfully prioritizes the protection of women and children.²⁹⁵ The ULRC 2006 nationwide study on domestic violence established that domestic violence was predominantly faced in the Northern Region of Uganda as compared to other regions at the time.²⁹⁶

Whereas the majority of responses given were not specific to CARSV, they point towards a phenomenon that is challenging to the family unit in the post conflict era. Protecting women and children from domestic and family violence is an essential policy goal. The enactment of the Domestic Violence Act in 2010, the development of the National Policy on the Elimination of Gender Based Violence in Uganda and the development of a domestic violence referral pathway are steps in the right direction. However, these initiatives are impeded by inadequate financing.²⁹⁷ Efforts should be made by Government to finance GBV activities among the various MDA's responsible for the implementation of the law and policy on GBV.²⁹⁸

4.3.1 Key informant's knowledge and awareness of CARSV

The majority of key informant respondents demonstrate awareness of the occurrence of CARSV with examples of its occurrence. They mentioned the various forms it takes within the communities in the following statements:

*'It was very rampant during the LRA war/conflict. It was common in the camps during the war. During the LRA insurgency a man who was an RC1 chairman raped his pregnant wife who passed away.'*²⁹⁹;

*'During the insurgency of 1986-1987 Kony took us far away, raped and burnt our homes and food plantations. Rebels took me and wanted to kill me, they raped my wife. She conceived a child who misbehaved and left home.'*³⁰⁰;

*'Sexual violence usually happened during war (UPF, LRA.) and during the seasons of cattle rustling. There was an incident where rebels forced a man plus a woman to have sex publicly in Omoche village. Again, in Omoche village – a soldier guarding the village went out for patrol and raped the parish chief's wife. In Tubur village – soldiers pretend to send you to get something for them leaving your wife behind and they rape her.'*³⁰¹;

*'During the UPA war – I witnessed two women who were raped by rebels and I was beaten. In Palaet Parish – Kelimbi village, a pregnant woman of 8 months was raped by mobile force officer.'*³⁰²

294 FN Aolain, DF Haynes, HHGPN Cahn (2011). *On the Frontlines*. Oxford University Press.

295 Uganda Law Reform Commission. (2006). *Study on Domestic Violence*.

296 As above.

297 Trócaire & Civil Society Budget Advocacy Group (2016). *Funding Analysis Of The Domestic Violence Act (2010) And The National Policy On The Elimination Of Gender Based Violence In Uganda (2016)*. <https://www.csbag.org/download/funding-analysis-of-the-domestic-violence-act-2010-and-the-national-policy-on-the-elimination-of-gender-based-violence-in-uganda-2016/>

298 As above.

299 LC Chairman, Obalang sub-county.

300 Leader Patiko, Gulu District.

301 Religious leader Soroti District.

302 Political leader, Amuria District.

*'In Obule village – a soldier gathered people – forced them to pair up and have sex, those without partners were raped.'*³⁰³

*'All girls abducted by Kony rebels were raped; the girls' clothes were piled up – and the men would pick a wife based on the clothing they picked.'*³⁰⁴

*'There are different forms of CARSV that happened during previous conflicts in 1979: The Masai raped my wife and her uterus was affected – I took her to Amuria hospital. The doctors removed her uterus.'*³⁰⁵

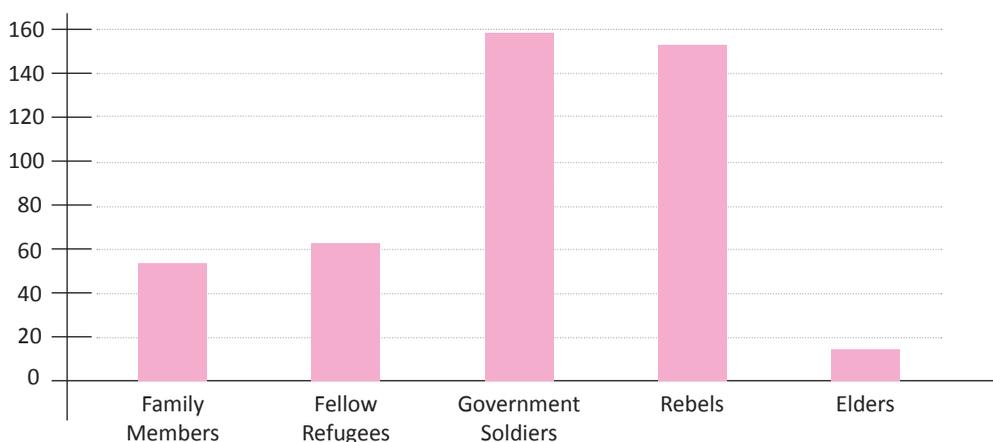
The foregoing responses demonstrate a broad range of incidences of CARSV that happened during the various political insurgencies within Uganda. The discrepancy between the responses obtained from the communities and those obtained from the various actors further substantiate the likelihood of reluctance on the part of the community members (especially the women), to relay their knowledge and experiences about CARSV.

The dearth of statistical and other information impedes support interventions for victims of CARSV. It is important to appreciate the fact that this gap in information on CARSV is brought about by victims' tendency to remain silent and to underreport their experiences. The Government of Uganda should step up its efforts to document victims of CARSV using both direct and indirect means of capturing the information.

4.3.2. Perpetrators of Sexual Violence in conflict

The study sought to establish the categories of persons that perpetrated CARSV. The majority of responses highlighted rebels and Government soldiers as indicated in the graph below. According to the responses the two categories were responsible for committing 81% of the sexual violence during the periods of conflict. Other categories that were listed included fellow refugees, displaced persons and family members.

Chart 2: Perpetrators of CARSV



303 Traditional leader, Soroti District.

304 Former Camp leader, Gulu District.

305 Political leader, Soroti District.

Whereas the majority of responses point towards government soldiers and rebels as the major perpetrators of sexual violence in conflict, the other categories mentioned were also significant. Victims of CARSV are not only vulnerable to soldiers and rebels but also to displaced persons, family members and refugees who also take advantage of the prevailing circumstances of instability to commit sexual violence. The broad range of potential perpetrators signifies an enhanced level of vulnerability of the victims of CARSV as violations may occur even within the domestic sphere or within designated areas of safety, such as refugee camps.

In this regard, proposals to address sexual violence in conflict should not be limited to the known categories of combatants. Efforts to redress the problem should be well thought-out and holistic, so as to provide protections and redress mechanisms for a broad range of perpetrator categories. Special attention and redress should be given to the category of Government troops as perpetrators as well as designated areas of safety.

4.4 Reporting of CARSV

The study findings demonstrate low levels of reporting for incidences of CARSV in all the regions visited. Key among the reasons advanced by the key informants for the limited initiative to seek redress were: the challenging circumstances surrounding the insurgency including the breakdown of public systems, the culture of silence around sexual issues and lack of knowledge about the existing avenues for redress. The responses demonstrate the various obstacles faced by the victims.

*'Only a few cases of rape and defilement were reported. In the Teso sub-region, the arrow boys were formed because the government had failed. The Government did not do anything to protect the victims.'*³⁰⁶

*'The victims found it easier to report to local authorities e.g. Local Council Executives.'*³⁰⁷

*'Reporting was not done because of cultural taboos about discussing sexual matters, fear of the repercussions including stigmatization or divorce, fear of the institutions or even fear of the unknown, some victims did not appreciate the existing interventions.'*³⁰⁸

*'Sometimes victims were stopped by their families and sometimes they are not aware of where to report.'*³⁰⁹

*'During the conflict, there were hardly any instances of reporting sexual violence because there were no existing institutions to support the processes at the time; most of the institutions had broken down.'*³¹⁰

The various Government actors interviewed recounted the incidences of CARSV that they handled during conflict pointing out that they were particularly challenging as seen in the responses highlighted below:

*'Only a few cases of rape and defilement were reported. People would report to LCs but the LCs had no powers to do anything.'*³¹¹

306 Traditional leader, Arapai sub-county, Soroti district.

307 Religious leader, Adjumani District.

308 CDO Arapai sub-county, Soroti District.

309 Police officer Pachara sub-county, Adjumani District

310 District leader, Gulu District.

311 Youth leader Tubur, Soroti District.

*'During the insurgency there is nowhere for a victim to report; the right place to report was the army since they too were involved, it was hard to report.'*³¹²

*'Soroti was an operation area; there was no system of Government, a victim could not find a place to report. The security organs were based in Soroti – there was nowhere to run to report. There was limited access.'*³¹³

*'During insurgency, there was no owner of property. There was no Government – during insurgency even if it were my wife; I could have nowhere to report.'*³¹⁴

*'By the time you report, the perpetrators have already run away; sometimes soldiers would also participate in the rape during cattle raids, follow up cannot happen.'*³¹⁵

Some of the few initiatives that directly support victims of CARSV include medical camps that are set up within the communities to treat fistula and other complications that may result from rape and defilement. In Lira district, the respondents specifically referred to the medical interventions and support to CARSV victims rendered by Africa Youth Initiative Network (AYINET) and Plan Uganda as very helpful. One of the respondents from AYINET stated as follows: *'We send out medical teams to hold medical camps in the villages affected by conflict and specifically targeting victims of sexual violence. The village is given an opportunity to participate in identification of the victims that need help. We provide the victims with medical treatment, medicines and counselling.'*³¹⁶

Failure to report and obtain immediate redress for CARSV victims is problematic. Survivors often require immediate life-saving health care, including comprehensive clinical management of rape, and medication to prevent sexually transmitted infections and unwanted pregnancies. Survivors may also require life-saving psychosocial support to recover from the psychological and social impacts of CARSV.³¹⁷

Victims and witnesses of CARSV can be harmed in ways that extend beyond the immediate violence they suffered at the hand of perpetrators.³¹⁸ Additional, serious harm can be caused by unresponsive or inadequate health, police or justice services and responses; by family and community members that do not support survivors, and may even ostracize, blame and punish them.³¹⁹ The plight of most CARSV victims in Uganda was heightened by the breakdown of formal redress mechanisms like the police and the court systems. As such, victims of CARSV have lived with their plight without medical interventions or legal redress and no hope for justice and reparations for the crimes that took place. This has contributed further to their trauma and harm.

Therefore, in designing future initiatives for CARSV, the safety and dignity of survivors should be at the center of the redress mechanisms. The risk of additional harm should also be carefully avoided in the process of seeking redress. Situations of conflict pose different challenges. Among these is the fact that the perpetrators include combatants and Government forces, whose officers may not be easily brought to book in the

312 Former Camp leader, Pabbo Camp, Gulu District.

313 Political leader, Acowa, Amuria District.

314 CDO Patiko, Gulu District.

315 Elder, Amuria District.

316 Officer from AYINET.

317 M Greco (2020, May 13) *Conflict-related sexual violence: consequences and needs of female victims (part 1)* <https://ilg2.org/2020/04/13/conflict-related-sexual-violence-consequences-and-needs-of-female-victims-part-1/>

318 *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* (First Edition). (2014, June). https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/319054/PSVI_protocol_web.pdf

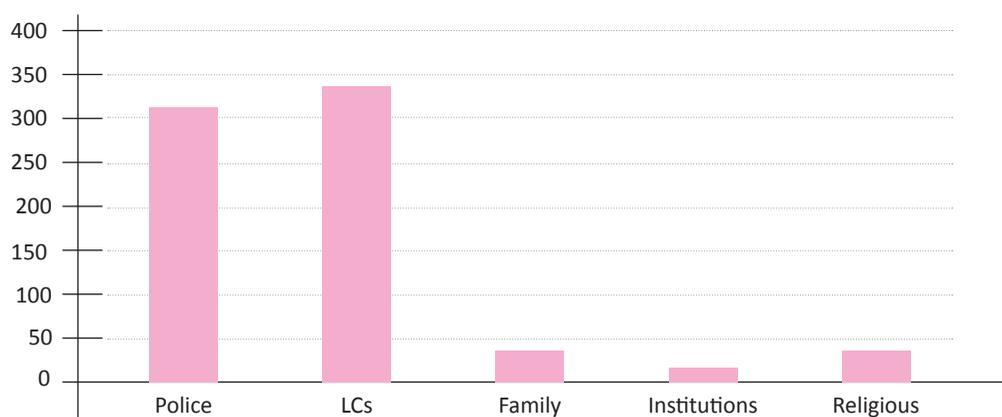
319 As above.

circumstances that prevail at the time. The absence of means and measures to document and obtain evidence and the general atmosphere of war and state of lawlessness collectively hamper any attempt at interventions to formally redress CARSV, even where it is reported. Any efforts to document CARSV as an initial step to seeking redress for victims should be undertaken by a well-trained documentation team that places the survivor at the center of their approach. These actors should adequately plan their interventions and put in place strategies to mitigate potential harm of the victims in the process.³²⁰

4.5 Institutions where cases were reported

The few instances in which CARSV was reported was at the Local Council and the police as seen in the following table. Other commonly mentioned avenues were civil society organisations including AYINET and Plan Uganda in the districts where they were operational.

Chart 3: Institutions where cases of CARSV were reported



As earlier discussed, the circumstances under which CARSV is committed are unusual, making CARSV difficult to investigate, document and prosecute. Whereas the police and LC's are the most accessible avenues for redress, the support they can offer is only minimal at best. A medical examination and report are usually the best evidence in support of a crime of a sexual nature. It should be considered that investigating and prosecuting CARSV crimes presents its own, unique challenges. The medical examination of the victim is an essential aspect of the investigation to prove a sexual assault. In most cases, the most urgent service is to refer the victim to a hospital for medical attention. The immediate referral is crucial both for the health of the victim and in order to gather medical evidence of the offence.³²¹

In Uganda, Police Form 3A has been designed to provide medical evidence to support claimants of physical or sexual assault. However, the requirement is that these are filled upon a medical examination by medical personnel including medical officers, midwives and nursing officers. These medical interventions are not always available in periods of conflict where healthcare systems may be severely under-resourced, poorly functioning, or completely demolished during and immediately following armed conflict. The use of medical evidence collection techniques with surviving patients during and

³²⁰ As above.

³²¹ J du Mont, D White & Sexual Violence Research Initiative. (2016). The uses and impacts of medico-legal evidence in sexual assault cases: A global review. World Health Organization. <https://svri.org/sites/default/files/attachments/2016-01-19/medico.pdf>

shortly after armed conflict and episodes of mass violence against civilians is still relatively new and not well institutionalized, even in settings in which specialized physician training and capacity to collect and analyze forensic evidence exist.³²²

There are three forms of medical documentation and their associated evidence collection techniques after armed conflict and they include: the patient medical record, the medical certificate, and the sexual assault medical forensic exam and its associated forensic evidence collection kit. Like other technologies, medical evidence collection techniques designed to corroborate rape reflect their historical origins in place and time, and their character, use, and potential effects are likely to vary in new contexts of armed conflict and mass violence.³²³

Historically, such techniques were developed to document individual harms to individual victims by direct perpetrators and collect corroborative evidence for use in domestic courts. Their adaptations for use in contexts of armed conflict and mass violence signal the differences in scale between individual and collective crimes of sexual violence and the barriers to prosecution of sexual violence as an international crime in the national jurisdictions in which it has occurred, with potentially far-reaching effects within and beyond courts.³²⁴ Medical evidence of sexual violence during armed conflict was not available or required as corroborative evidence in specialized international and hybrid courts. However, in the last 10-15 years, an increasing number of organizations have introduced or adapted medical evidence collection techniques for use in settings of ongoing or recent armed conflict, mass violence, and humanitarian emergencies.³²⁵ The techniques include: re-purposing routinely collected patient medical records as evidence for investigation and prosecution of international crimes of sexual violence; issuing medical certificates as part of basic medical care in humanitarian emergencies and; offering sexual assault medical forensic exams during and immediately following episodes of mass violence for use in domestic courts.

Re-purposing involves the use of individual patient records held by hospitals, clinics, or non-governmental organizations to corroborate victim testimony and to generate statistics based on aggregated, de-identified patient data that may facilitate investigation, indictment and prosecution.³²⁶ In addition, routinely collected medical records can provide corroborating evidence even when they were not initially collected for the purposes of criminal investigation and prosecution. Hospitals and clinics in a specific geographic area may be among the first places that surviving victims go after a specific event (such as a massacre), during ongoing war, or after they have arrived at refugee camps receiving those displaced and fleeing armed conflict.³²⁷

Offering sexual assault medical forensic exams involves using biological specimens to establish recent sexual contact, identify the suspect (if unknown), and link the victim to the accused or link the victim/accused to the crime scene.³²⁸ Practitioners complete a form or medical certificate on which they record

322 J Morse 'Documenting Mass Rape: Medical Evidence Collection Techniques as Humanitarian Technology' *Genocide Studies and Prevention* 8(3) (2014) 63–79. <https://doi.org/10.5038/1911-9933.8.3.6>

323 As above.

324 As above.

325 As above at 65.

326 The patient medical record documents the medical encounter: why a patient seeks healthcare, what symptoms or injuries the patient reports, and what diagnoses, treatment, or recommendations a healthcare provider makes. Such statistics may describe patterns of patient reporting, injuries, pregnancies, related medical procedures (such as abortion where it is legal), and other reported and observed health sequelae.

327 Such re-purposing was used in (i) establishing that mass rape had occurred in the former Yugoslavia in 1992 based on medical records, (ii) introducing evidence of post-traumatic stress disorder in the Furundžija case at the ICTY, and (iii) providing context evidence in the Taylor case at the Special Court for Sierra Leone (SCSL).

328 Such as semen, saliva, blood, hair, debris, and other possible sources of trace DNA that is sent to forensic laboratories for analysis.

the victim narrative, document patient and suspect characteristics, and summarize their observations.³²⁹ Issuing Medical Certificates involves making use of the medical certificate as an official record of medical findings following the report of a crime or legal claim that involves medical opinion. In cases of rape and other forms of sexual violence, the requirements for obtaining a medical certificate vary across national jurisdictions.³³⁰

Legal procedures and evidentiary requirements of criminal trials affect the weight awarded to a victim's testimony. In view of this fact, efforts should be made by the Government of Uganda to consider the procedures discussed above and identify best practices of obtaining medical evidence to support the adjudication of CARSV violations.

4.6 Evaluation of the services/assistance given to victims of CARSV

When asked to evaluate the medical, psycho-social or redress assistance given to victims of CARSV by the Government, the majority of responses demonstrated dissatisfaction. The respondents' perceptions on access and adequacy of assistance by victims of CARSV were as follows: the majority of respondents (84%) stated that victims of CARSV who reported cases did not obtain any assistance and/or that the assistance obtained by victims who sought redress for SVC was inadequate (97%).

Chart 4: Evaluation of essential services to CARSV survivors

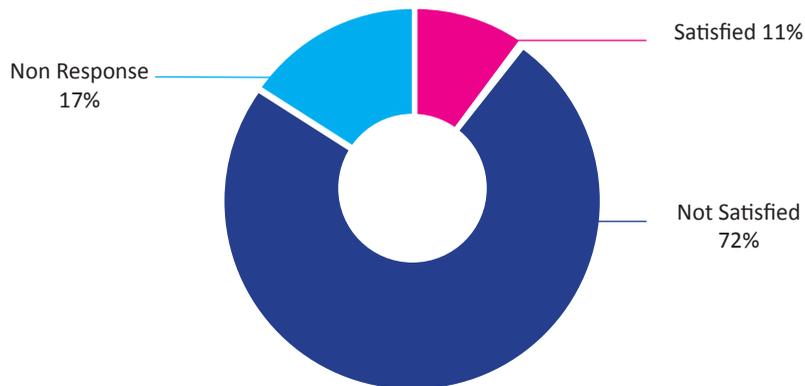
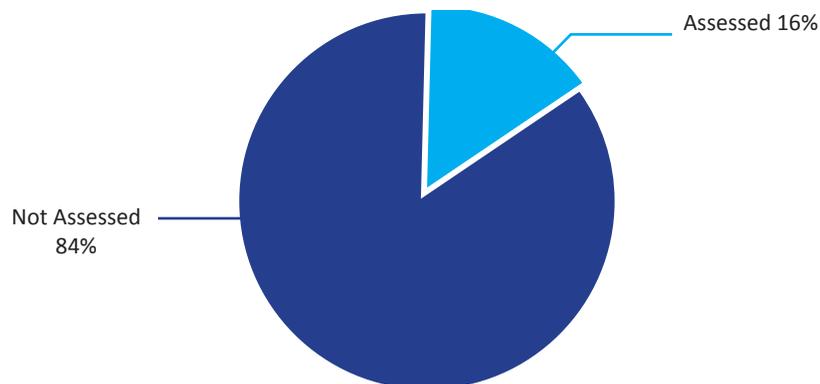
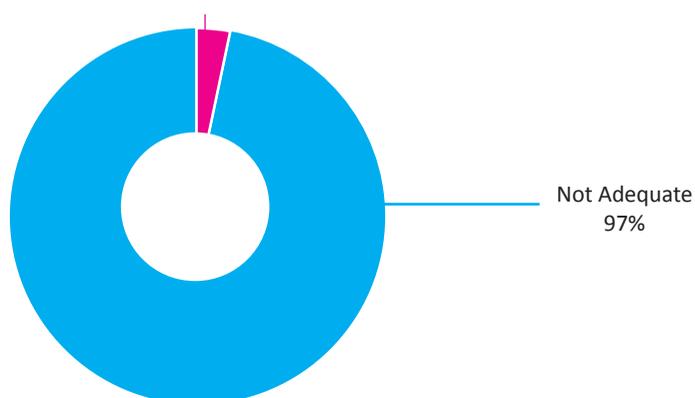


Chart 5: Views on redress and response to reported cases on access to assistance



329 As above.

330 Morse, n 322 above.

Chart 6: Views on redress and response to reported cases on adequacy of assistance

It is important for victims of CARSV to report cases but also equally important for those seeking redress to believe in the institutions established to help and offer redress to victims. The study findings demonstrate that a very small section of respondents felt that the interventions offered by the existing institutions were adequate. As such, it is imperative for the Government of Uganda to develop appropriate interventions to support victims of CARSV at the community level and also at the police and at the courts level, in order to ensure successful investigation and prosecution of CARSV.

4.7 Conclusion

The findings demonstrate the fact that CARSV was widely experienced in the various wars and civil conflicts in Uganda. However, most of the atrocities remain hidden as victims are faced with cultural and structural barriers. Many victims of CARSV remain undocumented, unsupported and vulnerable.

The processes to support victims of CARSV are hampered by both legal and structural challenges including the limited resource allocations to redress mechanisms and domestic penal laws and evidentiary requirements that may impede accountability.

The National Transitional Justice Policy is a step in the right direction for the support of victims of CARSV in so far as Government provides therein assurances of employing a victim-centered approach and mainstreaming gender and children's rights concerns in its implementation.

The proposals contained in the model law on CARSV provide protective measures for victims of CARSV in the court process. These innovations provide the much-needed divergence from the usual legal requirements in rules of procedure and evidence thereby providing procedural protections for victims in domestic and international courts. It is anticipated that the Model Law on CARSV will facilitate the development of a victim-centered prosecution standard within our jurisdiction.

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INCLUSION

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