

Making the law count:



Kenya: An audit of legal practice on sexual violence

KENYA
An Audit of Legal Practice on Sexual Violence

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ACRONYMS

ACORD	Agency for Co-operation and Research in Development
ACHPR	African Charter on Human and Peoples Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AI	Amnesty International
AIDS	Acquired Immune Deficiency Syndrome
CDPF	Convention on the Political Rights of Women
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDOVIP	Centre for Domestic Violence Prevention
CID	Criminal Investigation Department
CSTPEPO	Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others,
CTC	Care and Treatment Centres
CVCs	Community Volunteer Counsellors
DEVAW	Declaration on the Elimination of All Forms of Violence against Women
DNA	Deoxyribonucleic Acid
DRC	Democratic Republic of Congo
DV	Domestic Violence
DW	Defence Witness
ECP	Emergency Contraception Pill
FGM	Female Genital Mutilation
FIDA	Federation of Women Lawyers
GBV	Gender Based Violence
HIV	Human Immune Deficiency Virus
ICC	International Criminal Court
ICGLR	International Conference on the Great Lakes Region
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IDP	Internally Displaced Person
IPCPR	International Pact on Civil and Political Rights
IRC	International Rescue Committee
LRA	Lord's Resistance Army
MCH	Maternal and Child Health
NGO	Non Governmental Organization
OCD	Officer Commanding Defence
P3	Police Form Number 3
PC	Penal Code
PEP	Post-exposure prophylaxis
PP	Public Prosecutor
PW	Prosecution Witness
RMP	Public Prosecutor's Register
RP	Criminal Register
SGBV	Sexual and Gender Based Violence
SH	Sexual Harassment
SOA	Sexual Offences Act (Kenya)
SPP	Primary Criminal Sentence
STI	Sexually Transmitted Infection
UDHR	Universal Declaration of Human Rights
UNFP	United Nations population Fund
UNHCR	United Nations High Commission for Refugees
UNIFEM	United Nations Development Fund for Women
UNO	United Nations Organization
UPT	Urine Pregnancy Test
USAID	United States Agency for International Development
USD	United States Dollar
VAW	Violence Against Women
WHO	World Health Organization

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The comprehensive five-country study from which this Kenya component has been extracted would not have been possible without the support and effort of a range of individuals and institutions.

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

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

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

Last but not least we would like to thank Satima Consultants who consolidated and guided the content and direction of this entire study and were also central to the development of the Kenya audit.

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

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

PREFACE

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

ACORD's research history in the area of gender and conflict dates back many years. ACORD has made several notable contributions in these areas through publications and research documents such as *Gender Sensitive Programme Design and Planning in Conflict-affected situations*² *Research Report; Cycles of Violence; Gender Relations and Armed Conflict*³ and *A Lost Generation: Young People and Conflict in Africa*⁴. From 2006, ACORD has given priority to sexual and gender based violence (SGBV) in conflict and post-conflict societies as the focus for its gender theme. The goal of this emphasis was to facilitate the development of a culture of effective and efficient gender justice in the states that are in, or have emerged from, conflict. ACORD aims to do this by challenging impunity and bringing perpetrators of sexual and gender based crimes to justice while restoring the health and livelihoods of the survivors.

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

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

In Uganda, several interventions have been undertaken to raise the issue of the prevailing impunity in relation to sexual crimes particularly in the context of the conflict in the Greater North of Uganda. Highlighting sexual crimes and the needed justice for women and communities need to be integrated into the discussions and the accountability frameworks that will be established for Uganda to have true reconciliation.

In Tanzania, ACORD has undertaken various gender based initiatives for the displaced including promoting awareness on gender relations in refugee hosting communities; establishing district gender forums; supporting local government authorities in gender analysis, mainstreaming gender into development programmes and gender audits; gender-focused poverty mapping for monitoring progress under the national Strategy for Growth and Reduction of Poverty (NSGRP).

In Kenya, a research on protection and restitution for survivors of sexual and gender based violence was undertaken immediately after the aftermath of the 2007 post election violence. The research and writing process was informed by regional and international frameworks or protocols that have either investigated or supported women's involvement in post-conflict recovery initiatives. Reference to the UN Resolution 1325, AU Protocol, ICGLR Declaration, the UN's Responsibility to Protect Convention, the Guiding Principles on Internal Displacement, the Arusha Tribunal and the Sierra Leone experience, among others, were important. Even though the study was based on the Kenyan context, its ability to inform and be informed by other processes was critical.

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

³ Judy El Bushra & Ibrahim Sahl, 2005

⁴ ACORD, May 2007.

The comprehensive 5 country study is therefore a continuation of ACORD's focus on sexual and gender-based violence and builds upon a foundation that we have laid in alliance with other organisations. It recognises that much work has been done in the general area of advocacy and service delivery for survivors of sexual and gender based violence. We recognise that across the continent multiple layers of activism exist to address sexual and gender based violence, whether in situations that are deemed to be overtly in conflict or otherwise. However, through a consolidated view of the five countries and an informed situation analysis we believe that the adoption of sub regional approaches that address the structural problems rather than isolated country processes are critical to advancing the SGBV agenda forward.

EXECUTIVE SUMMARY

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

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

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

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

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

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

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

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

I OBJECTIVES AND METHODOLOGY OF THE AUDIT

Overall objective

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

Specific objectives

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

Mobilisation and training of researchers

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

Audit methodology

The audit was a qualitative study that utilised:

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

Sites:

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

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

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

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

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

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

The world community in seeking to bring to trial mass violators set up two *ad hoc* tribunals with an after- the- fact listing of crimes that could be tried. The Statutes of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) Ad hoc tribunals defined rape as a crime against humanity alongside murder, extermination, enslavement, deportation and persecution on political, racial and religious grounds. The jurisprudence emerging from Akayesu case⁸ (ICTR) affirmed this by defining rape for the first time – rape was found to be a form of genocide as well as torture and could amount to enslavement. The ICTY through the Delalic⁹ and Furundzija¹⁰ judgments affirmed Akayesu and found rape to be a form of torture.

The establishment of the International Criminal Court (ICC) constitutes a departure from this ad-hoc and retrospective justice experience of trial and accountability. The ICC is the world’s first permanent international tribunal that will try individuals for serious crimes of an international nature. The ICC has jurisdiction over cases of genocide, war crimes, crimes against humanity and aggression. The court acts as the court of last resort.

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

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

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

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

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

10 Prosecutor v. Anto Furundzija 10th Dec 1998, Case Number IT-95-17/11

11 Crime against humanity includes extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity, enforced disappearance of persons... And it includes “other inhuman acts of similar character intentionally causing great suffering or serious injury to body or to mental or physical health”

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

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

14 Ibid

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

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

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

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

All the 5 Countries under this audit namely: Burundi, Democratic Republic of Congo, Kenya, Uganda and Tanzania are signatories of various international and regional human rights instruments that promote the respect and protection of women's human rights. Annex I is a table showing the countries' commitments to these instruments.

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

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

III

OVERALL CONTEXT

Sexual and Gender Based Violence (SGBV), in its various forms, is endemic in communities around the world, cutting across age, sex, class religion and national boundaries. There is no universal or single definition of sexual and gender based violence, it is the expression used to differentiate violence aimed at individuals on the basis of their gender from violence in general. In its widest sense, it refers to the physical, emotional or sexual abuse of a survivor.¹⁷ According to the United Nations High Commission for Refugees (UNHCR), sexual and gender based violence include acts which cause physical, mental or sexual suffering or injuries such as threats, constraints and other restrictions on freedom.

Sexual and gender based violence includes, but not limited to:

- (i) Physical, sexual and psychological acts of violence inflicted on women within the family (i.e. domestic violence etc)
- (ii) Physical, sexual and psychological acts of violence inflicted on women within their communities (i.e. community violence).

“Physical violence” means any act of physical aggression, as well as threats of violence, with or without a weapon; “Sexual Violence” includes verbal aggression and obscenities, acts such as sexual touching, forced sexual intercourse or intercourse under duress, as well as being undressed or forced to undress.

As for “psychological violence” this includes insults, restriction on freedom of movement, isolation or the deprivation of material resources (e.g. money, water and food). Acts of sexual and gender based violence may occur anywhere, in so called developed societies or developing countries, in conflict or peace environments.

It is undisputable that Sexual Gender Based Violence (SGBV) is a form of discrimination and a gross violation of human rights¹⁸. It is equally undisputable that every single violation of one’s human rights is legally repressible and that the responsibility of dispensing justice rests within the criminal justice system. In crises brought on by war, forced displacement, or natural disasters, incidents of gender-based violence tend to increase due to social upheaval and mobility, disruption of traditional social protections, changes in gender roles, and widespread vulnerabilities. During conflict, women frequently lack the traditional protection of their families and spouses, and often face the additional threat of armed soldiers who regard them as “spoils of war”. Even when abuses are not aimed at them individually, women suffer violations of their human rights disproportionately when normal codes of social conduct are ignored in times of crisis.

During armed conflict, social structures are disrupted. Women and children face the additional risks of being subjected to sexual and gender-based violence when fleeing the fighting and seeking asylum. Family members are often dispersed during flight, leaving children separated from the rest of their families and women as solely responsible for protecting and maintaining their households.

The culture of impunity in relation to sexual abuse and violation of girls and women is rooted in the normalised violation of women in pre conflict situations. SGBV does not only take place during situations of conflict or war but is practiced when and where legal frameworks and institutions are functional. Communities uphold, practice and normalise various forms of abuse on the female gender which among others include female genital mutilation (FGM), child and forced marriage, virginity testing, and parents willingly receiving bribes/tokens when their girl child is sexually violated. Discussions on sex are also taboo and the value attached to female chastity so high that even when one is a survivor of sexual abuse, the community response is typically to isolate and stigmatize the survivor¹⁹

¹⁷ 2008, Population Council, *Sexual and Gender Based Violence in Africa*

¹⁸ Rome Statute of the International Criminal Court, 2002

¹⁹ ACORD Proposal. *Investing in Equality*

IV OVERVIEW OF JUDICIAL AUDIT FINDINGS

The incidence of sexual gender based violence (SGBV) has continued to rise at alarming levels, whilst perpetrators arrests and convictions are negligible. Embarking on a journey in the form of auditing structures that respond, manage and adjudicate sexual gender based violence is boldly questioning the level of the states' human rights commitment and obligations.

The Judicial audit has examined five countries namely; Burundi, the Democratic Republic of Congo, Kenya, Tanzania and Uganda. The countries under this study though diverse also illustrate several commonalities which are elaborated in fuller detail in the report. Despite the different legal regimes there are some levels of commonality and commitments to respond to the devastating consequences of SGBV. The commonalities include domestic legislation as well as regional commitments to end SGBV. In terms of accountability for sexual crimes in the Great Lakes region, all the countries audited are signatories to the Great Lakes Protocol on the Prevention and Suppression of sexual violence which provides clear and progressive definitions of sexual violence, how it is categorised as a crime of genocide, as a crime of war, as a crime of trafficking and as a crime against humanity.

It is only when SGBV is wholly recognised as a gross human rights violation [and not a “private” sphere concern] and when law enforcement agents become socialised and capacitated to treat SGBV as a human rights violation and provide commensurate services to survivors, shall we witness a reversal of the patriarchal attitudes that hinders SGBV survivors' protection and redress.

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

The audit demonstrates how the region has responded to the phenomenon of SGBV. When political stability is fragile in any of these countries, they are ramifications in the entire region as fighting groups migrate across the porous borders and survivors flee to neighbouring countries in search of peace. The incidents of gender-based violence tend to increase due to social upheaval and mobility, disruption of traditional social protections, changes in gender roles, and widespread vulnerabilities. This audit alludes to the range of difficulties survivors face in seeking justice and redress in situations of conflict, such as the mobility of perpetrators, the “flight mode” of survivors therefore their inability to report, store any evidence, heal emotional and physical wounds.

The national infrastructures in the form of judiciary, police and health institutions, receive numerous survivors on a daily basis, whose bodies are maimed, whose souls are scarred and fragmented, whose voices are lost, whose tears are dried and whose faith in justice is lost! This judicial audit presents several issues relating to SGBV including: how and where the legal frameworks locate SGBV; how judicial officers interpret the law and the factors influencing their adjudication on SGBV matters; how police receive survivors, how they determine whether to investigate, the protocols of investigations and prosecutions; how the health institutions respond to survivors and finally how non-state actors engage to prevent SGBV. The audit reveals the insurmountable challenges survivors of SGBV encounter when seeking health services, when seeking redress for injustices and when attempting to reintegrate within their families. The report also highlights model interventions that can be undertaken for managing survivors of SGBV.

Overall, the human rights normative framework in all the 5 countries is facilitative in preventing and protecting survivors of SGBV. All the countries have signed and ratified relevant international and regional human rights instruments and protocols that condemn SGBV as presented in the **Annex I**. Regionally, The International Conference on the Great Lakes region has been the incubator for the formulation of landmark protocol and model legislation for the region in the areas of Prevention and Suppression of Sexual Violence against Women and Children. The Protocol seeks to fill the legal void that prevails in most of the legal systems in the countries of the region as a response to the systemic rape of women and children in the Great Lakes Region.²⁰

²⁰ Liberata Mulamula, *Sex and Gender Based Violence in the Great Lakes Region*

At the national levels, different legal and policy frameworks are in place to respond to SGBV. The Burundi and Democratic Republic of Congo legal systems are based on Civil law, whilst the Kenyan, Ugandan and Tanzania are based on common law. Burundi and Uganda rely on the Criminal Codes as the basis of prosecution of SGBV offenders, whilst in DRC, Kenya and Tanzania rely on specific legislation relating to SGBV. One of the significant differences between the Criminal Codes and Sexual offences laws is that the later requires stricter corroboration of rape or other SGBV crimes, whereas, specific sexual offences laws recognise the impracticality of strict corroboration or the imposition of high burden of proof on the survivor. It is crucially important to note that whilst legal and judicial sectors play a preventive role in so far as SGBV is concerned, they have been criticised for their leaning toward punishing the perpetrator, rather than restoring the safety of the survivor.

A review of the types of SGBV cases that are presented in the courts indicates that rape and defilement are the highest prosecuted offences in all the 5 countries. For instance in: Uganda out of the 22 cases reviewed 91% were defilement whilst 9% were rape; Burundi out of the 62 cases reported²¹ in Bujumbura Mairie, 58 of them were rape; the study sites of the Democratic Republic of Congo; Kinshasa and Tshangu rape was reported to be highest offence reported for prosecution; Tanzania all the 20 cases reviewed were rape cases, whilst in Kenya out of the 54 cases reviewed 28 were defilement and 8 were rape cases. In addition, the court analysis presented in the audit demonstrates that in very rare circumstances will courts impose the maximum sentence to the perpetrators.

In situations of conflict and post conflict impunity for SGBV is heightened. In armed conflicts sexual violence is often used as a tactic in ethnic cleansing or as part of a strategy to destroy community bonds. Women may be viewed as a “trophy” and are forced into sexual slavery and kept to provide domestic services to the armed troops. Women themselves, when deprived of their homes, separated from their families and without community structures to protect them, are often forced into trading sex for material goods or protection, or simply in order to survive. In many cases they are held responsible for the acts of sexual and gender-based violence. Perpetrators may include fellow refugees, members of other clans, villages, religious or ethnic groups, military personnel, relief workers and members of the host population, or family members (for example, when a parent is sexually abusing a child). The enormous pressures of refugee life, such as having to live in closed camps, can often lead to domestic violence. In many cases of sexual violence, the victim knows the perpetrator.

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

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

An assessment of the challenges experienced within the judiciary in determining SGBV cases are largely similar in all the 5 countries. Firstly there is the insufficiency of the law where some internationally recognised crimes sexual offences are not captured in the domestic law such as marital rape, domestic violence and the rape of men. Thus a survivor who testifies to such violations can only get redress through normal assault or other sexual offence provisions. The detailed provisions of offences in each of the audited countries is analysed in this report. Secondly, the provisions that allow survivors to withdraw charges against the accused person undermine survivors redress. In all the five countries, it has been found that most SGBV survivors withdraw their cases due to family pressure, threats and trauma they experience in testifying in courts. The other challenge is the court process of determining cases which takes unduly long periods, at times up to 5 or 10 years. In operational terms, the weak court infrastructure such as inadequate computer skills, traditional methods of recording evidence in writing, inadequate courts, few magistrates and judges are challenges which need to be addressed.

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

²¹ These are figures for 2007 only.

Forensic evidence is needed to confirm the occurrence of sexual assault and to prove or disprove a link between the alleged perpetrator and the assault²². Forensic examination, specimen collection, analysis and documentation provide the link between the health and the criminal justice system.²³ These are crucial elements in securing successful prosecution and appropriate sentencing. The unavailability of health services in most of the regions of the audit greatly compromises the physical, mental and emotional well being of survivors of SGBV. In DRC for example, accessing a specialised health centre or hospital dealing with SGBV for this survey was difficult as they are rare. In Tshangu, one of the study sites, there was no health centre dealing with SGBV. The nearest health centre identified was Saint Joseph's Hospital in Limete, Funa District. Most patients and/or survivors of SGBV were drawn from very remote communes. Most of the health centres reviewed for this audit reveal that health personnel are not well equipped (in terms of skills and equipment) to manage the full range of consequences due to SGBV. Health centres that are private or operate as non-governmental organisations do have the entire range of services such as the PEP,ARV's, emergency contraception as well as trauma counselling. Examples of these are found in Burundi's Rwibaga Hospital, Kenya's Nairobi Women's Hospital, DRC's Saint Joseph's Hospital and Tanzania's Mtabila Hospital. When a survivor decides to report an SGBV incident, they are faced with additional challenges of having an appropriate record from the police, it varies in name for instance in Tanzania it is known as the P4, whilst in Kenya it is known as the P3 Form. Essentially, this is the document upon which any prosecution is to be based thus it is integral.

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

The next sections of this audit are specifically Kenya focused.

22 2003, World Health Organisation, 2004, Kenya Ministry of Health

23 2005, Kilonzo and Taegtmeier

5.1 Introduction

In Kenya, provisions protecting survivors of sexual and gender based violence can be found in a comprehensive form within the Sexual Offences Act 2006 (SOA). The Kenyan Constitution and the Employment Act 2007 also respond to some offences of SGBV.

Kenya's Constitution, in its Bill of Rights, provides for the respect of individual fundamental rights and freedoms and more specifically elaborates "that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect or the rights and freedoms of others and for the public interest, to each and all of the following, namely –

- Life, liberty, security of the person and the protection of the law;
- Freedom of conscience, of expression and of assembly and association; and
- Protection for the privacy of his home and other property and from deprivation of property without compensation"

The Sexual Offences Act came into force on 21 July 2006²⁴. This particular piece of legislation was enacted after many years of intense lobbying by *inter alia* women's rights groups, civil society organizations and female Members of Parliament who decried the bald-faced inadequacies of the provisions of the Penal Code on sexual offences under the misleading head "Offences against Morality".

Such inadequacies included: recognition of only a few forms of sexual offences, limited and antiquated definitions of the offences legislated against, judicial *carte blanche* in sentencing convicted offenders, the strict requirement of corroboration to prove rape and other sexual offences and an absolute lack of provisions geared towards protection of survivors of sexual offences when reporting and prosecuting such crimes.

The purpose of the Sexual Offences Act (SOA) was to introduce a comprehensive law reform with regard to rape and sexual assault, to introduce stiffer and enhanced penalties for offenders.

The enactment of the SOA by the 9th Parliament was lauded, by all, as a major achievement because it remedied these patent shortfalls by *inter alia*:

- Expanding the list of sexual offences legislated against to incorporate offences such as the rape of men, sexual harassment, gang rape, child sex tourism, and child pornography amongst others;²⁵
- Including minimum sentencing provisions to curb the inconsistent and largely lenient sentences previously handed out by the judiciary to convicted offenders;
- Eliminating the authoritarian requirement of corroboration in sexual offences cases;
- Enacting novel provisions that take into account social realities such as HIV & AIDS, and the commission of sexual offences by juristic persons;
- Recognizing the need to safeguard the privacy of survivors of SGBV crimes when prosecuting these matters in a court of law by enacting provisions that amongst others allow certain witnesses to be declared vulnerable and restricting the type of questions than can be asked of a witness and
- Integrating technological developments such as use of DNA profiling in the detection and proof of sexual offences amongst many others.

These provisions were enacted to ease the challenges faced by survivors in the prosecution of SGBV cases with a view to improving the mode of dispensation of criminal justice in sexual offences matters.

The novel provisions within the SOA may lead one to conclude that all loopholes in the law have been sealed, that SGBV cases are now easily prosecuted in the Kenyan legal system and that survivors are now benefiting from a gender and survivor friendly judicial process in Kenya. However, the law still has some challenges in applicability.

²⁴ Act No 3 of 2006

²⁵ Annex 4 comprises the entire list of amendments and new offences introduced by the Sexual Offences Act

It is trite that there is always a marked difference between the substance of the law on the one hand and its enforcement and execution on the other hand. Justice is said to be a continuum that begins from the pronouncements and substance of the law, to the different stages and forms of its enforcement²⁶. In order for the SOA to discharge its mandate fully, proper enforcement must be realized. As stated by Honourable Njoki S Ndung'u, the mover of the SOA in Parliament soon after its enactment, *"It is not enough to have the law on paper; we need to set up the systems that will ensure its effective implementation"*²⁷.

Without effectual enforcement, the SOA or some of its vital provisions will remain as mere "white elephants" because of a lack of proper interpretation and execution by the body charged with this duty i.e. the judiciary. The Judiciary appears alive to its role in this regard. One noted judge expressed herself thus on the issue *"Upon enactment and receipt of presidential assent, the Act (SOA) was handed over to the judiciary as one of its most valuable tools of trade"*.

The question to be considered herein is whether this "valuable tool of trade" is being effectively utilized in practice. The establishment of the task force on the implementation of the Sexual Offences Act is one way to accelerate reform in the patriarchal dispensation of justice, by targeting law enforcers and their attitudes towards such offences.

The recently enacted Employment Act²⁸ also legislates against sexual harassment. Section Six (6) thereof defines the ingredients of sexual harassment to include:

- a) Direct or indirect requests for sexual intercourse, sexual contact or any other form of sexual activity that contains and implied or express – promise of preferential treatment in employment, threat of detrimental treatment in employment, threat about present or future employment status of the employee;
- b) Use of language whether written or spoken of a sexual nature;
- c) Use of visual material of a sexual nature and;
- d) Physical behaviour of a sexual nature which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee and that, by its nature, has a detrimental effect on that employee's employment, job performance or job satisfaction.

The provision goes further to require each employer in Kenya with a staff of over twenty to issue a policy statement on sexual harassment. The statement is required to:

- a) Define what sexual harassment is;
- b) State that every employee is entitled to employment that is free from sexual harassment;
- c) State that the employer shall take steps to ensure that no employee is subjected to sexual harassment in the workplace;
- d) State that the employer shall take such disciplinary measures it deems appropriate against any person under its direction, who subjects any employee to sexual harassment;
- e) Explain how complaints of sexual harassment may be brought to the attention of the employer and
- f) Pledge that the employer will not disclose the name of a complainant or the circumstances related to the complaint to any person except where disclosure is necessary for the purpose of investigating the complaint or taking disciplinary measures in relation to the complaint.

26 See Ngondi-Houghton, C. (November 2006). "Access to Justice And The Rule Of Law In Kenya". A Paper Developed For The Commission For The Empowerment Of The Poor

27 Kathambi K. August 2006. 'Legislating against Sexual Violence: The Kenyan Experience'

28 Act No 11 of 2007

5.2 ASSESSMENT OF SERVICE PROVISION FOR SGBV IN KENYA

Identifying the prevalence of sexual assault is difficult in any circumstances: rape is one of the most underreported crimes in the world. In the Kenyan context, the availability of services, the level of awareness about the value of medical assistance, the degree of trust in police and other security-related issues, as well as the cultural acceptability of acknowledging victimization in the different regions are each important considerations when attempting to identify the scope of sexual violence within and across geographic areas.

The number of rape reports - especially in the earliest stages of an emergency, when women's focus may be on survival - should not, in itself, be an indication to the humanitarian community of the need for instituting protections for women and girls.

Methodology: The study used a cross sectional qualitative approach. In-depth interviews and focus group discussions were held with Kenyatta National Hospital gender based violence response centre personnel, personnel of the Gender, Community Policing and Children police department, senior representatives of women human rights organizations focusing on gender based violence and some survivors.

Findings: The manner in which Kenyan society is ordered, (largely male dominated and embracing patriarchy) has significant effects on the service seeking behaviours patterns of survivors. Socialisation has resulted to most cases of SGBV remaining shrouded in secrecy and silence. Inadequate linkages and feedback mechanisms between the health institutions, government doctors, police and other judicial officers undermine potentially effective strategies for management of SGBV. There is currently no manual detailing protocol to be observed in maintaining of evidence chain and lack of utilization of the existing documentation procedures by the police. Insufficient judicial training and community awareness of the new provisions in the Sexual Offences Act will hinder advances anticipated for survivors of SGBV.

Conclusion: Delivery of medical and legal services cannot be effective without appropriate referral mechanisms established for the health care, law and order sector. The existing medical legal protocols need to be harmonized to ensure proper utilization of referral systems between different sectors involved in service delivery. Intensification of rights awareness and empowerment campaign programmes for survivors are necessary. Creating alternative sites for collective survivor's voice and testimony should be explored as ways of strengthening and healing. Gender sensitisation programmes, within the entire criminal justice system, should be mandatory and integrated as a performance indicator at all levels of assessments. Wide dissemination of the provisions of the Sexual Offences Act and training for the entire criminal justice system will accelerate realisation of the objects of protecting and ending SGBV.

5.2.1 The Police

The Kenya Police Crime Report and Data for 2007 indicates that there were 876 cases of rape, 1,984 cases of defilement, 181 cases of incest, 198 cases of sodomy, 191 cases of indecent assault and 173 cases of abduction reported in 2007.

The 2003 Kenya Demographic and Health Survey showed that 49% of Kenyan women reported experiencing violence in their lifetime; one in four had experienced violence in the previous 12 months.²⁹

According to the UNAIDS report, Violence Against Women and Girls in the Era of HIV and AIDS, the survey revealed that, 83% of women and girls had experienced one or more episodes of physical abuse in childhood; 46% reported one or more episodes of sexual abuse in childhood. In Kenya, 25% of 12-24 year old had their first sexual experience by force.³⁰ Over 60% of these women and children did not report the event to anyone prior to reporting for this survey. Only 12% who had been physically or sexually abused reported to someone in authority, such as a village elder or the police.³¹

There are 341 police stations in Kenya, 227 police posts and 221 police patrol bases, for a total of 789 permanent policing centres. In 2004, the Kenyan government launched the first ever gender desk at the Kilimani Police Station.³²

²⁹ Kenya Demographic Health Survey 2003

³⁰ Violence Against Women and Girls in the Era of HIV and AIDS. A Situation and Response Analysis in Kenya 2006

³¹ Ibid.

³² WILDAF Kenya, Study on the Operations of the Gender Desk/Office in Kenya 2009

Two cases of assault or rape are reported on average every day to the Kilimani police station's gender violence desk³³ in the Kenyan capital, Nairobi. About 95 incidents of assault and 24 rape or attempted rape cases were reported to the station in 2006³⁴. Survivors received counselling while investigations were carried out, were referred to hospital for treatment and advised to seek help from non-governmental agencies that target the problem.

Even though women's and children's desks exist in almost all police stations, their effectiveness is limited by a variety of reasons. Most of the officers responsible for the gender desks have not received training on gender responsive crime management, neither do they possess skills of handling survivors of SGBV such as, counselling or referral. The other significant challenge is that, the resources are minimal to equip and train the police officers so that they can effectively manage the gender desks.

The resource constraints hamper credible investigations processes. As aptly captured by a key respondent from the police force: ***“You may have a complainant attend the gender desk with a case of rape, you can tell that she is emotionally traumatised. Before she is able to file her complaint, she may require medical attention; we don't have vehicles to transport or refer her to any hospital....in such cases, due to the trauma, she may leave without giving enough information to warrant an investigation”.***

Thus, resources can undermine ability to ensure that all sexual-violence related complaints are investigated³⁵. Even if a police officer has a heightened awareness and sensitivity about sexual violence, lack of resources may make it particularly challenging to ensure the safety and security of survivors.

For an investigation to be initiated, a woman survivor has to report the crime to the police. Her statement regarding the alleged abuse should be recorded in the Occurrence Book held in each police station. However, the majority of police officers are not trained on gender issues or how to handle cases of domestic violence, especially marital rape. Most police officers³⁶ regard violence within the home as a domestic matter, and enforce and uphold discriminatory attitudes against women.

There are special provisions – gender desks, for women that were established in some police stations to make the police more responsive to gender-based crimes. These desks are separate from the main police desk, to enable survivors of rape and sexual violence to report the offence in more private environment and to police officers trained to interview survivors and investigate the offence in a sympathetic and sensitive manner.

However, women who seek police intervention are often embarrassed, ridiculed, verbally abused and made to feel as if they are wasting police time³⁷. Women are reluctant to approach the police and only reported their case when the violence had become so extreme that they needed intervention to protect their lives. According to Human Rights Organizations³⁸, if a woman complains of rape by a police officer, it is extremely rare for an investigation or prosecution to be initiated. The offence has to be reported to the local police station and, where police officers are implicated, the immediate colleagues of the accused may be the investigators. It is likely that survivors will not report such allegations to the police for fear of reprisal or inaction. In cases where the only other witnesses are other police officers, they are often unwilling to testify against a colleague. In many cases, police officers suspected of, or accused of rape, are transferred to other units, instead of being investigated and brought to justice. Local human rights organizations have accused the police of using delaying tactics to postpone court hearings in cases which do come to court, such as losing evidence or transferring the case to another court.

Police face various challenges that require continual consideration for improvement.

These include:

- Poor response rates to crimes committed against particular social groups. The attitude of the police towards SGBV offences, specifically if it has happened in the domestic environment.
- Excessive use of force against particular groups, especially marginalized groups such as men from minority groups, indigenous peoples, LGBT people³⁹
- Exclusion of particular groups within the police institutions
- Misconduct and abuse of function
- Refusal to register complaints
- Poor investigation skills – leading to low conviction rate
- Lack of accountability
- Lack of civilian trust

³³ IRIN News Report

³⁴ Police Inspector in Charge of the Gender Desk

³⁵ Interagency GBV Assessment Report Jan-Feb 2008

³⁶ In August 2001 the then Kiambu Divisional Police Chief, Mr. Njue Ngagi, reportedly freed a church leader, arrested on suspicion of the crime of defilement of a six-year-old girl, because he was a “married man with children and, therefore, incapable of committing such an offence.”

³⁷ KII – Fida Official

³⁸ Kenya Human Rights Commission Quarterly Reports

³⁹ 3 suspected gays arrested in estate, by Vincent Agoya – Nairobi Star, Monday June 22, 2009

5.2.2. Medical Services

Comprehensive post-sexual violence services⁴⁰ are available in the Nairobi area visited. They were Kenyatta National Hospital Gender Violence Recovery Center (GVRC) and Nairobi Women's Hospital GVRC, but these services, except for those of Nairobi Women's Hospital, are often unknown and under-utilized. The catchment area of Nairobi Women's Hospital is extremely large, such that the hospital is inaccessible to many women and girls, especially those from many of the informal settlement areas. Referrals are also often made to clinics that do not actually provide sexual violence response services, which may dissuade some survivors from ultimately seeking health services that they need. According to Kenyatta National Hospital statistics, 60% of reported cases are rape of adult women, 30-35% of reported cases are defilement cases and 5% are sodomy of boys/ adult men. The trends have remained static and an analysis is not done according to the months.

Kenyatta National hospital facilities lack resources to employ sufficient staff. The doctors available are either, medical students or work on locum. The services are only available from 9am-5pm, Monday through Friday, and one nurse runs each facility-the rest of the staff are pulled from the hospital when a case is presented. The medical personnel reportedly has not been trained on how to respond to survivors, confidentiality, or the medical management of rape. Also, forensic evidence is often poorly collected due to inadequate legislation, resources and training.

Upon reporting to the hospital, the survivor is first seen by a councilor, then a medical exam is done. There is a standardized rape kit that is used. The kit, however, does not include medication, as these can vary from patient to patient. Evidence of rape under Kenyan law can only be obtained by examination of semen deposits, bruises and laceration. Absence of this kind of evidence renders the prosecution's case more difficult to prove.

The interviews revealed that there is limited communication between police, forensic analysts and medical personnel which can also inhibit an effective forensic process. This situation is compounded by a pervasive absence of national minimum standards and effective referral mechanisms. Kenyatta National Hospital lacks laboratory services to examine forensic evidence. Doctors lacking experience with rape survivors often do not know how to take specimens. If there is a suspect, police often do not ensure that a doctor examines him for corroboratory evidence, such as a sexually transmitted disease, which is acceptable to the court as evidence. Many cases get dismissed because of lack of corroboration. The lack of skilled support and adequate resources for health professionals, especially in documenting rape cases⁴¹, means that, the few cases that do go to trial are often dismissed for lack of adequate medical evidence.

There exists a pervasive lack of awareness among the general population of the correct procedure after rape, (i.e. not washing and keeping clothes) and of the window of opportunity for medical attention and forensic examination. DNA samples are recognized as the most efficient means of proving or disproving a link to sexual assault. However, this is a costly undertaking and most of the health facilities do not have the capacity or resources to offer this service.

The clinics partner with NGO's that offer legal services for survivors seeking legal justice. The clinic at the hospital follows up with survivors for a period of 6 months where they are routinely tested for HIV and counselled by professionals. These services offered are not sufficient and are lacking in resources, funds and personnel.

Other comprehensive post-sexual violence services are available in the Nairobi area through the Kibera South MSF/Ministry of Health (MOH) Health Centre, MSF Blue House (Mathare), MSF France, National Kenyatta Hospital Gender Violence Recovery Center (GVRC), NWH GVRC, and the Ministry of Health Riruta Health Centre (with support from LiverpoolVCT)⁴². Marie Stopes Kenya provides post-rape care that includes provision of emergency contraception and STI prophylaxis treatment aside from PEP, through six clinics: Eastleigh, Kencom City, Kenyatta Market, Kibera, and Kangemi. For PEP, Marie Stopes Kenya makes referrals to one of its HIV partners.

Nairobi Women's Hospital is by far the most widely known referral site for sexual violence services in spite of its inconvenient location for many slum-based patients. Still, referrals to NWH continue to be made because service providers are largely unaware of the alternatives listed above.

Generally, there seems to be lack of information on facilities that offer comprehensive post-sexual violence care and treatment. During health center visit to Kenyatta National Hospital, it was difficult to gain a clear understanding of the protocols used to medically manage the needs of survivors, (including the provision of first aid and referral), indicating a need for capacity-building to ensure that multiple health centers throughout Nairobi can provide comprehensive sexual violence medical management services. Another major concern is that, most medical services are not free in many facilities, if they are offered at all, except at Kenyatta National Hospital (out-patients services) and Nairobi Women's Hospital.

⁴⁰ Interagency GBV Assessment Report Jan-Feb 2008

⁴¹ According to the KII interviewed for this information, there is no data collected on SGBV cases

⁴² Interagency GBV Assessment Report Jan-Feb 2008

Service providers (Kenyatta National Hospital and Nairobi Women's Hospital) reported that they know that sexual violence escalated after the post-election violence, but that actual reports/cases they have received have been low. Interviewees believe that, a significant number of rapes that occurred early, after the post-election crisis, have likely not been treated because many women, in the slum areas, are still fearful of moving around. It is also possible that, many of these women may have been referred to health facilities that do not treat sexual violence cases.

5.2.3 Role of Women's Rights Organisations

Justice traditionally implies prosecution and punishment of the guilty. Whilst the circumstances of securing justice for women are hindered by a myriad of reasons including their socialization and levels of empowerment, the suffocating societal pressures of ostracisation, unfriendly and insensitive criminal justice system, FIDA-Kenya has through its interventions sought to move the concept of justice to embody critical elements of giving women voice. Through its legal aid centers located in Mombasa, Kisumu and Nairobi, FIDA Kenya strives to offer a conducive environment for survivors to tell their story, through the self-representation skills building and counseling; the organization supports the survivor to tell her story and prepare her to testify and through its advocacy interventions, it seeks to sensitise survivors first points of contact such as local chiefs, the police and health institutions.

Women needing legal advice about concerns such as maintenance, other matrimonial issues and inheritance usually go to non-governmental human rights or women's organizations, such as FIDA (K). In the majority of cases, domestic and sexual violence plays a major part in the women's request for action from such groups. However, few women survivors of such violence leave their husbands or pursue a legal case against them. This is mainly because of economic dependence on their husband, high legal costs, fear of losing custody of the children and of being ostracized by family and community, and a lack of confidence in the police and judicial system to protect them and ensure adequate means of redress.

As women in Kenya constitute the majority of the poor, many cannot pay to bring a case to court; the cost of hiring an advocate is prohibitively high for them. If women do seek help from a local organization or report the incident to the police, according to FIDA, they "will receive threats from [their husband's] family in order to drop the case. However, many women would rather protect the family so they will suffer long term abuse and will only come...when they fear for the children. In other cases, the FIDA representative observes " the survivors' husbands give money to the police to have the case dropped."

Often courts take the view that there was some provocation by the woman and treat cases of domestic violence lightly.⁴³ One of the key criteria for a functioning state is a fair, impartial, independent and functioning justice system, which is capable of protecting the rights and integrity of the individual. The failure to bring to justice those responsible for crimes of sexual violence, as defined in the Sexual Offences Act and the Penal Code, undermines the rule of law and indicates a weak and inadequate judicial system that fails to take appropriate action with regard to these crimes.

This study also established that, marital rape is being committed with impunity and several women complain about this. However, the law has failed to comprehensively articulate marital rape as a criminal offence. Hence women cannot be afforded the legal opportunity to bring to justice those who commit rape in the home. Access to justice for survivors of marital rape is extremely difficult. It is rare, for a case of marital rape to reach the courts, and the perpetrator is more commonly charged with assault than rape.

Key informant interviews with judges indicate that socialisation is a great challenge in dispensing justice: ***"sometimes those sitting on the bench are heavily influenced by the way they were brought up, so, rather than looking at the law as well as the facts before the court...unfortunately, since most of these matters are heard at the lower courts, we are not able to reverse the decisions unless they come to us on appeal. This is worrisome as communities may begin to feel that the court system is not serving them. We need a lot of gender training and that is where our programme on equality of jurisprudence will transform the courts."***

During the post elections crisis, the preliminary findings for a study undertaken collaboratively with diverse agencies, confirmed initial reports from Nairobi-based hospitals that sexual violence had increased during that time. Evidence suggested that perpetrators exploited the conflict by committing sexual violence with impunity, and efforts to protect or respond to the needs of women and girls were remarkably insufficient.⁴⁴

Sexual violence was not only occurring as a by-product of the collapse in social order in Kenya brought on by the post-election conflicts, but, it was also being used as a tool to terrorize individuals and families and precipitate their expulsion from the communities in which they lived.

⁴³ In August 2000 a High Court, under Justice Vitalis Juma, set free Dickson Chege Mwangi, who had admitted stabbing to death his wife, Regina Wawira, because of her alleged infidelity. The court reasoned that the accused had been highly provoked by his wife's infidelity

⁴⁴ Waki Report 2008

Investigation into sexual violence which occurred during flight yielded anecdotal reports from all regions, but in particular from Mombasa, Nairobi, and parts of the North Rift, of revealed threats of sexual violence being used as a fear-instilling tactic, in so far as women were told they and their children would be raped if they did not vacate their property within a designated timeframe.

5.2.4 Analysis of Judicial Decisions

As growing concerns continue to be expressed by various human and women rights organizations regarding the treatment of SGBV survivors within the court process, this chapter of the judicial audit, examines the experience of SGBV survivors in Kenya who, not only choose to report crimes perpetrated against them, but, go further and participate in prosecution efforts with a view to contributing towards informing, reforming and improving the policy and practice in the criminal justice system with respect to SGBV prosecution.

This section of the audit will focus on the extent to which, the Kenyan justice system has engaged with SGBV and in doing so, gauges the degree to which it has performed with respect to the vital task it bears of delivering justice to survivors of the many crimes committed by perpetrators of SGBV.

Documentation, review and analysis of judicial decisions⁴⁵ on SGBV cases given over the last three years will be undertaken with particular emphasis being laid on the hallmark decisions given by the superior courts as well as consideration of the decisions of subordinate courts which are the courts of first instance and therefore the actual trial courts in all SGBV cases. From this, the audit will attempt to provide an illustration of the emerging trends and jurisprudence on SGBV cases within the Kenyan court system.

The following pertinent matters which inform the responsiveness of a judicial framework to the needs of SGBV survivors who appear before them will be investigated:

- What are the precise forms of SGBV that manifest most commonly before the Kenyan courts?
- What are the thresholds of proof set down to successfully prosecute SGBV cases?
- Are the laws of evidence supportive to SGBV survivors?
- How do the courts interpret legal provisions on SGBV?
- Are the courts innovative or reluctant to invoke proactive measures to protect SGBV survivors before them?
- What role does judicial discretion play in the dispensation of justice in SGBV cases?
- Is the justice system gender responsive?

The answers obtained from the above queries will inform the status quo currently existing in the justice system of Kenya which will in turn point to the strengths that need to be lauded and the weaknesses that must be reformed in this particular system in order to ensure that justice is not only achieved but more importantly seen to be achieved in all SGBV cases coming before the Kenyan courts.

It is expected that the findings made and lessons learnt from this audit will be utilized to institute much needed reforms in the Kenyan judicial system in light of the specific shortcomings it faces in order to ensure that it is both gender and survivor sensitive.

In this section, we shall provide an analysis of 54 cases decided by the courts over the last three years on various forms of SGBV. These cases were sourced from both online sources as well as hard copies of reported. First hand case study material from the Kericho Law Courts⁴⁶ was also included in this analysis. Of the total number of cases obtained, 5 are Court of Appeal decisions, 24 are High Court decisions while 25 are Magistrate Courts decisions.

The Commission of Inquiry on the Post Election Violence (CIPEV)

Following the hotly contested December 2007 presidential and parliamentary elections, violence broke out in most parts of Kenya because the Kenyan opposition party leaders and the incumbent administration failed to agree on which one of them exactly won the elections.

This electoral dispute resulted in mass ethnic violence all over the country and Kenya declined into chaos and destruction between the months of December 2007 and March 2008. The violence largely ended at the end of February 2008 after an agreement was reached by the opposition and the government based on reconciliation talks chaired by the immediate former UN Secretary General Kofi Annan, which outlined a power-sharing deal between the opposition and the Government through a grand coalition.

⁴⁵ For purposes of this report, we define judicial decisions to strictly encompass those cases in which final judgment has been given. Cases currently pending in courts in trial or appeal are not considered herein.

⁴⁶ Kericho is a small town in the Rift Valley Province of Kenya.

A Commission of Inquiry on the Post Election Violence (CIPEV) (popularly known as the Waki Commission) was set up and has some jurisprudential value⁴⁷. The commission, a quasi-judicial body, stumbled upon the colossal SGBV disaster that occurred in Kenya during the post election crisis in the course of its investigations and resolved to further investigate the phenomenon⁴⁸.

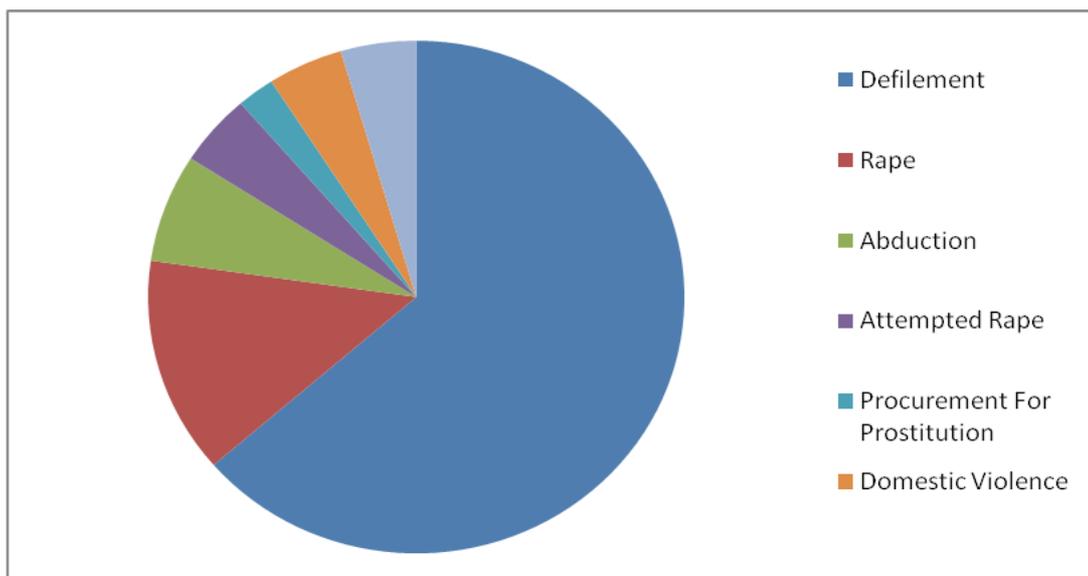
Informed by emerging international developments in jurisprudence (such as the Akayesu case) the Waki Commission remarkably determined that crimes of rape and sexual violence⁴⁹ constituted substantive elements of rights violations and should be considered with equal weight alongside other forms of electoral violence.

Although the Commission only took evidence from survivors and did not undertake actual prosecution of offenders, its findings on SGBV in Kenya, the manner in which it carried out investigations into the phenomenon and its final recommendations which have yet to be implemented are vital in auditing the response of the Kenyan justice system in general and the judiciary in particular in SGBV matters and shall be considered herein.

5.2.4.1 Forms of SGBV Judicially Considered

The forms of SGBV that were tried by the various courts were rape, attempted rape, defilement, attempted defilement, abduction, incest, false allegation of rape and indecent assault. Defilement cases were the largest in number accounting for 28 of the cases decided by the courts with rape following at 8 cases.

CHART SHOWING FORMS OF SGBV CONSIDERED BY THE KENYAN COURTS BETWEEN AUGUST 2006 AND MARCH 2009



As stated above, a Commission of Inquiry on Post Election Violence (CIPEV) was formed following political mediation with a mandate to investigate the facts and the conduct of state security agencies, and to make recommendations.

This was the first Commission of Inquiry in Kenya to consider the sexual violence consequences of internal conflicts in Kenya. Chapter 6 of its Report is dedicated to sexual violence and it exhaustively shows the Commission's consideration of factors such as what had occurred to cause the high levels of sexual violence, how SGBV manifested in this period, its extent and the evidence that proved the above queries.

⁴⁷ The CIPEV was brought into being on 23rd May 2007 by Kenya Gazette Notice No.4473 vol. cx-no.4.

⁴⁸ Ibid at page 238 In its report the Commission states that it is upon hearing bits and pieces of life shattering experiences as a result of sexual violence during the conflict period that alerted it to the need to make inquiries into the sexual violence that occurred following a central focus of its investigation into post-election violence.

⁴⁹ This in the Commission's words was because; Sexual violence is a form of violence and as the Commission was about violence, it felt strongly that there should be a focus on it in its investigations and secondly being people from various walks of life, the members of the Commission also were horrified by the stories of sexual violence that came to their attention in the conduct of their survey. Like others, they too felt compassion for the victims of post election sexual violence and wanted to learn and expose what had happened.

The Commission carried out hearings specifically for SGBV survivors to enable them to furnish details on the nature of sexual crimes committed against them, the perpetrators of such crimes, the reasons for being attacked and the response of the justice system to the sexual violence. In October 2008, the Commission submitted its report to the government.

The Commission received numerous reports of SGBV perpetrated during the post election conflict period against men, women and children which consisted mainly of **rape, gang rape, defilement, genital mutilation, sodomy, forced circumcision, insertion of objects and sexual exploitation**. These types of SGBV are typical of conflict situations worldwide.

The reports were received first hand from survivors who had experienced the sexual violence, from those who had witnessed the violence being perpetrated against others and from over 40 organizations which had undertaken studies in various parts of the country on the same issue. The commission, in its report however did not put a figure on the prevalence of each type of sexual violence reported; rather, it gave a general report pointing only to the fact that these offences had been committed.

The Commission's recommendations covered individual criminal responsibility of alleged perpetrators of the violence, police reform, the incorporation into domestic legislation of the Rome Statute of the International Criminal Court (ICC) and constitutional reforms. The Commission's key recommendation was for the government to establish a Special Tribunal to investigate and prosecute perpetrators of the violence. If the government failed to do this, the Commission recommended that the cases be referred to the ICC for investigation and possible indictments in relation to alleged crimes against humanity committed during the post-election violence.

a) Thresholds of proof

Under the SOA, the standard of proof is the normal standard for criminal cases i.e. proof beyond reasonable doubt. The prosecution is required to prove the charge against the accused person to this standard for the trial court to convict.

In Kenya, the practice by the Police is to lay a main charge and an alternative charge, lesser charge against the accused person in order to ensure that, if the main charge is not proved to the requisite standard, then the court can fall back on the alternative charge and convict the accused person on the same set of facts.

In *Republic v Antony Mutua Mutinda*⁵⁰, the accused was charged with the offence of attempted rape⁵¹. He was also charged in the alternative with the offence of indecent assault⁵². The issue that the trial court had to consider was whether the prosecution had proved the charges facing the accused to the required standards. The court held that on the evidence before it, the main count had been proved "beyond reasonable doubt" and therefore there was no need to make a finding on the alternative count.

The SOA has however been faulted that the excessive description of the offences may make it increasingly difficult for the prosecution to demonstrate their case in accordance with the requisite standard of proof⁵³. For example, with regard to the offence of rape, contrary to Section 3(1) of the SOA, three things must be proved for the burden to be met:

- That penetration occurred
- That such penetration was intentional and unlawful⁵⁴
- That no consent was given or that such consent was obtained through threats or intimidation.

Where the charge laid is defilement, contrary to Section 8(1) of the SOA, the prosecution must prove that:

- The survivor is a child
- That the accused person penetrated the child.

In *Jacob Odhiambo Omumo vs R*⁵⁵ where the accused person was charged with the offence of defilement, the Court of Appeal stated that based on the definition of the offence, the act of penetration by the offender is a vital ingredient which must be proved by the prosecution. In this case, the report of the medical officer showing penetration had indeed occurred coupled with the straightforward and unshaken testimony of the child (the survivor) which the trial court found to be truthful and was sufficient to discharge the burden as set.

⁵⁰ CRIMINAL CASE NO. 512 OF 2006 [2008]KWJA 1 at 24

⁵¹ Contrary to section 4 of the Sexual Offences Act

⁵² Contrary to section 6(a) of the Sexual Offences Act

⁵³ Digest Of New Acts Of Parliament: The Sexual Offences Act 2006

⁵⁴ Section 43.(1) of the SOA provides that an act is intentional and unlawful if it is committed -

(a) in any coercive circumstance;

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

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

⁵⁵ [2008] eKLR

However, some judicial officers place the burden to prove penetration too high, such that, it is simply impossible for the prosecution to prove the offence occurred. In *Republic v Samuel Wanjala Njongirire*⁵⁶, for example, the accused person was charged with defilement of a child aged 4 years⁵⁷. Medical examination proved that the child's hymen was torn. However, the only evidence linking the accused person to the crime was the fact that the child had informed her mother that he had "done bad manners to her". In discharging the accused person, the trial court held that the vital requirement of penetration by the accused person was not proved. It held that the medical report which indicated that the child's hymen was torn did not indicate whether this tear was recent or old or the manner in which it had been caused, stating that, such evidence could not tie the accused to the particular case, it could have been any other culprit, or, an object for that matter.

Evidently, there is need by the higher courts to set clear precedents on how the standard of proof, as set by the SOA, should be discharged in light of its exhaustive definitions of each sexual offence.

b) Minimum Sentencing for Perpetrators

One of the strengths of the SOA is the minimum sentences that it lays down, as mandatory, where an accused is found guilty of any charge.

Unlike previously, where the court had absolute discretion to hand out any sentence they deemed fit, now judicial officers must keep within the minimum bounds set by the law. The benefit of minimum sentencing legislation is that it makes sure that consistency is maintained in sentencing and that the sentence in each case is commensurate with the tenor of the offence.

In rape matters for example, the minimum sentence set by Section 3(3) of the SOA is "not less than ten years but this may be enhanced to imprisonment for life". Attempted rape⁵⁸ carries a penalty of not less than five years but which may also be enhanced to imprisonment for life. In defilement cases under Section 8, the minimum sentence is predicated on the age of the child. If the child is between the age of twelve and fifteen years, imprisonment for a term of not less than twenty years is prescribed. Where the child is aged between sixteen and eighteen years the sentence upon conviction is imprisonment for a term of not less than fifteen years. Where the child is less than 11 years old, then life imprisonment is the mandatory sentence.

These sentencing limits are adhered to by the courts.

In *Republic v Maina Muriuki Kihu*⁵⁹, after the trial magistrate made a definitive finding that the survivor was aged 11 years and that she had been defiled by the accused, she went on to impose life imprisonment despite the fact that the prosecutor had asked that he be treated as a first offender because this was the prescribed sentence.

In the case of *Jacob Odhiambo Omumo vs R*⁶⁰, the appellant was charged and found guilty of defiling a child of 11 years. In his second appeal to the court of appeal, he disputed the sentence, stating that it was harsh in the circumstances. The Court of Appeal in upholding both the conviction and the sentence of life imprisonment stated thus "the sentence imposed is lawful and we have no power to interfere with it".

c) Exercising Judicial Discretion

Although the SOA defines minimum sentences upon conviction, it leaves room for the exercise of judicial discretion in SGBV cases. For instance in a rape matter, the judge or magistrate has discretion to hand out a sentence of 10 years and above to the maximum set of life imprisonment.

They can therefore choose to give the minimum sentence or enhance it if they are of the opinion that the circumstances warrant this. The appellate court also has discretion to interfere with the sentence handed out by the trial court if satisfied that the same is in its view, inordinately harsh or excessive.

For instance in the case of *Solomon Kahi Mwangi vs R*, the trial court had on the evidence presented before it found the accused guilty of the offence of rape. By law, such a conviction carries an automatic minimum sentence of 10 years under Section 3 of the SOA. The magistrate handed out a 20 year sentence. On appeal, the High Court upheld the conviction but reduced the sentence to the minimum set of 10 years. In the judge's view, the sentence of 20 years was "rather harsh and excessive" taking into consideration that the accused was a first offender.

⁵⁶ CRIMINAL CASE NO. 3902 OF 2006 [2008]KWJA 1 at 76

⁵⁷ Contrary to section 8(1) as read with 8(2) of the SOA

⁵⁸ Section 4

⁵⁹ [2008] 1 KWJA at 58

⁶⁰ [2008]eKLR

d) Protection of Survivors

The SOA has, by its provisions, sought to protect survivors of SGBV to the furthest extent possible. We shall consider the provisions that are directly related to the conduct of a SGBV case before the court. Firstly, the provisions on sentencing as discussed above which ensure that a convicted person gets the requisite punishment under the law act as a means-of protection.

Secondly, the Act makes provision for the concept of “**vulnerable witnesses**” under Section 31 of the Act. The provision states that: “*The court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is –*

- The alleged survivor in the proceedings pending before the court;
- A child; or
- A person with mental disabilities.

The declaration of vulnerability is made by the court on its own initiative or on request by the prosecution or any witness other than the accused⁶¹. The court may accede to this request or take the said initiative if, in its opinion, the witness is likely to be vulnerable on account of *inter alia* age, intellectual, psychological or physical impairment, trauma, the relationship of the witness to any party to the proceedings, the nature of the subject matter of the evidence or any other factor the court considers relevant.

Upon declaration of a witness as a vulnerable witness, the court is mandatorily required to direct that such witness be protected by one or more of the following measures:⁶²

- Allowing such witness to give evidence under the protective cover of a witness protection box;
- Directing that the witness shall give evidence through an intermediary;
- Directing that the proceedings may not take place in open court;
- Prohibiting the publication of the identity of the complainant or of the complainant’s family, including the publication of information that may lead to the identification of the complainant or the complainant’s family; or
- Any other measure which the court deems just and appropriate.

Section 32 of the Act places the duty of informing a witness in an SGBV case of the possibility that he or she may be declared a vulnerable witness in terms of section 31 and of the said protective measures on the prosecution. This information must however be given prior to such a witness commencing his or her testimony at any stage of the proceedings.

The court is mandated to enquire from the prosecutor prior to hearing evidence given by a vulnerable witness, whether the witness has been informed of the option to be declared vulnerable and the court shall note the witness’ response on the record of the proceedings, and if the witness indicates that he or she has not been so informed, the court shall ensure that the witness is so informed. Section 31(10), however, prohibits the court from convicting an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary. From the cases audited, this vital section was not invoked by the court even where the circumstances warranted it. The main reason for this failure can be attributed to the lack of training of magistrates and prosecutors on provisions that protect the survivor.

⁶¹ Section 31(2) of the SOA

⁶² Section 31(3) of the SOA

A glaring example of this is in the case of *Republic v Nelson Githu Kibaki*⁶³, where the accused person was charged on the main count with defilement of two children aged below 11 years. The children were his nieces with whom he lived in the same house. The alternative charge of indecent act with a child⁶⁴ was also preferred. During the course of the trial, one child survivor (PW2) was unable to testify because of the trauma suffered as a result of the ordeal. The medical doctor who testified at the trial verified that she had been defiled. He stated that during medical examination after the defilement, the child look scared, was not easily talking to him and that he was unable to take virginal swabs as she and the other survivor were crying and were scared. During trial, the child did not complete her testimony. The judgement states that, she was stood down 3 times as she became scared and went mute, each time she was asked whether she knew the accused. She only managed to state that she knows him and that he did something to her. She also stated that they live together. The court ordered that she be assessed by a psychologist but the order was not carried out and subsequently the prosecution chose not to continue with her evidence. Based on this, the court found the accused person not guilty of the charge on the ground that the complainant's uncompleted evidence failed to link the accused to the crime. The magistrate declined to accept the testimony of the survivor's mother to whom the survivor had given details of the accused's unlawful actions dismissing it as hearsay.

In her judgment, the trial magistrate thus "The second PW2, did not give concrete testimony. She appeared scared, and traumatized and only managed to state that the accused did something to her. PW4 (her mother) and PW5 (the investigating officer) told the court that she reported to them that the accused had slept with the 2 of them. The P3 form (medical form) produced by the doctor shows that she had bruises on her genitalia, her hymen partially broken and it was concluded that penetration had been attempted. Without evidence of the complainant herself as to how the partial penetration occurred it is difficult to make a finding of guilty against the subject. The medical report is left hanging and the evidence of PW4 and 5 remain hearsay which is not admissible."

Clearly, the magistrate and the prosecutor handling this case were oblivious of the provisions of Section 31 of the SOA. The child survivor here was traumatized and this was acknowledged by the court. In such circumstances, the court should have invoked Section 31 and allowed the child to give evidence either through an intermediary or under protection of a witness box. Section 2 of the Act defines an "intermediary" to mean a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker. The mother's evidence stating what the child had told her in detail could have been received as the evidence of an intermediary and not simply termed hearsay and rejected.

Another factor that the court ignored was that the accused person was the child's uncle and they lived in the same house with him. Section 22(4) of the Act provides that in cases where the accused person is a person living with the complainant in the same house or is a parent or guardian of the complainant, the court may give an order removing the accused person from the house until the matter is determined and the court may also give an order classifying such a child as a child in need of care and protection and may give further orders under the Children's Act. None of these orders were invoked by the trial court in favour of the child survivors. The upshot here is that, although the Act may have numerous protective provisions, failure by the courts to utilize them makes them redundant and the justice system can simply be deemed to lack survivor protection mechanisms in SGBV cases.

One worrying provision in the SOA with respect to the protection of survivors of SGBV is Section 38 which makes it an offence to falsely accuse a person of a sexual offence. The provision states "Any person who makes false allegations against another person to the effect that the person has committed an offence under this Act is guilty of an offence and shall be liable to punishment equal to that for the offence complained of". Human Rights Organizations in Kenya and internationally, have decried the enactment of this section on the grounds that it will only act to discourage SGBV survivors from taking steps to prosecute offenders. This is because they may be afraid that should they be unsuccessful in proving the case, the offender can turn around and prosecute them under this provision.

The section was applied by the court recently in the case of *Republic v Beatrice Wambura Mwangi*⁶⁵. The defendant, a 16 year old girl, was charged with the offence of making a false allegation contrary to Section 38 of the SOA. The particulars of the offence as stated in the charge were that on 24th June 2006, at Karatina Police Station in Nyeri, she made a false allegation that one John Kinyua Muhara defiled her during the month of April 2005 and impregnated her, information she knew to be false and caused him to be arrested and charged⁶⁶. During the trial however, the defendant said that it is one Patrick who had impregnated her and not the accused. While being cross examined by the prosecution, the subject had stated thus; "I feared to say that it is Patrick who defiled me, so I did tell police that it is John Kinyua who defiled me." It is on the basis of this confession that she was charged.

63 [2008] 1 KWJA at 65

64 Contrary to Section 11 of the SOA

65 [2008] 1 KWJA at 27

66 Karatina Law Courts in Criminal case NO.479/06.

The trial magistrate found her guilty as charged and rendered her judgment thus; *“This court notes that the offence committed is very serious. So serious that the penalty provided for under S.38 of the Act is equivalent to the one which the false allegation was made. In the circumstances, the subject herein ought to face up to a life imprisonment as that is the maximum sentence provided for the offence of defilement. The court however now faces the difficulties of implementing the provisions of S.38 of this Act Vis- a-Vis that of the Children’s Act No.8101, the subject herein is a minor. Under the provisions of S.190 of the Children’s Act, “No child shall be ordered to be imprisoned”. And considering the subject herein is a minor, this court invokes the said provisions of S.190 of the Children’s Act and directs that a Probation report be availed.”*

From the tenor of the magistrate’s judgment, it appears that she would have sentenced the accused to life imprisonment had it not been for the fact that she was a minor. The fact that the survivor feared some form of repercussion if she revealed the true offender ought to have been investigated further.

6.1 Transition from the Penal Code to the Sexual Offences Act

Upon the coming into force of the SOA on July 2006, the judiciary was placed in a position where it had to change its attitude and mode of operation overnight in dealing with SGBV cases, because this area of law was now governed by a new regime that was completely different from the old. As succinctly described by Lady Justice Roselyne Nambuye the new Act had new concepts; new and expanded definitions, new offences and new procedures all of which challenged the traditional role of a judicial officer of being a mere impartial arbiter or umpire and added thereon the role of counselor, friend, social worker, psychologist and a human rights activist for both the survivor and the offender without discrimination and/ or distinction⁶⁷. The transition from the old to the new was not smooth as shown below.

6.2 Administrative Lapses: Non Distribution of New Act

Firstly, administrative gaps hindered the successful implementation of the Act by the court. Copies of the Act were not distributed to the many courts, especially the subordinate courts in rural areas. An interview given by Jane Onyango, the former executive director of the Federation of Women Lawyers-Kenya (FIDA-Kenya), to IPS in March 2007 stated that, fieldwork undertaken by the organization in Kericho, South-western Kenya, soon after the enactment of the Act, revealed that, copies of the legislation had not been distributed to courts and police stations in the area at the material time. She stated that: “*There is no awareness creation among judicial officers. As we speak, the law is not being fully utilized. Copies of the law are not even available in courts, particularly those in remote places*”⁶⁸. Because of lack of awareness and training, the courts and prosecution continued to unlawfully apply the old law as contained in the Penal Code. On appeal, the higher courts would quash the conviction, not for lack of evidence, but because of the incurable procedural defects brought on by these lapses.

This was the case in *Republic v Wycliff Adulu*⁶⁹ for instance; the accused was charged with abduction contrary to section 143 of the Penal Code. The offence with which he was charged was allegedly committed on 2nd December 2006. The SOA had come into force on 21st July 2006 and it was the governing law on such matters at the material time. The Chief Magistrates court hearing the case declared a mistrial and discharged the accused person because he was charged under a non-existent law. This is despite the fact that the evidence against the accused person was overwhelming and would have supported a finding of guilty. Clearly, the police officers who had drawn up the charge sheet were unaware that the SOA was the relevant statute in this case. This can be because they did not have a copy of the Act or they had no information that it had come into force.

6.3 Dismissals on Commencement Date of New Law – Technicalities

Not only were copies of the new Act not distributed, but more importantly persons charged with implementing the SOA such as police officers and magistrates did not receive any form of training on the Act prior to its coming into force.

The magistrates, who are the persons, charged with trying SGBV cases in the first instance, would therefore invoke certain provisions of the SOA improperly or fail to invoke them at all, where relevant. For instance a magistrate could sentence the accused under the provisions of the SOA in cases where the charge had been laid under the Penal Code. This practice contravenes criminal law principles of non retroactivity of the law. In most cases where an appeal was preferred, the superior court would discharge the accused.

This was also the case in *Raphael Ogongo Akumu vs R*⁷⁰, where the accused was charged on 30th November 2005 with defilement and abduction under the Penal Code⁷¹.

67 KWJA Training Manual 2008. Forward by Lady Justice Roselyne Nambuye

68 Joyce Mulama. ‘International Women’s Day Kenya: Kenyan Courts Far From a Safe Haven’. IPS News. March 7 2007

69 (April 11, 2008) CRIMINAL CASE NO 3899 OF 2006 [2008]KWJA (190)

70 [2008]eKLR

71 Contrary to Section 145 and 143 of the Penal Code respectively

The Resident Magistrate's court hearing the matter found him guilty on both counts and sentenced him on 4th May 2007 to 20 years' imprisonment on count 1 and 3 years on count 2. The magistrate invoked Section 8(1) of the SOA, which legislates against defilement in sentencing the accused on count 1. The appellant appealed against conviction and sentence on *inter alia* the ground that the magistrate had erred in law by convicting him under the SOA without first amending the charge sheet as required by law. The appellate court agreed with this contention. It cited Part 3 of the first schedule to the SOA which provides that "*all cases commenced under any written law repealed by the Act shall continue to their logical conclusion under those written laws*" and found that the trial magistrate being "hell bent" on applying the SOA had erred in law. However, because she had not invoked the penal section of the law in sentencing the accused, the appellate court found that the error was not fatal and declined to discharge the accused instead opting to send the case back for retrial before a different magistrate.

Similarly in *Kamaro Wanyigi vs R*⁷², the accused, a 67 year old man was charged under the Penal Code for the offence of rape committed against the survivor on diverse dates in August 2005. He entered a plea of not guilty on 2nd February 2006. The court after hearing the case, found the accused guilty as charged on 27th September 2006 and sentenced him under Section 8(4) of the SOA to 20 years imprisonment. On appeal against the sentence, the High Court held that the invocation of the SOA by the trial magistrate was unlawful since the accused person had been charged under the Penal Code. He therefore ought to have been sentenced under the same Act. The High Court discharged the accused person on this ground.

In *Dalmar Musa Ali vs R*⁷³, the accused person was charged with the offence of abduction contrary to section 142 of the Penal Code. The offence was alleged to have been committed between 16th June and 2nd July 2006. The SOA came into force on 21st July 2006. At the time of rendering judgment, the trial magistrate invoked the SOA which was newly enacted. In his judgment, he modified the charge and proceeded to sentence the accused person under Section 8(3) of the SOA.

On appeal, the High Court quashed the conviction and sentence because the accused person had been denied his constitutional right to answer to the charge of defilement which had been included arbitrarily by the magistrate at the time of judgment.

6.4 Special Role of Training and Implementation Framework for New Laws

The crisis manifested during this transition period, and resulted in a variety of actors calling for remedial actions. The establishment of a Task force for the Implementation of Sexual Offences Act was set up alongside the production of a draft Reference Manual on the SOA designed specifically for prosecutors. In the words of the Attorney General, "*We realized that for the Sexual Offences Act to be embraced in our courts of law, it was key for the law enforcers who are obliged to draft charges for the reported offences in police stations to be well equipped with the contents of the Sexual Offences Act vis a vis the Penal code*"⁷⁴.

The manual, launched in December 2007, is now used as a point of reference by prosecutors in sexual offences cases. It has been incorporated into the training syllabi of the police force countrywide. It is hoped that the training of prosecutors and police officers on the SOA will reduce and eventually curb the latent problems such as those above that curtail effective prosecution on SGBV cases.

The task force appointed by the AG in March 2006 was mandated to draft regulations to guide judicial officers in the implementation of the SOA. The task force initially headed by former Court of Appeal Judge Lady Justice Joyce Aluoch (now Judge in the International Criminal Court) is currently chaired by Retired Justice Effie Owuor. This task force has recently finalized the regulations as mandated.

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6.5 Collaboration with Existing Infrastructure within the Judicial System

To complement the training efforts, the Kenya Women Judges Association (KWJA)⁷⁶ has also recently finalized a training manual for judicial officers on the SOA. The manual which is yet to be launched was developed through a series of workshops in which various judicial officers participated. This manual was developed after KWJA's Chair Hon. Lady Justice Mary Ang'awa realized that the Act in its raw form provided real challenges to judicial officers and took steps to mobilize the members of the association to form a task force to develop training materials for members of the judiciary.

72 [2008]eKLR

73 [2008]eKLR

74 Martin Mutua. 20 December 2007. 'Sexual Offences Guide Launched'. EA Standard. See also Anne Kithaka. 5th August 2008. *Enforcement of the Sexual Offences Act in Kenya*. Pambazuka News Issue 392. online at <http://pambazuka.org/en/category/comment/49923>. Last accessed 3rd May 2009.

75 Zulekha Nathoo and Sam Kiplagat. 11 September 2008. 'Sex Offences Act Rules Now Ready'. Daily Nation. See also Kenya: No land for sex offenders

76 The Kenya Women Judges Association (KWJA) was established in July 1993 as an affiliate of International Association of Women Judges. Its members comprise of women judges and magistrates drawn from within the Republic of Kenya.

The Association has also printed a handbook on sexual offences and a compendium on judgments based on the Sexual Offences Act and aims to ensure that copies of the same are distributed to judicial officers all over the country once the manual is launched by the Chief Justice.

6.6 A Supportive and Enabling Environment is Mandatory for Successful Utilization of Laws

The legislation of an offence does not automatically ensure that it has been successfully dealt with. There must be a supportive and enabling environment for the utilization of the law for the benefit of survivors. For instance, despite the enactment of laws outlawing sexual harassment, it remains an endemic problem amongst Kenyan women and girls in institutions of learning, in employment situations and in everyday life. It “*was often not reported and rarely resulted in charges being filed*”⁷⁷. In the employment sector, the vice is especially prevalent in low paying blue collar jobs such as in the flower, tea and clothes manufacturing industries⁷⁸.

In the country's Export Processing Zone (EPZ) for example, where over 90% of the country's textile manufacturing is done for export, sexual harassment is rampant. A 2007 Kenya human rights and business country risk assessment established that more than 90% of female workers in the sector have experienced or observed sexual abuses at their workplace⁷⁹. Senior managers working in the EPZ, admitted that most companies are aware of the rampant sexual harassment, but are powerless to intervene unless the survivors file a complaint, which rarely happens, as most survivors believe that they will be victimized⁸⁰.

Sexual harassment is equally widespread in white collar employment. Although such women are aware of their legal rights, it is only very few who will take action such as reporting the harassment and even fewer still, who will take steps to prosecute the offender. The main reason behind this we suppose, is fear of loss of employment and the embarrassment that they will face in front of their colleagues when the issue is exposed. There is also a firm belief that, the taint of the scandal and the fact that they exposed it, will curtail their upward mobility in their careers, whether within the same organization or in other organizations.

Most women will therefore, withstand the harassment and attempt to put an end to it personally, or they will simply quit their jobs and change employers, in order to escape from the offender.

In the conduct of this study, two cases touching on sexual harassment which are still pending in court were analyzed. These two cases did not however involve prosecution of sexual harassment in the context of Section 23 of the SOA. They arose in civil employment suits, where the women involved were suing against alleged wrongful dismissal by their employers and they cited sexual harassment as the ground of dismissal due to their refusal of sexual advances from their superiors. In both suits, only damages for wrongful dismissal were sought from the court. No prosecution of the offender was instituted in the manner envisaged under the SOA.

From the above, it is clear that the mere legislation of an offence is not enough. The right holders must be educated on the fact that such laws exist and they must be encouraged to take action against offenders, where an offence is committed. In addition, duty bearers (employers) who have the responsibility to create conducive environments that protect employees from sexual harassment should accelerate their compliance to the supportive employment legislation requirements, for adopting sexual harassment policy and civic education on the same. Similarly, behavioural change in society must be advocated for, so that the society itself, understands that sexual harassment is a crime and it is not acceptable in any context.

77 2008 United States Country Report Kenya

78 See Plus News. 24 November 2008. KENYA: Sex for Jobs in Export Processing Zones. Online at <http://www.plusnews.org/Report.aspx?ReportId=81638>. See also Nyong'o. Z. 'I Can't Plant a Rose in My Own Name' A Dissertation on Flower Growing in Kenya which found that over 90% of women who work on flower farms in Naivasha, Kenya are subjected to sexual harassment by the superiors and that nearly all women accede to these demands because they have no other viable job opportunities.

79 As above

80 Note 19 above

6.7 Non- recognition of Domestic Violence as a Crime Increases Women’s and Girls’ Vulnerability to Sexual and Gender Based Crimes

Domestic violence is not legislated against in its true form under Kenyan law. Cases of domestic violence incidences are prosecuted as normal assault cases or under the charge of “causing grievous bodily harm⁸¹” under the country’s Penal Code. Under these innocuous heads, domestic violence is prosecuted less rigorously than deserved and the sentence meted out is less than satisfactory and inconsistent with the seriousness of the offence.

Despite its lack of legislation, domestic violence is still considered by the courts. However because of societal and traditional conceptions that consider domestic violence acceptable, coupled with lack of definitive legal provisions barring its commission, the judicial response to this vice is far from satisfactory.

From the cases analyzed, we find that many judicial officers condone and excuse domestic violence due to the lack of severity that they deal with such cases and more so the lenient sentences that they hand out to persons they find guilty.

This is illustrated clearly in *Ndungu v Republic*⁸². The appellant here appealed against a conviction and sentence of a charge of causing grievous bodily harm to his girlfriend. The medical report (P3 form) adduced at the trial in the Magistrates court showed that the survivor had suffered a deep cut wound on the left side of her chest and a cut wound on the left palm both inflicted by a sharp object. A neighbour who had come to her rescue found the accused holding a knife in his hand and standing over her as she writhed in pain on the floor. The trial magistrate found the accused person guilty and sentenced him to 4 years’ imprisonment. On appeal, the High Court upheld the finding of guilty and recognized the accused actions as domestic violence but reduced the sentence handed out to time served and gave a Community Service Order instead on the grounds that the survivor had “exaggerated” the wounds inflicted upon her by the accused.

In rendering her disappointing verdict, the judge expressed herself thus, “Domestic violence has a common occurrence in our homes and the same cannot be condoned. However, I find there are circumstances that warrant a review of the sentence in that the seriousness of injuries was not closely scrutinized by trial magistrate and also that complainant exaggerated her evidence. I therefore confirm conviction but set aside sentence of imprisonment term of four years of which he has already served about six months. I think this is a case in which the Appellant can benefit under the Community Service Order Act.

The courts reaction is just as bad where the accused person has, by his violent actions, caused the death of his spouse. Under the Penal Code, a charge of murder carries a mandatory sentence of death. Manslaughter on the other hand carries a maximum sentence of life imprisonment. No minimum sentence is set and the court has full discretion in such cases. The jurisprudence emerging from the court, especially the Court of Appeal shows that domestic violence is not worthy of such harsh sentences.

This was made evident in *R vs Mudala Okuku Odindo*⁸³, where the accused was charged with the offence of manslaughter⁸⁴ for causing the death of his wife of 20 years.

The facts under the charge were that the accused and his wife got into a row on the material night in question which caused him to beat her until a neighbour intervened and rescued her. Two days later the wife died in hospital from injuries inflicted during the beating. The court found that the prosecution had proved the case beyond reasonable doubt and convicted the accused. However in mitigation the accused pleaded for mercy stating that he had been in remand for 3 years since he was charged and that he had minor children depending on him now that his wife was dead. The court (Hon Mr. Justice Mwera) after hearing his pleas and considering him as a first offender sentenced him to only 18 months imprisonment.

The High Court appears to be following the precedent set by the Court of Appeal in domestic violence related cases. For instance in *Maina v Republic*⁸⁵, the appellant was charged before the superior court with the offence of murdering his wife. The facts supporting this charge were that on the 14 day of October 2002, he caused the death of his wife by severely beating her for several hours because she allegedly returned home in a drunken state. Several neighbours witnessed the beating. The wife passed away as a result of the injuries sustained. The appellant in a bid to conceal her death secretly buried her body in the family plot.

In his defence, the appellant alleged that he was drunk at the time of the incident and that his wife had provoked him because she came home drunk and when he asked her how she could care for the children in that state, she responded in a manner not acceptable to him by telling him it was not the duty of women to educate children. He alleged that he had only slapped her twice causing her to run away. He next heard of her when he was informed by the police that her body was discovered buried in his plot.

81 Section 234 of the Penal Code

82 [2002] LLR 3470 (HCK)

83 [2005] eKLR

84 Under Section 202 of the Penal Code

85 [2005] LLR 4528 (CAK) Decided 4 August 2006

The trial court found the appellant guilty as charged and sentenced him to death as required by law. The learned judge held that the accused had the necessary *mens rea* (guilty mind) to cause the death of his wife and that neither his defenses of drunkenness nor provocation held any water because there was no evidence that he was so drunk as to be incapable of knowing what he was doing or as to be temporarily insane⁸⁶ or that his wife's alleged drunken state and retort that had caused him to beat her was sufficient provocation. In the trial court's view, the fact that the accused buried the body of his wife in an attempt to conceal her death clearly showed that he knew exactly what he was doing.

On appeal however, the Court of Appeal reduced the charge from murder to manslaughter and sentenced the accused to serve imprisonment for a period of 10 years. The three judge male bench in its judgement excused the appellant's actions and found fault with the trial judge's reasoning. On the defence of intoxication it stated in part as follows: ***"In this case, the learned Judge was clearly alive to the defence of intoxication, and dealt with it. However, it is the way she dealt with it that was, in our view, and with every respect, not proper. She treated it as a plea. It was a defence that would have, if properly considered, negated the intent to kill and reduce the charge to that of manslaughter.... On our own view of the matter, we feel that the benefit of doubt as to whether the appellant was so drunk as to negate the intent to kill goes to the appellant and together with the mild provocation by the response by the deceased, and that both were drunk, the offence of murder was not established as required by law. That of manslaughter was established."***

On the issue of burying his wife, the appellate court held that ***"The evidence on record did not show anywhere that it was the appellant who buried the deceased and in any case, it does not show the deceased was buried and how many days after death even if one were to accept that the appellant buried the deceased. This time element is important as intoxication or drunkenness is a temporary episode and thus the appellant, if he buried the deceased at all, could have done so after drunkenness had subsided."***

And on the defence of provocation it stated ***"Lastly, we also note that the learned Judge did consider that the response of the deceased to the appellant's question on who would care for the children was a minor matter that could have not amounted to provocation. The learned Judge did not consider such a remark with the background of the rural folk still intent on maintaining men's supremacy over their wives. Perhaps, if she had done so, she may have come to a different conclusion particularly if she had noted that both were apparently under the influence of alcohol."***

The totality of all the above is that we allow this appeal against the offence of murder and set aside the conviction and the sentence of death."

The Court of Appeal had taken a similar stance earlier in *Oyugi vs R*⁸⁷ where the accused person was charged with murder after he slashed his daughter with a panga (machete) instantly killing her. He had accidentally mistaken his daughter for his wife with whom he was engaged in a fight. The High Court had on the evidence put before it, found the accused guilty, convicted him of murder and sentenced him to death.

On appeal however, the Court of Appeal reduced the charge from murder to manslaughter on grounds that the trial court did not consider and make definitive findings on the twin defences of provocation and drunkenness raised by the accused person. It reduced the sentence meted out from death to 18 years imprisonment.

The lack of legal provisions on domestic violence clearly curtails its effective prosecution in the courts. Judicial discretion is left to govern the matter and this leads to very low sentences for convicted offenders. Similarly, the patriarchal tendencies, perpetrated by the judges, majority of whom are males, result in a total failure of justice for domestic violence survivors in the Kenyan courts.

There is urgent need to enact the Domestic Violence (Family Protection) Bill that has languished in Parliament for the last few years in order to put a stop to this worrying trend exhibited by the courts.

A legal framework accompanied with intensive awareness raising of the gendered justice systems and how it hinders realization of rights should be integrated in the upcoming Judicial Training Institute. In this way, domestic violence will receive the serious punishment it requires ultimately influencing societal trends and behaviours that indicate domestic violence is intolerable.

⁸⁶ Section 11 of the country's Penal Code only allows the defence of drunkenness to a criminal charge if the state of drunkenness was not caused by the accused himself and if it has the effect of making the accused to be incapable of knowing what he was doing or to be temporarily insane at the time of committing the crime.

⁸⁷ [2002] 2 KLR 481

VII

RECOMMENDATIONS

Strengthening the institutions and mechanisms of justice

7.1 The Legal Framework

This audit sought to establish the current status of response and management around SGBV. In examining the legal normative framework, it emerges that, to a large extent, the Sexual Offences Act has remedied some of the gaps with respect to articulating sexual violence crimes. We note that marital rape and domestic violence continue to rage unabated and the law has not sufficiently addressed or recognised it as a crime. Further, even where laws are present, the social, cultural environment may hinder women's ability to seek protection or claim their rights. The experiences relating to sexual harassment demonstrate this. Whilst appreciating the legal framework as a basis for advancing claims for protection and ending SGBV, it is important to remain keenly aware that the law is not the panacea for survivors of SGBV. In addition that, in order for the legal framework to respond to all forms of SGBV, it is necessary that a Family Relations bill dealing with domestic violence be enacted. The provisions of rape in the Sexual Offences Act require to be expanded and anticipate necessary ingredients, proof and punishment for marital rape.

Perhaps with the growing numbers of victims of SGBV, there may be need to set up an office of a rapporteur on sexual violence as recommended in the Waki Report. The responsibility of the rapporteur will be to highlight, on a continuous basis, the fact that sexual violence is a serious crime and needs an equally serious response on the part of law enforcement authorities.

In order to enrich the jurisprudence around SGBV, it is recommended that activists lobby for the implementation of the Waki report, particularly with respect to the establishment of the special courts that will handle post election violence incidences including sexual and gender based violence. Such special courts may be in a position to hand out severe punishments to perpetrators of SGBV and significantly reducing the levels of impunity. In addition, public apologies, reparations and other forms of compensations could be ordered.

7.2 The court system and the police

While analysing the court decisions we learn that as creatures of a social system of patriarchy, individuals working in the criminal justice system will inevitably resort to analyse facts before them based on their socialisation. The urgent need to integrate gender and human rights in a holistic and systematic manner throughout the entire criminal justice system cannot be over emphasised. The sectoral reform under the Governance, Justice, Law and Order Sector (GJLOS) should integrate gender responsiveness more affirmatively, demonstrating tangible key targets and indicators. Existing actors within the criminal justice systems that are already awakened to the need for gender responsiveness and women's rights should provide effective avenues for this integration. Within the judiciary, the Kenya Women Judges Association is a potentially significant actor in reforming the judiciary from within. Their flagship programme on Equality of Jurisprudence could be up scaled and supported so that it becomes integrated as a core curriculum within the upcoming Judiciary Training Institute. In the short run, support to highlight and document subordinate court decisions on SGBV would provide a good basis for training the magistrates and judges – as these decisions would be assessed for their compliance to gender sensitivity and respect for women's rights.

Within the police force, the gender desks present an opportunity for improved service provision for SGBV survivors. Whilst resource constraints plague the police force, interventions such as the gender desk should either be properly resourced or removed all together, as they undermine the very objective they were set up to resolve. A systematic process of ensuring that the problem of SGBV receives high priority could be reflected through the establishment of a special squad on SGBV as well as seniority of officers assigned to manage the desks. Officers who are to manage a gender desk should be of a specified rank and with specialised training on handling gender based crimes. The section should be well resourced as other special squads such as flying squads, narcotics etc. This audit established that some gender training is conducted at the Kiganjo Training College by the Federation of Women Lawyers. However, this training needs to be integrated within the entire police training curricula with relevant practical assignments undertaken, in order for recruits to qualify for their pass outs. In addition, overall reform within the entire security sector that assures gender responsiveness will be necessary. Such interventions should be targeted to the Military, Administration police, Criminal Investigation department, General Service units. The post electoral violence demonstrated that most security actors were unable to recognise the sexual violence risks that women and girls were exposed to, and hence, they were unable to provide sufficient preventive measures.

7.3 Service providers co-ordination – models, awareness, advocacy, linkages

Within the medical sector, this audit reveals that Kenya has a model gender recovery centre for survivors of SGBV at the Nairobi Women's Hospital. This is an opportunity for other health institutions to establish similar centres for survivors. The Kenyan government is determined to replicate the model of Nairobi Women's Hospital Gender Recovery unit through out the country. The first pilot at Kenyatta National Hospital is struggling to create a specialised service to survivors of SGBV. The intent of replication is not supported by sufficient political will, that requires adequate resource allocation. In terms of space, laboratories, counselling and recovery sites, Kenyatta National Hospital has not been able to create enough space or personnel. It is recommended that, through a matching grant with bilateral agencies and others, the Kenyan government dedicate one floor, in the Kenyatta National hospital to receive and manage survivors of SGBV, at minimal cost of less than one dollar. Such a floor will be modelled, alongside the Nairobi Women's Hospital, with specialised services and personnel competent to manage survivors of SGBV. This recommendation is similar with that of the Waki Commission which directed the government to establish gender violence recovery centres as departments in every public hospital with their own staff, facilities, and budget.

This audit and other literature suggests that there is low level of awareness amongst survivors on where or how to get assistance or help. It is noted that there are several organisations which are conducting community mobilisation and awareness on gender and rights throughout the country. The awareness campaigns should be intensified and widely disseminated, allowing communities to know where and how to contact organisations that can offer assistance. Whilst it is acknowledged that cultural change in behaviours and attitudes takes time, there is need to structure the mobilisation and awareness interventions so as to obtain the desired results. Overall mapping of what women's organisations are doing country wide has already been undertaken by a variety of actors. The second stage of identifying the actual content in the training curricula is necessary to guarantee that nationwide mobilisation around intolerance to rights violations including SGBV form substantive part of the training. It is only through systemised nationwide training that survivors will gather courage to report and/or seek advice. A national level co-ordination mechanism working to end SGBV could be formed; at the policy advocacy level, it could constitute non-governmental organisations with policy and advocacy focus on SGBV at one level whilst at the local level it could be constituted as a coalition amongst community based organisations.

It also emerges that as a preventive strategy, intensified advocacy interventions on ending SGBV will be required. The profile of SGBV should attain great visibility that will trigger policy directives and interventions with a view of ending the continued rise in the number of SGBV cases. This would be through developing a variety of infomercials that communicate to policy makers, police, medical personnel and the faith based leaders on the magnitude, the face, the pain, the anguish of survivors of SGBV. Such information should be accompanied with a call for action for each of them.

From this audit, it is recommended that all actors in the chain of evidence develop stronger linkages and co-ordination mechanisms so as to effectively protect survivors of SGBV. For instance, the weak links between the health personnel and the police with respect to the P3 form which is the backbone of evidence in court needs to be addressed. The constraints of having only three police doctors clearly undermines this process. However, it is recommended that the police recruit additional police doctors who can complete the P3 form within a reasonable period of time and with sensitivity to the SGBV survivor. In the event, this is considered a long term solution; in the short term, government should empower the Nairobi Women Hospital doctors with powers to complete the P3 forms. Such delegation of powers should also be accompanied with strict procedures open to scrutiny and regular monitoring so as not to undermine the credibility of reports by non-police doctors.

Inter agency collaboration amongst actors in the SGBV sector are also recommended so as to ensure harmonised intervention. Through such sharing and co-ordinated approaches it would significantly contribute to ensure reduced SGBV as well as enhanced redress, support and care to survivors of SGBV.

It is recommended that as part of accountabilities of the agencies working on SGBV, there may be need to design annual reviews and plans to share the results of interventions on SGBV. It is through such fora, that some strategies may be reviewed or abandoned; it is also through such interaction that creative and fast tracked interventions may be designed towards ending SGBV and towards empowering survivors of SGBV.

In terms of empowering survivors, agencies working on SGBV should design innovative ways for survivors to tell their stories. Creation of space for survivors' voice will significantly inform agencies on the appropriate strategies that are required to support survivors of SGBV. Through collective voice, fora of survivors of SGBV may be able to organise themselves without fear and begin movement building or campaigns to end SGBV.

ANNEX I: International Human Rights Instruments

Countries' Commitments

Instrument	Burundi	DRC	Kenya	UG	TZ
African charter on Human and People's Rights 1981	✓	✓	✓	✓	✓
African Union Solemn Declaration on Gender Equality in Africa 2004	✓	✓	✓	✓	✓
Beijing Declaration and Platform of Action 1995	✓	✓	✓	✓	✓
Convention against Torture and other cruel, inhuman or degrading treatment or punishment 1984	✓	✓	✓	✓	✓
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1948	✓	✓	✓	✓	✓
Convention on the Elimination of all Forms of Discrimination Against Women CEDAW 1979	✓	✓	✓	✓	✓
Convention on the Prevention and Punishment of the Crime of Genocide 1948	✓	✓	✓	✓	✓
Convention on the Rights of the Child 1989	✓	✓	✓	✓	✓
Convention relating to the status of refugees 1951	✓	✓	✓	✓	✓
Declaration of the Rights of the Child 1959	✓	✓	✓	✓	✓
Declaration on the elimination of Discrimination against women 1967	✓	✓	✓	✓	✓
International Covenant on Civil and Political Rights ICCPR 1966	✓	✓	✓	✓	✓
International Covenant on Economic, Social and Cultural Rights 1966	✓	✓	✓	✓	✓
Protocol Relating to the status of refugees 1967	✓	✓	✓	✓	✓
Protocol to Prevent, Suppress and Punish trafficking of persons, especially women and children supplementing the United Nations Convention against Trans national Organised crime 2000	✓	✓	✓	✓	✓
Rome Statute on the International Criminal Court 1998	✓	✓	✓	✓	✓
The Protocol to the African Charter on Human and Peoples Rights on the Rights of women 202	✓	✓	✓	✓	✓

Others

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

ANNEXE 2: Study Tools

A. Tool to assess normative framework on SGBV – Judiciary Key Informant

Interview

- 1) Is your country a signatory to international and regional human rights instruments that promote the respect and protection of women’s human rights? For example

Instrument	Yes	No
African charter on Human and People’s Rights 1981		
Universal Declaration of Human Rights 1948		
Convention on the Prevention and Punishment of the Crime of Genocide 1948		
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1948		
Convention relating to the status of refugees 1951		
Declaration of the Rights of the Child 1959		
International Covenant on Economic, Social and Cultural Rights 1966		
International Covenant on Civil and Political Rights ICCPR 1966		
Protocol Relating to the status of refugees 1967		
Declaration on the elimination of Discrimination against women 1967		
Convention on the Elimination of al Forms of Discrimination Against Women CEDAW 1979		
African charter on Human and People’s Rights 1981		
Convention against Torture and other cruel, inhuman or degrading treatment or punishment 1984		
Beijing Declaration and Platform of Action 1995		
Convention on the Rights of the Child 1989		
Optional Protocol to the convention on the Rights of the child on the involvement of children in armed conflicts 2000		
Optional protocol to the convention on the rights of the children on the sale of children, child prostitution and child pornography 2000		
Rome Statute on the International Criminal Court 1998		
Protocol to Prevent, Suppress and Punish trafficking of persons, especially women and children supplementing the United Nations Convention against Trans national Organised crime 2000		
The Protocol to the African Charter on Human and Peoples Rights on the Rights of women 202		
African Union Solemn Declaration on Gender Equality in Africa 2004		

Others

- I. Does your country constitution contain a section on Fundamental rights and freedoms and does it include following categories of rights?

Security rights to protect citizens from violent crime

Liberty rights to protect freedoms like belief and religion, assembly and movement

Due process rights to protect citizens from abuses stemming from the legal system

Equality rights to guarantee equal citizenship and non-discrimination

2. Is the crime of rape included in your Country's Penal code? How broadly is rape defined⁸⁸ ?
 For example:
 Ø Is the definition gender-neutral?
 Ø Does the definition include penetration by any body part or object?
 Ø Does the definition include forced oral and anal penetration?
 Ø Does the definition focus on the acts of the perpetrator?
 Ø Is there need to prove overwhelming physical force
 State the provisions
- What is the sentence for a convicted rapist? What factors determine and guide sentencing? Are victims compensated by perpetrators?
3. Does your Penal Code capture other sexual gender based violence crimes such as, sexual harassment, sexual slavery, incest, and trafficking, forced pregnancy?
 If yes, list them and state the relevant legal provisions
- What is the sentence for the above offences? What factors determine and guide sentencing? Are victims compensated by perpetrators?
4. Penal Code and Laws of Evidence
- Are there rules that restrict the admission of **evidence of consent** in trials of crimes of sexual violence? Under what circumstances does the court determine whether a complainant consented? *Specifically probe:* Is it impermissible to imply consent due to **silence** or a **lack of resistance** by the victim?
 - Can consent **not** be inferred from words or conduct of the victim where there was force, threat of force or a coercive environment?
 - Is the admission of such evidence considered *in camera* (closed proceedings)?
 - Is evidence of prior or subsequent sexual conduct of the victim inadmissible in trials for crimes of sexual violence?
 - Is **corroboration** of the victim's testimony required in crimes of sexual violence?
5. Rules and procedures for handling sexual Gender based violence
 Are there specific rules or guidelines for survivors/victims of gender based violence utilised in your court? Do they include for example victim's participation in court proceedings with a lawyer? Is legal representation for such a victim provided by the state through a national legal aid scheme or otherwise? Are cases conducted in camera or in open court? Are there benefits of either option?
6. How many SGBV cases have you conducted in the past 1 (one) year? *Specifically probe on outcome;* How many convictions and how many acquittals were they successfully prosecuted? Did complainant withdraw? Was perpetrator convicted and what was the sentence?
7. Are there effective measures to ensure that there is **gender balance and expertise** amongst staff of the judiciary?
Specifically probe for policies, resource allocation and technical expertise, for example;
- a) Is there any affirmative action requirement for appointing authorities to achieve a fair balance between men and women amongst prosecutors, judges and other staff of the criminal justice system?
 - b) Do national laws and court rules require that court staff have expertise on issues surrounding gender-based violence?
 - c) Do national laws and court rules require the adoption and implementation of effective training for staff of the criminal justice system? Is gender mainstreaming considered a priority in such training?
 - d) Does the judiciary have resources for gender specific initiatives? Is there a conducive environment for these initiatives and/or support for fundraising for them
8. Why are some cases not successfully prosecuted?
9. What are the reasons for acquittals in SGBV cases?

⁸⁸ Is the definition consistent with the International Criminal Court (ICC) Statute

10. What would you recommend as effective judicial interventions for handling SGBV cases? *Probe a variety of levels; at investigations stage, prosecutorial stage, witnesses as they testify, laws etc*

B. Tool to assess service provision for SGBV – Police Key Informant Interview

1. What is your own understanding of Sexual Gender Based Violence?
 2. Is there specific training for the police on handling sexual and gender based crimes? *Specifically Probe at what stage training is offered and whether it is institutionalized; at police training school? is it continuing education and who provides the training? If you do not have the training what are difficulties you encounter while investigating SGBV cases?*
 3. Does your police station keep records on the types of crimes reported? If so how many can be categorized as SGBV crimes in the past one (1) year? *Specifically probe statistics; whether they are disaggregated by sex? How many complaints are by women vis a vis men? How many are withdrawn (for women and for men).*
 4. (a) What are the most common forms of SGBV present in your setting (e.g. rape, domestic violence, early/forced marriage, FGM, trafficking in women and children etc)?
(b) What mechanisms are in place for identifying and recording SGBV case?

(c) Does your situation have a desk for reviewing SGBV survivors? *Probe if it exists? How are survivors received? What efforts are in place to ensure privacy for the survivors etc?*
(d) Has the problem of sexual violence gotten worse or stayed the same in the last year?
(e) What particular types of sexual violence have gotten worse?
 5. Who are the main perpetrators of SGBV? *Probe to find the profile, in terms of education, socio-economic status, marital status, age?*
 6. What is the hierarchy of reporting when in receipt of a SGBV complaint? Is there a law under which the victims of SGBV report the complaints?
 7. Do you provide the survivors with any information on legal mechanisms on what to expect from the legal process? Are the survivors adequately informed of their rights, procedures and time involved in the legal process?
 8. (a) Do victims of SGBV have access to medical support and legal action?

(b) Do you refer the victims of SGBV to institution for judicial support and counselling?
 9. What has the Government done to improve the safety of women and girls in this community? Do women and men look for help when they experience sexual violence? Do they tell anyone (family member, police, community leader)? What is the attitude of the community towards women who have been raped?
 10. Do women's support networks exist to help the survivors? What social and legal services exist to help address problems associated with sexual violence (health, police, legal counselling, and social counselling)? Who provides these services? How could the efforts be improved?
- 11.** What are the challenges the police face in investigating and prosecuting cases of SGBV?

C. Tool to assess service provision for SGBV – Healthcare Provider Key Informant Interview

1. How many health care providers do you have at the Hospital or Health Care Centre?
2. How many are trained in clinical management of SGBV? How many are trained to undertake forensic examination for SGBV survivors?
Do you require a police report prior to treating SGBV survivors?
3. Do you have a rape kit? What items does the rape kit contain?
4. What are the clinical procedures that are followed on attending to survivors of SGBV?
5. Is there a laboratory for test analysis?
6. Are medical personnel willing to testify in court?
7. What are the most common forms of SGBV that you receive? *Probe* on location and types of SGBV and profile of victims in terms of age, gender, marital status etc.?
8. What is the trend of SGBV cases for the past 12 months?
9. Do women's support networks exist to keep the survivors? If they exist, what form of support do they provide? *Probe* health, counseling, social and legal? Is it sufficient? If not, is there need for their improvement?

Referral Hospital Situation

Name of the hospital	
Number of patients coming from health centre during the last six months	
Motive of referral	
Cost of medical visit	
Follow up visit cost	
Cost of drugs for the patients	
Existing Partnership	
Physical condition of the hospital	
Accessibility	
Laboratory	
Name the different in-service trainings	

Checklist of supplies of clinical management of rape survivors (Referral Hospital)

1. Protocol Available

Written medical protocol translated in language of provider;

2. Personnel Available

Trained (local) health care professionals (on call 24 hour/day)

For female survivors, a female health provider speaking the same language is optimal. If this is not possible a female health worker (or companion) should be in the room during the examination.

3. Furniture/Setting Available

Room (private, quiet, accessible to a toilet or latrine)

Examination table

Lighting, preferably fixed (a torch may be threatening for children)

4. Administrative Supplies Available

Medical chart with pictograms

Forms for recording post-rape care

Consent forms

Information pamphlets for post-rape care (for survivors)

Safe, locked filing space to keep confidential records

Tool D: Focus Group Discussion with Women's Organisations, SGBV Survivors and Traditional Birth Attendants

1. In your own words define SGBV?
2. Are there national statistics on the magnitude, forms and consequences of SGBV? (Probe for reports).
3. What are the major forms of SGBV and how do they manifest themselves? Is there a difference in manifestation during times of peace and in times of conflict?
 - a) If yes, elaborate
 - b) Probe to see if the problem of SGBV has it gotten worse or stayed the same reduced. What form of SGBV has gotten worse, stayed the same or reduced?
 - c) Who are the main perpetrators?
4. Does the constitution and national law conform to international and regional human rights with gender equality and SGBV provisions?
 - a) If yes, is this compliance in conformity with the practice?
5. What challenges do women and men face in accessing courts in instances of SGBV?
 - a) What challenges do women and men face in reporting SGBV?
6. In your own experience is there any distinction in how the court systems deal with women and men? Is this treatment similar in instances of SGBV?
7. In your own experience is there any distinction in how the police deal with women and men reporting crimes? Is this treatment similar in instances of SGBV (Probe whether police make recommendations for complainants to negotiate or settle and whether the intensity is same for both women and men)
 - a) To what extent are sexual minorities treated similarly
 - b) Is the treatment of lesbian women and gay men different?
 - c) Are sexual identities a hindrance to availability of health services?

8. In your own experience is there any distinction on how the health systems deal with women and men seeking treatment or other health services? Is this treatment similar in instances of SGBV (Probe to establish requirements for spousal or male consent, confidentiality)
9. Do you consider that the cases of SGBV are adequately processed and punished? Probe processed to establish investigation and prosecution and witnesses. Probe punished to establish mechanisms to protect and support witnesses' e.g. counselling, legal aid, shelter, hotline PEP?
10. Are there any government led interventions to reform governance justice and legal sector?
 - a) To what extent are CSO's involved?
11. Are there community mechanisms to prevent SGBV and punish perpetrators of SGBV? Probe community capacity to respond to SGBV and manage SGBV
12. If you were to make reform recommendations to prevent and manage the incidents of SGBV, what would you propose at the following levels
 - a) Community
 - b) Police
 - c) Health
 - d) Judiciary
 - e) Other

Focus Group Discussion Questions – Specific to Internally Displaced Persons

1. What problems did the community face as a whole?
2. What problems were specific to men?
3. What problems were specific to women?
4. What problems were specific to children?
5. What are sexual and gender violence?
6. What constitutes acts of sexual and gender violence?
7. Where did incidents occur?
8. Who were/are the survivors?
9. Who were/are the perpetrators?
10. How do survivors cope?
11. What support structures exist in the camp for the survivor?
12. Who are the governing bodies officially charged with this issue?
13. What happens to survivors and perpetrators in the judicial system?
14. How has the community responded to this issue?
15. How have Women's Representatives responded?
16. What have been successful responses?
17. How could these responses be improved?

Tool E: Key Informant Interviews, International NGO's, Human Rights Watchdogs

1. In your own words define SGBV?
2. Are there national statistics on the magnitude, forms and consequences of SGBV? (Probe for reports).
3. What are the major forms of SGBV and how do they manifest themselves? Is there a difference in manifestation during times of peace and in times of conflict?
 - a) If yes, elaborate
 - b) Probe to see if the problem of SGBV has it gotten worse or stayed the same reduced. What form of SGBV has gotten worse, stayed the same or reduced?

- c) Who are the main perpetrators?
- 4. Does the constitution and national law conform to international and regional human rights with gender equality and SGBV provisions?
 - a) If yes, is this compliance in conformity with the practice?
- 5. What challenges do women and men face in accessing courts in instances of SGBV?
 - a) What challenges do women and men face in reporting SGBV?
- 6. In your own experience is there any distinction in how the court systems deal with women and men? Is this treatment similar in instances of SGBV?
- 7. In your own experience is there any distinction in how the police deal with women and men reporting crimes? Is this treatment similar in instances of SGBV (Probe whether police make recommendations for complainants to negotiate or settle and whether the intensity is same for both women and men)
 - a) To what extent are sexual minorities treated similarly
 - b) Is the treatment of lesbian women and gay men different?
 - c) Are sexual identities a hindrance to availability of health services?
- 8. In your own experience is there any distinction on how the health systems deal with women and men seeking treatment or other health services? Is this treatment similar in instances of SGBV (Probe to establish requirements for spousal or male consent, confidentiality)
- 9. Do you consider that the cases of SGBV are adequately processed and punished? Probe processed to establish investigation and prosecution and witnesses. Probe punished to establish mechanisms to protect and support witnesses' e.g. counselling, legal aid, shelter, hotline PEP?
- 10. Are there any government led interventions to reform governance justice and legal sector?
 - a) To what extent are CSO's involved?
- 11. Are there community mechanisms to prevent SGBV and punish perpetrators of SGBV? Probe community capacity to respond to SGBV and manage SGBV
- 12. If you were to make reform recommendations to prevent and manage the incidents of SGBV, what would you propose at the following levels
 - a) Community
 - b) Police
 - c) Health
 - d) Judiciary
 - e) Other

ANNEX 3: List of Amendments and New Offences Introduced by the SOA

- GANG RAPE
- SEXUAL ASSAULT
- COMPELLED AND INDUCED INDECENT ACTS
- INDECENT ACT WITH CHILD OR ADULT
- INDECENT ACT WITH ADULT
- PROMOTION OF SEXUAL OFFENCES WITH A CHILD
- SEXUAL HARASSMENT
- SEXUAL OFFENCES RELATING TO POSITION OF AUTHORITY AND PERSONS IN POSITION OF TRUST
- DELIBERATE TRANSMISSION OF HIV OR ANY OTHER LIFE THREATENING SEXUALLY TRANSMITTED DISEASE
- DISTRIBUTION OF A SUBSTANCE BY JURISTIC PERSON
- CULTURAL AND RELIGIOUS OFFENCES
- NON-DISCLOSURE OF CONVICTION OF SEXUAL OFFENCES
- KEEPING CRIME SCENE SECURE
- OFFENCE TO MAKE FALSE ALLEGATIONS



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