

**Sexual and Gender Based Violence, Fair  
Trial Rights and the Rights of Victims**  
Challenges in Using Law and Justice Systems  
Faced by Women Human Rights Defenders

ICJ Reflection Paper  
November 2015

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® **Sexual and Gender Based Violence, Fair Trial Rights and the Rights of Victims**

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Published in November 2015

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This report was made possible with the support of the European Union and the Irish Aid.



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## TABLE OF CONTENTS

	Page
<b>I. Introduction</b> .....	3
Overview .....	3
The phenomenon of sexual and gender based violence .....	4
<b>II. Balancing the rights of victims at trial in the context of fair trial standards</b> .....	6
Fair trial standards .....	6
Rights of defendants .....	7
Rights of victims .....	9
Rights of children and other vulnerable victims .....	11
<i>Recommendations</i> .....	12
<b>III. Implementing international standards on sexual and gender based violence</b> .....	14
Sexual and gender based violence as an international concern .....	14
Regional human rights mechanisms .....	15
National legislation on sexual and gender based violence .....	17
Swaziland .....	18
Zimbabwe .....	19
South Africa .....	20
The International Criminal Court .....	20
Prosecution for crimes against humanity in Africa .....	23
Cross-sector collaboration .....	23
<i>Recommendations</i> .....	24
<b>IV. Addressing the causes of sexual and gender based violence</b> .....	26
Sexual and gender based violence as a genderless problem .....	26
Changing cultural attitudes .....	26
<i>Recommendations</i> .....	28
<b>V. Applying a gender perspective</b> .....	29
A gender sensitive lens .....	29
Mainstreaming a gender perspective into judicial decision making .....	29
<i>Recommendations</i> .....	31
<b>VI. Recommendations</b> .....	32
<b>Annexes</b>	
1. List of colloquium participants .....	35
2. Colloquium programme .....	36

## I. INTRODUCTION

### Overview

From 30-31 July 2015, the International Commission of Jurists (ICJ) held a regional colloquium in Swaziland composed of 38, predominantly female, lawyers, judges and human rights defenders, from eleven different countries in Southern and Eastern Africa. A full list of participants can be found in Annex 1.

The colloquium was organized in partnership with the Law Society of Swaziland, Lawyers for Human Rights Swaziland and the European Union (Swaziland). The colloquium was opened by the Acting Chief Justice of Swaziland M.C.B. Maphalala and closed by ICJ Commissioner, and High Court Judge in Swaziland, Qinisile Mabuza. Welcoming addresses were given by ICJ Secretary-General, Wilder Tayler, and ICJ Africa Programme Director, Arnold Tsunga. ICJ commissioner Professor Michelo Hansungule also attended the conference and gave a presentation to participants. Other presentations are acknowledged at the beginning of relevant sections throughout this report and it should be noted that these may also have informed other sections in the report, albeit to a lesser extent. A list of all presentations given can be found in Annex 2.

The event was convened with financial assistance from IrishAid as part of an ongoing project to support women as agents of change by empowering and connecting women human rights defenders, lawyers and judges across Sub-Saharan Africa. Since the project's inception in 2013, the ICJ has been working with women judges, lawyers and other human rights defenders to identify and address issues of gender inequality within the legal profession and wider issues of gender inequality in African society. The project aims to advance the protection of human rights and promote women's empowerment and equality within the region. Previous colloquia have taken place as part of this project: in 2013 in Tanzania and in 2014 in Zimbabwe. Additional financial support was provided for this event by the EU.

From these previous colloquia, the ICJ identified a number of common challenges that are faced by women in the legal profession, including the lack of transparency surrounding judicial appointment processes; conflicts between constitutional and customary rights; failings in education and training; personal attacks against the reputation of women's rights defenders and their families; and threatened and actual violence against individuals and groups who work on women's rights issues. All of these problems have been identified as being underpinned by a general lack of willingness to recognize, understand and engage with women's rights.

Building on these previous colloquia, the ICJ convened this event to address the implementation of international law and standards on sexual and gender based violence within the context of fair trial standards. This thematic attention focuses on one of the prevalent challenges faced by women human rights defenders when seeking to use law and justice systems, and the ways in which laws and justice institutions may hamper or undermine their work as defenders. Over the course of two days, there were presentations and discussions about the various forms of sexual and gender-based violence; causes, signs and effects; efforts made internationally and in various national jurisdictions; and protection frameworks and mechanisms available internationally, regionally and at the domestic level. At the end of the colloquium, participants came up with a set of recommendations for tackling the problem of sexual and gender based violence. These recommendations are included within parts of the main body of the report and are also summarized together in section VI of this report.

This Reflection Paper is a summary of the discussions which took place, and is not necessarily in accordance with the views of the ICJ itself. Discussions held were subject to the Chatham House Rule so that, where quoted, they remain non-attributable.

## The phenomenon of sexual and gender based violence

Sexual and gender based violence constitutes a breach of fundamental rights to life, liberty, dignity, equality between women and men, non-discrimination and physical and mental integrity.<sup>1</sup> While it should be recognised that sexual and gender based violence may be perpetrated against males and females, the focus of this colloquium, which was convened within the framework of a project concentrating on women, is restricted to violence against women. Violence against women can result in physical injury and mortality; harm to mental health, including an increased risk of suicide; negative consequences for sexual and reproductive health; and risks to an unborn child where a woman subjected to violence is pregnant or becomes pregnant as a result of the violent act(s).<sup>2</sup> The Declaration on the Elimination of Violence against Women defines violence against women as:

“any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.”<sup>3</sup>

Violence against women is a persistent and universal problem that occurs globally across all geographical regions and social strata. Sexual and gender based violence is not solely an issue that affects women and girls; men and boys can also be victims of and vulnerable to this kind of violence. However, such acts are predominantly committed against women and girls. Sexual and gender based violence starts with inequality but is not only limited to the inequalities between men and women. The intersection of various factors such as gender, age, race, disability, religion or belief, political or other opinion, national, ethnic, or social origin, birth, sex, sexual orientation and other status or identities may give rise to multiple forms of discrimination and social inequalities. The targeting of women and girl children is most often the reflection of patriarchal societies that put a lesser value on women and girl children, and in doing so create an environment where these offences flourish. Activists clarified that targeting the elimination of sexual and gender based violence through the courts is not about confronting men, but rather the patriarchal systems that so often favour men.

The recurrence of gender based violence is now so common in many societies that participants noted that, in such societies, it has almost become accepted as an everyday part of life and ceases to shock people. Yet, despite its pervasiveness, gender based violence does not get the attention called for by the extent of the problem for many reasons, including because people are ashamed to talk about this. This failure to address the issue openly and honestly is in itself shameful. It is estimated that at least one in three women throughout the world has been subjected to some sort of physical or sexual violence at least once in her lifetime.<sup>4</sup> Many women will be subject to such violence repeatedly and this kind of violence will most often be perpetrated by someone she knows, including her partner or a member of her own family. In Africa, it has been estimated that 30 per cent of the time, perpetrators of sexual and gender based violence

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<sup>1</sup> See International Covenant on Civil and Political Rights (ICCPR), Preamble and Articles 2, 6, 7 and 9; African Charter on Human and People’s Rights, Articles 2, 4, 5, 6 and 18; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); and the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (the Maputo Protocol), Articles 2, 3 and 4.

<sup>2</sup> World Health Organization, ‘Understanding and addressing violence against women: Intimate Partner Violence’, URL: [http://apps.who.int/iris/bitstream/10665/77432/1/WHO\\_RHR\\_12.36\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/77432/1/WHO_RHR_12.36_eng.pdf).

<sup>3</sup> Declaration on the Elimination of Violence against Women, adopted under General Assembly Resolution 48/104(1993) (DEVAW), Article 1.

<sup>4</sup> United Nations Populations Fund, URL: [www.unfpa.org/gender-based-violence](http://www.unfpa.org/gender-based-violence).

are close family members; 60 per cent are family acquaintances; and only ten per cent are strangers. The personal connection between victims and perpetrators in 90 per cent of incidences impacts on the numbers of cases that are reported. Many cases are not reported or, where they are reported, do not result in a conviction.

The prevalence of sexual and gender based violence will not be curbed unless mind-sets are changed through targeting the cultures, structures, attitudes and inequalities in society. As more women are educated and empowered about their rights, they are turning towards the courts for redress. However, as Legal Aid Director of the Arab Renaissance for Democracy and Development said: "Law is a tool to fight gender-based violence, but it is not enough. We must also push for society to think twice."<sup>5</sup>

Discriminatory societal attitudes, economic inequalities and traditional structures support and perpetuate systematic discrimination and violence against women. In a recent paper, the ICJ explored a number of harmful gender stereotypes and assumptions in the application of law and practice.<sup>6</sup> It is the primary duty and responsibility of the State to enforce the rights of women and protect women against violence and abuse.<sup>7</sup> However, most States in Africa have not adequately taken the requisite measures to prevent and punish acts of gender based violence. Despite the introduction of sexual violence legislation in South Africa, for example, the country continues to be known as 'the rape capital of the world'. When the State fails to hold perpetrators accountable, impunity not only intensifies the subordination and powerlessness of targets of violence, but this also sends a message to society that violence by men against women is both acceptable and inevitable, thus rendering the patterns of violent behaviour normalised.

Participants at the colloquium discussed whether it was more appropriate to use the term 'victim' or 'survivor' when discussing those that have been subject to sexual and gender based violence. Women and girls that have been subjected to sexual and gender based violence are both victims and survivors of the violence they have endured. Some participants commented that they preferred the term 'survivor' as an expression that is more empowering and better reflects the strength exhibited by many that have been subjects of sexual violence. Others felt that the term 'victim' was more appropriate because it is in keeping with other crimes and does not specifically identify an individual with the type of crime they have experienced in a way that 'survivor' may. It was noted that 'victim' was the terminology used in the Maputo Protocol and other international law materials when referring to those who have been subjected to a variety of crimes, including those of a sexual nature. As this Reflection Paper considered the problem of sexual and gender based violence in the context of fair trial standards, the term 'victim' has been used throughout the document in keeping with international law and standards relating to fair trial standards, which consistently refer to individuals subjected to any crime as 'victims' without further differentiating persons based on the type of crime experienced.

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<sup>5</sup> Arab Renaissance for Democracy and Development – Legal Aid, 'Women's Access to Justice in the Context of a Crisis: Addressing Gender-Based Violence', 13 July 2014, URL: <http://ardd-jo.org/node/280>.

<sup>6</sup> International Commission of Jurists, *Sexual Violence Against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Law and Practice* (2015), URL: <http://www.icj.org/icj-addresses-harmful-gender-stereotypes-and-assumptions>.

<sup>7</sup> See CEDAW and the Maputo Protocol.

## II. BALANCING THE RIGHTS OF VICTIMS AT TRIAL IN THE CONTEXT OF FAIR TRIAL STANDARDS

This part of the report was primarily informed by the following presentations:

- Justice Martha Koome, *Ensuring fair trial in gender based violence cases involving girl children*
- Justice Lavender Makoni, *The cautionary rule and corroboration in SGBV cases: Adequate protection of accused's rights to fair trial?*
- Janita Mesu, *Accountability for SGBV Cases: Effectiveness of Specialised courts in the fights against SGBV*
- Justice Leona Theron, *Sentencing in SGBV cases: Mandatory minimum sentences versus judicial independence and accused's right to a fair trial and proportionate sentence*

### Fair trial standards

The right to a fair trial for those accused of criminal offences, including sexual and gender based violence, is a fundamental human right, enshrined in most modern constitutions and recognized under regional and international law. Fair trial standards are elaborated in a number of international and regional treaties, establishing that everyone is equal before the law and has the right to a fair and public hearing before a competent, independent and impartial tribunal established by law.<sup>8</sup> In addition to the binding regional and international instruments, the Human Rights Committee's General Comment No. 32 on the right to a fair trial under Article 14 of the International Covenant on Civil and Political Rights (ICCPR) explains the various elements of a fair trial and their application in law and in practice.<sup>9</sup> The African Commission has also developed its own fair trial principles, which set out a number of general principles and guidelines applicable to all legal proceedings and the rights of victims of crime.<sup>10</sup>

In the context of sexual and gender based offences, two elements forming part of the right to a fair trial were identified during the colloquium as particularly relevant to accused persons: the presumption of innocence and the rights of the accused to examine witnesses and challenge adverse evidence. The presumption of innocence means that everyone has the right to be presumed innocent until they have been convicted according to law in proceedings that meet fair trial standards.<sup>11</sup> The right of the accused to examine witnesses and challenge adverse evidence ensures the defence has the opportunity to challenge the evidence against the accused.<sup>12</sup> This reinforces the right to the presumption of innocence but must also be exercised in accordance with State obligations to protect the rights of victims and witnesses, including specific requirements that may apply in situations of sexual and gender based violence.<sup>13</sup>

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<sup>8</sup> Including: Articles 2(1), 3, 14 and 26 of the ICCPR; Articles 2 and 15 of the CEDAW; Articles 6(1) and 14 of the European Convention on Human Rights (ECHR) and Article 1 of Protocol 12 to the ECHR; Articles 2, 3, 6, 7, 8 and 26 of the African Charter on Human and Peoples' Rights (ACHPR); and Article 8 of the Maputo Protocol.

<sup>9</sup> United Nations Human Rights Committee, General Comment 32, *Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32 (2007).

<sup>10</sup> African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* 2003 (Africa Fair Trial Principles), Sections C and P.

<sup>11</sup> Including: Article 14(2) ICCPR; Article 7(1)(b) ACHPR; and Article 6(2) ECHR.

<sup>12</sup> Article 14(3)(e) ICCPR; Article 6(3)(d) ECHR; Section N(6)(f) Africa Fair Trial Principles.

<sup>13</sup> Including: Articles 56 and 57 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention); Article 36(2) of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse; Articles 10 to 12 of the Council of Europe Convention on Action against Trafficking in Human Beings; and Section P(f) Africa Fair Trial Principles.



Defendants should have access to all the evidence against them and be afforded the opportunity to cross-examine that evidence, including evidence from any witnesses. Maintaining these fair trial rights are important, although it was recognised that the cross-examining of victims of sexual and gender based violence can be very traumatic for victims. Whilst it is important that safeguards for the defendant's rights are in existence, it is equally important that certain safeguards are afforded to the victims of such crimes.

### **Rights of defendants**

Proceedings must not only be fair but also perceived to be fair. Sometimes judges will be careful to make decisions, in accordance with fair trial principles, that will not lay the ground for later appeals. Some of these decisions may appear unjust to the victims and will be neither publicly understood nor widely agreed with but judges are understandably reluctant to make convictions they consider to be unsafe.. However, it was recognized that sometimes judges may be overcautious in this regard and be too quick to acquit a defendant. In as much as a defendant's rights to a fair trial must be safeguarded, it is nevertheless important to ensure that a victim's rights to effective remedies and reparation are not undermined by putting in place safeguards that act as insurmountable obstacles to those seeking justice. Fairness is important and it is up to judges to strike a balance between what is fair to the defendant and what is fair to the victim, within the applicable framework of guaranteed rights and corresponding State obligations. Participants expressed the view that when it came to the prosecution of sexual and gender based violence, the balance was often tipped too far in the favour of the accused, whereby the elements needed to secure a conviction, as an element of justice for the victim, were unduly burdensome for State prosecutors and the victim.

### *Minimum sentences*

Judges explained that in some jurisdictions they are bound by minimum or mandatory sentences for certain crimes, so that conviction of certain offences will require judges to impose particular sentences ranging from a set number of years of imprisonment to life imprisonment. Whilst there is a degree of flexibility in such cases where, for example, a minimum sentence may be waived if there are compelling circumstances, there have been concerns raised that the existence of minimum sentences impinges on both judicial discretion and on the accused's right to a fair trial. In South Africa, however, the Constitutional Court ruled that the existence of compelling circumstances enabled enough judicial discretion to ensure that the separation of powers between the judiciary and the executive remain intact.

However, in spite of a number of relevant crimes accompanied by minimum sentences, including certain cases of rape being subject to minimum sentences of life imprisonment, this has not reduced the prevalence of rape in South Africa, which continues to be known as 'the rape capital of the world'. It was observed that the failure of minimum sentencing to impact on crime rates may be a result of judicial reluctance to convict where a minimum sentence must be applied such that, even in seemingly clear-cut cases, judiciaries may look to either convict on a lesser offence or to find compelling circumstances not to apply the minimum sentence.

Justice Theron had been one of the appeal judges in the case of *Nkomo v The State* in South Africa,<sup>14</sup> reviewing an appellant's sentence of life imprisonment where he had been convicted of rape. The victim had sat in a bar with the appellant, whom she did not know, whilst she waited for her friend. When the victim tried to leave, the appellant forced her into a hotel room and raped her. When left alone, the victim jumped out of the second floor window to try to escape but landed where the appellant was drinking with friends. He forced her to return to the room, raped her multiple times over the

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<sup>14</sup> *Nkomo v The State* [2006] SCA 167 RSA.

course of the night and hid her clothes so she could not run away. The majority of the Supreme Court took the view that when the trial court imposed the compulsory minimum sentence of life imprisonment, it had not taken into account compelling circumstances, including: the appellant's relative youth (he was 29 at the time of the offence), the fact that it was his first offence and that he was employed at the time. The minimum sentence was quashed and he was sentenced to 16 years' imprisonment instead. Only Justice Theron dissented, stating that this was the kind of rape case that legislators had in mind when introducing the minimum sentence.

### *Cautionary rule*

The 'cautionary rule' is an evidentiary rule designed to assist judicial officers in assessing the evidence put before them by advising caution in accepting evidence of certain witnesses. The premise of the rule is that certain witnesses are inherently unreliable and it is intended to protect the rights of an accused to a fair trial. However, participants took the view that the cautionary rule, when applied to cases where women and children are victims, more often hinders than promotes the delivery of justice.

Participants expressed concern that the cautionary rule has been frequently employed in cases of sexual and gender based violence in a way that has taught members of the judiciary that women are untrustworthy evidence providers. In cases of sexual violence in Zimbabwe, the damage to justice delivery that the cautionary rule was having led to the abolition of the rule in the case of *Banana v State*.<sup>15</sup> However, despite abolition of the rule, judges in Zimbabwe continue to use it through surreptitious means. In the case of *Mupfaranyuki v State*,<sup>16</sup> it was stated that caution should still be applied in rape cases where the complainant has either taken a long time to report the case or has been promoted to report the case by someone else. In the case of *Mushore v State*, which involved the rape of a child, it was stated that the court should still exercise caution in regards to the evidence of a child.<sup>17</sup>

Arguments that the abolition of the cautionary rule in sexual cases weakens the rights of the accused were said to be invalid by participants. It is inexcusable that the cautionary rule be applied in such a manner that results in a higher onus being placed upon victims of sexual and gender based violence, predominantly the already marginalized groups of women and children, compared with victims of other crimes. The removal of the cautionary rule does not remove all protections for the accused and other evidentiary rules remain in place. For example, whilst it remains possible to convict on the evidence of a sole witness, this will only be possible where the witness is found to be credible, for example where the witness has told the truth on all other material facts.

It was noted that problems with the cautionary rule and other precedents are something that can be overcome by judges who have a responsibility to address any areas of the law they find problematic. Many politicians are not legally trained and do not understand

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<sup>15</sup> *Banana v State* [2000] 4 LRC 621 (Supreme Court of Zimbabwe). Gubbay JA's judgement found that, in present day society, there was no rational reason to apply the archaic cautionary rule in cases of a sexual nature. This followed changes in neighbouring jurisdictions like South Africa and Namibia. Gubbay JA quoted with approval the Namibian judgment, *S v D & Anor* (1992 (1) SA 513 (NM)), in which the following was said: "in the end only one test applies, namely, was the accused's guilt proved beyond reasonable doubt, and the test must be the same whether the crime is theft or rape" (see at 517A-B). Gubbay JA went on to quote, again with approval, the South African judgment in *S v Jackson* (1998 (1) F SACR 470 (SCA)), in which the following was said: "In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt - no more and no less."

<sup>16</sup> *Mupfaranyuki v State* (2012) HH 80-2012.

<sup>17</sup> *Mushore v State* (2011) HH 181-11.

the technical details of all aspects of legislation, so it is for judges to take the lead in shaping the cautionary rule and precedent in accordance with domestic and international human rights obligations.

### Rights of victims

“What we can do is look outside the box. We are too much locked inside the box. The box in criminal matters is if the state is representing the interests of X and the defence is representing the interests of the accused is there equality?”<sup>18</sup>

It was felt by participants that the balance between rights of the accused and rights of the complainant/victim are imbalanced in favour of the accused, particularly in relation to sexual and gender based violence offences where higher standards of proof seem to be applied when compared with other offences. In contrast, the case of *Musumhiri v State of Zimbabwe* saw Justice Tsanga emphasise the need for a better balancing of the rights of victims and offenders, stating:

“...the conduct of rape victims [generally falls short] of the standard that society has so relentlessly crafted in terms of expected behavior and its ideal victim. She must scream - very loudly. She must show evidence of physical resistance. She must be battered and bruised if she is a genuine victim.”<sup>19</sup>

Participants agreed with Justice Tsanga’s statement and felt that cases of sexual violence are put on a pedestal that puts the onus of exceptionally high standards of proving guilt onto the victims themselves.

Participants acknowledged the difficulties of addressing abrasive cross-examinations of witnesses and the risk of further traumatizing already traumatized victims, but were uncertain as to how this could be avoided without jeopardizing the rights of the accused. Traumatized victims may suffer from post-traumatic stress disorder or other psychological conditions that may impact on their ability to give sufficient evidence. It was suggested that medical and legal professionals could work together to highlight awareness of these kinds of psychological conditions, so that seemingly unreliable evidence of a traumatized victim is not simply dismissed. Judges should feel free to ask the prosecution to call forward medical professionals in the case of witnesses where they feel this would be in the interests of justice.

One advocate said the prosecutor is not necessarily acting in the interests of the victim because they are focussed on obtaining a conviction, stating:

“Representation by a prosecutor has never been adequate because the prosecutor is about getting the accused nailed, but there is more to representation. There are also issues of how the person is feeling emotionally.”<sup>20</sup>

Participants suggested that victims could be provided with dedicated legal assistance for their needs, wherein they could assist witnesses with difficult cross-examinations, prepare witnesses for court and guide them through the entire trial process. This is something that is already provided in Scandinavian jurisdictions.

It was also noted that, even in a number of States where there is strong legislation against sexual and gender based violence, resources are often not in place to support adequate implementation of the laws. In these States, the search for justice becomes almost entirely victim-driven. Participants said that cases of a sexual nature are in many States not ‘in vogue’ and consequently do not always attract the attention they deserve; the prosecution may not prepare cases adequately and this can result in acquittals, or

<sup>18</sup> Colloquium participant.

<sup>19</sup> *Pedzisai Musumhiri v State of Zimbabwe* (2014) HH 404-14.

<sup>20</sup> Colloquium participant.

unsafe convictions that may then be successfully appealed; and police may be slow to react or may wait for the community to act first in capturing the accused and bringing him to the police station before they proceed with investigations.

Zimbabwe was noted as having a strong legal framework to protect women and children from sexual violence. In 1995, the Police Victim Friendly Unit was set up where specially trained officers deal with cases of sexual violence. The Victim Friendly System sets out a multi-sectoral approach to supporting victims of sexual violence and made provisions for a number of victim sensitive measures, including providing a support person during criminal proceedings, provision of witness expenses, awareness raising campaigns, use of anatomically correct dolls and permitting court officials to act in a less formal manner before and during the trial. In 2012, the Protocol on the Multi-Sectoral Management of Sexual Abuse and Violence in Zimbabwe was signed by a number of government ministries to ensure a coordinated and integrated approach to sexual violence.

On paper, the legal and institutional framework in place in Zimbabwe to respond to cases of sexual and gender based violence is impressive, but the reality is that most geographical areas do not have the resources to match. Police do not have resources to transport victims, so victims must use their own resources to arrange transport to the police station and the medical centres. Dedicated victim friendly units are usually only open during weekday office hours, so victims of attacks outside of these times may have to wait some time or even days for assistance. Where there are not dedicated units, police may not have had the training to deal with the matter appropriately and may give the victim contradictory advice about how to act next.

If a victim in Zimbabwe falls pregnant as a result of rape, she is entitled to lawful termination of the pregnancy, provided that correct procedures are followed, but this relies on the victim being aware or being made aware of these procedures. In the case of *Mapingure v the State*,<sup>21</sup> the complainant was not given emergency contraception in time and was then given incorrect advice regarding how to obtain a termination of the pregnancy so that, by the time she had all the required paperwork in place, the time limit for termination had already passed. Mapingure was forced to go through with the pregnancy and to raise a child she did not want. The High Court found that the misfortune befell Mapingure as a result of her own ignorance of the correct procedures to follow, such that this was not attributable to the State. On appeal to the Supreme Court, the State was found liable for failing to provide emergency contraception but not for failing to ensure timely termination.

Participants from Kenya identified similar problems to those found in Zimbabwe and other African States. They highlighted a scandal where money was provided for the building of forensic laboratories that were not built.<sup>22</sup> Forensic testing can provide evidence that may prevent or limit the extent to which victims of sexual offences have to undergo abrasive cross-examination. Where there are clear-cut cases, for example where medical examination proves sexual assault and forensic evidence matches the defendant's DNA, then the need for cross-examination is not as compelling. If medical evidence can be conclusive in this way, then it is shocking that the laboratories needed to obtain such evidence are not more widely accessible.

Another issue raised was the problem of time limitations whereby complaints of sexual violence may be judged unfavourably in situations where the victim has taken longer than a certain amount of time to report the offence. However, there is wider recognition now that a delay in reporting an offence should not be used against the complainant.

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<sup>21</sup> *Mapingure v Minister of Home Affairs and Others* [2014] SC 406/12 ZWSC 22 (Supreme Court of Zimbabwe).

<sup>22</sup> BBC, 'Kenyan officials charged over Anglo Leasing scandal', 4 March 2015, URL: <http://www.bbc.co.uk/news/world-africa-31733052>.

The stigma and prejudice surrounding sexual crimes may make it difficult for many women to report the crime immediately.<sup>23</sup>

When cases do proceed to trial, it was noted that judges may look at the complainant standing in front of them and see them as they appeared before the attack; as composed, healthy, often young women who are getting on with their lives. Judges may therefore think the attack was not as grave as it is suggested by the prosecution or victim. This may therefore impact on verdicts and sentences.

Sometimes lawyers acting for victims of sexual violence are prevented from defending the rights of their clients at all because of hostile attitudes towards certain groups, such as lesbian, gay, bisexual, transgender and intersex (LGBTI) persons. When the Same Sex Marriage Prohibition Bill (now Act) in Nigeria was brought into being, a lawyer brought a case challenging the proposed legislation. The judge asked the lawyer if he was gay or if he could identify any gay clients. The lawyer was not gay and could not identify any individuals without putting them at risk. The lawyer was told that as he was not gay and could not identify anyone who was gay, then there were no gay persons in Nigeria. He concluded that the lawyer could not stand for a group of people who did not exist, such that nobody was suffering from the proposed law and the lawyer therefore lacked *locus standi* to bring the case before the courts.

### **Rights of children and other vulnerable victims**

In any cases involving children, including sexual offences, fair trial standards must be applied in accordance with the best interests of the child.<sup>24</sup> Measures should be put in place to protect young children from potentially traumatic court experiences, whether this be through difficult cross-examinations or being forced to face the perpetrator of offences committed against them. In the Kenyan Sexual Offences Act there are provisions which identify vulnerable victims and set out certain measures which may be available, such as provision of a witness protection box, allowing evidence to be given via an intermediary and prohibiting publication of the complainant's identity.<sup>25</sup> However, it may not be possible to implement these measures without sufficient resources.

It was suggested that there are other measures that should also be considered. Where a child has been assaulted by someone that they live with, it may be necessary to find them alternative accommodation, at least until the case is resolved, in order that the impact on their lives is as limited as possible, for example so that their education is not interrupted. Counselling may be needed during the course of the trial.

Judicial officers are often advised to exercise caution in regards to the evidence of a minor, but participants took the view that the assumption that children are not reliable witnesses is unhelpful. Judges at the colloquium commented that children often make for the most reliable witnesses so were unclear why the cautionary rule should be specifically applicable to the evidence of children. Certainly, taking evidence from a minor may be difficult. If judicial officers are not sufficiently trained in this regard, this can cause problems and impact on the quality of the evidence procured. The Kenyan Judiciary Training Institute provides specialized training for judicial officers in handling evidence of children and vulnerable witnesses, but this training needs to be widespread to ensure justice for all children. Such training may be useful in other jurisdictions as well.

It is helpful where procedural laws provide for others to give evidence on behalf of children. Some children are not capable of talking for themselves, either because they

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<sup>23</sup> See judgement of Justice Mavangira in *Zakeyo v State of Zimbabwe* (2012) HH 142-12.

<sup>24</sup> Article 3(1) Convention on the Rights of the Child; Article 4 African Charter on the Rights and Welfare of the Child; and Articles 1(2) and 6(a) European Convention on the Exercise of Children's Rights.

<sup>25</sup> Sections 31 and 31 Sexual Offences Act Kenya Act No. 3 (2006).

are very young or because they do not have the language to do so. In the 1990s, there was a widespread belief that having sex with a virgin child could cure AIDS. This resulted in the rape of large numbers of very young children and babies. Children may have difficulties giving evidence when they do not have the right words to describe what happened to them. Furthermore, because sex is a taboo topic in many societies, many children do not know the correct words for genitalia and so find it difficult to explain the precise nature of an attack. For example, when a child in Uganda who had been sexually assaulted was asked in court to explain what happened she said that the defendant put his 'tail' inside her. She did not know the word for penis. Even though what she meant was clear, the defence tried to use the girl's inadequate language as a means to dismiss the case.

Some participants suggested that anatomically correct dolls were a good way of mitigating against the fact that children may be too traumatized or lack the right vocabulary to clearly explain what has happened to them. There was some discussion over whether there was a need for better sexual education, including challenging the taboos that prevent people from talking about sex. It was commented that people are more comfortable talking about sex and sexual terminology in a second language but less so in their mother tongue. One participant said words for private parts have become vulgar swear words, so it is neither easy nor desirable to encourage people to freely use these words.

## **Recommendations**

Against the background of these reflections, colloquium participants identified the following recommendations:

### **1. Balancing rights of victims and accused at trial**

- 1.1 Victims should be entitled to a lawyer, free of charge.**
- 1.2 Victims should not automatically be required to give evidence, particularly when there is other evidence available.**
- 1.3 Victims should be protected from the accused; mechanisms should be available to prevent victims from having to face the accused during trial.**
- 1.4 Greater use of medical evidence should be used to protect the victim and the defendant. States should ensure provision of resources to enable easy access to forensic laboratories.**
- 1.5 Counseling should be available to victims during the course of the trial in order to psychologically prepare and support them.**
- 1.6 Medical and legal professionals should work together to highlight the psychological conditions that can affect victims of sexual and gender based violence, such as post traumatic stress disorder, which may impede their ability to give reliable evidence.**
- 1.7 Judges should be proactive to call for relevant experts, including psychologists and other medical professionals, if prosecutors do not produce them.**
- 1.8 Civil society organizations and victim representatives should undertake periodic trial observations to ensure that proceedings are fair towards both victims and the accused.**

**2. Protecting rights of children and other vulnerable victims at trial**

- 2.1** Where victims have an inability to verbalize what has happened to them, provision of anatomically correct dolls or images should be referred to.
- 2.2** Where victims are too traumatized to give evidence in person, evidence should be given through a trusted intermediary such as a social worker.
- 2.3** Training should be provided for those taking evidence from vulnerable witnesses.
- 2.4** Where the accused resides in the same house as the victim, safe alternative accommodation enabling the continuation of a child's life, including access to education, should be provided.

### III. IMPLEMENTING INTERNATIONAL STANDARDS ON SEXUAL AND GENDER BASED VIOLENCE

This part of the report was primarily informed by the following presentations:

- Doo Aphane, *Prevalence of SGBV in Swaziland and local response to combat the scourge: Critical Evaluation of Domestic Violence Bill*
- Shamila Batohi, *Challenging the culture of impunity for sexual and gender based violence: Complementarity between international efforts and domestic justice systems*
- Professor Michelo Hansungule, *Regional and sub-regional framework for the protection of women against sexual and gender based violence*
- Abigail Matsvai, *Understanding the dichotomy of common law rape, domestic violence and statutory rape: Critical analysis of Zimbabwe's legal response to sexual and gender-based violence*
- Janita Mesu, *Accountability for SGBV Cases: Effectiveness of Specialised courts in the fights against SGBV*
- Shamiso Mbizvo, *Charting new frontiers in accountability for rape as an international crime - highlights from the experience of the ICTR and the ICC in prosecuting rape as a constitutive act of genocide; as a weapon of war; and as a crime against humanity*
- Nondumiso Nsibande, *Ensuring adequate remedies for SGBV victims: Need for a multi-sectoral approach*
- Habiba Rezwana Osman, *Regional Perspectives on Sexual and gender-Based Violence*
- Asha Ramlal, *Effectiveness of South Africa's Domestic Violence Act in addressing SGBV*

#### Sexual and gender based violence as an international concern

Implementing international law and standards on sexual and gender based violence at a domestic level is an important global step in systematically addressing the problem of violence against women and girls. Effective implementation requires comprehensive policy making, a strong legal framework and other measures involving multiple stakeholders. However, assumptions are often made that a change in cultural attitudes will result in a change in international law whereas the development of international law often entails a clash of different legal systems that do not always sit well together. It can take years before changes in attitudes and ideas are reflected in international law-making and then filtered down into domestic implementation through national legislation.

General Comment 19 of the Committee on the Elimination of Discrimination against Women explains that gender based violence is a form of discrimination "that may breach specific provisions of the convention, regardless of whether those provisions expressly mention violence."<sup>26</sup> Violence against women as a human rights violation gained recognition following the Second World Conference on Human Rights in Vienna in 1993, when the UN adopted the Declaration Eliminating Violence Against Women (DEVAW), the first document to address sexual and gender based violence. In March 1994, the former United Nations Commission of Human Rights adopted a resolution appointing a Special Rapporteur on violence against women.<sup>27</sup> The Beijing Declaration and Platform for Action in 1995 dedicated a section to the problem of violence against women, stating that this

<sup>26</sup> United Nations Committee on the Elimination of Discrimination against Women, General Recommendation 19, *Violence against women*, UN Doc A/47/38 at 1 (1993), para 6.

<sup>27</sup> UN Human Rights Commission Resolution 1994/45.



is "an obstacle to the achievement of the objectives of equality, development and peace".<sup>28</sup>

The following international and regional norms all commit States to the elimination of violence against women: the Geneva Conventions of 1949 and the 1977 Additional Protocols thereto; the 1951 Refugee Convention and the 1967 Protocol thereto; the Rome Statute of the International Criminal Court; CEDAW and 1999 Optional Protocol thereto; the Convention on the Rights of the Child and the two Additional Protocols of 2000; the Maputo Protocol; the African Charter on the Rights and Welfare of the Child; the SADC Gender and Development Protocol; and other relevant regional and international human rights instruments. Adherence to these instruments, as well as the removal of any restrictions, limitations or reservations, is essential to combat sexual and gender based violence. Unfortunately, the status of ratification or accession to some of these instruments is not encouraging and, even where States have ratified, the extent of implementation may be limited. In addition, some of the mechanisms set up to implement regional and international norms to combat gender based violence, such as the International Criminal Court, the African Court on Human and Peoples' Rights and the CEDAW Committee, are not being fully utilized.

There has been an increase in jurisprudence at the international and regional levels where decisions set important precedents to guide domestic courts in the application of international law in cases of violence against women. Legislative and judicial developments at the national level have also elaborated on State responsibility within national contexts. For example, in the case of *Charmichele v Minister of Safety and Security*,<sup>29</sup> the Constitutional Court of South Africa held that the State has a duty under international law to protect women from gender based discrimination, including violence that has the purpose or effect of impairing the enjoyment by women of their human rights. However, it is disappointing that many instances of gender based violence have not been prosecuted and that conviction rates remain inexplicably low.

### **Regional human rights mechanisms**

An overview of the existing regional and sub-regional systems of human rights protection was given. There are three developed human rights systems: the European system, the Inter-American system and the African system. The African system of rights protection borrowed heavily from the European system.

The main instrument of rights protection at the African level is the African Charter for Human and Peoples' Rights. The African Charter was adopted in 1981 and came into force in 1986. It has been ratified by 53 of the 54 African States. It provides for the establishment of the African Commission on Human and Peoples' Rights as the treaty monitoring body with the mandate to promote and protect human rights in Africa. The Constitutive Act of the African Union, which came into force in 2002, is the main instrument for cooperation among, and political organisation of, African States. The Constitutive Act itself contains several references to human rights, including gender equality.

The Protocol establishing the African Court on Human and Peoples' Rights has only been ratified by 29 of the 54 African States.<sup>30</sup> Article 34(6) of the Protocol states that in order for States to be subject to the Court's jurisdiction, they must not only ratify the Protocol but must then make a Declaration accepting the Court's competence. Due to the lack of

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<sup>28</sup> Beijing Declaration and Platform for Action, adopted at the Fourth World Conference on Women, 15 September 1995 (Beijing Declaration and Platform for Action), para 112.

<sup>29</sup> *Carmichele v Minister of Safety and Security* 2001 (10) BCLR 995 (Constitutional Court of South Africa).

<sup>30</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court of Human and Peoples' Rights (Protocol on the Establishment of the African Court).

combination of ratifications and declarations, this means that, in practice, the majority of African States cannot have cases brought before them at the African Court on Human and Peoples Rights.

The Maputo Protocol is dedicated to the protection of women's rights in Africa. Thirty-six States have ratified the Protocol, 15 have signed and three have neither signed nor ratified. There is a need to push for those States who have yet to ratify the Protocol to do so, although it is known that a number of States refuse to ratify because they do not believe a woman is equal to a man. The Minister of Justice in Sudan allegedly told one participant elsewhere that Sudan would not ratify because the State did not believe men and women were equal as the Protocol states. The Minister further expressed that the Protocol was unnecessary because Shari'a provides clarity on the rights of women and is not subject to challenge.

The African Commission on Human and Peoples' Rights is mandated to ensure protection of the rights enshrined in the Maputo Protocol. The African Court is also mandated to do so, provided that States have ratified the Protocol on the Establishment of the Court and made the Declaration accepting the Court's competence.

Participants agreed that in order to effectively eradicate sexual and gender based violence, States must be encouraged to ratify the Maputo Protocol to demonstrate their commitment to ending this violence against women. States must also be encouraged to ratify the Protocol on the Establishment of the African Court and to make the necessary Declaration regarding the Court's competence so that the African Court has the scope to investigate any breaches of relevant treaties impacting on sexual and gender based violence.

In addition to Africa's regional system of rights protection, there are sub-regional systems: Southern African Development Community (SADC); Economic Community of Central African States (ECCAS); Economic Community of Western African States (ECOWAS); Arab Maghreb Union (UMA); Community of Sahel-Saharan states (CEN-SAD); East African Community (EAC); Common Market for Eastern and Southern Africa (COMESA); and Intergovernmental Authority on Development (IGAD). Some of the constitutive treaties for these mechanisms include specific references to human rights, whereas others have required the mechanisms to interpret jurisdiction over human rights within their mandates. Sadly, a regression in human rights protection mechanisms at the sub-regional level has been seen, particularly in the SADC with the dismantling of the SADC Tribunal by the Heads of State and Government. Current efforts to reconstitute it seek to remove SADC's human rights mandate and the individual access for people from SADC States who may feel that their rights have been violated.

Participants discussed how the integrity of the African Commission could be protected in a political context. For example, there is little political will amongst a number of States to support LGBTI groups and pressure is being put upon the Commission not to recognise NGOs that work on behalf of these groups. The Coalition of African Lesbians (CAL) are likely to have their observer status at the African Commission removed following pressure from certain African States. The Executive Council of the African Union is comprised of politicians such that there are politics behind the Council's existence and means of operation, and being elected into the African Commission requires political support. Politicians decided that CAL's observer status was not proper and directed the withdrawal of this status. The Chair of the African Commission, a judge from Rwanda, presented the report of the African Commission to the Heads of the State of the AU member States, showing among other things the granting of the observer status to CAL by the African Commission. The AU Heads then questioned the granting of CAL's observer status. The African Commission Chair explained that while she was opposed to the granting of the observer status to CAL personally, it was the majority decision to do so. The African Commission was subsequently directed to withdraw the

observer status of CAL. There are no provisions in the African Charter for the Commission to revise this decision and there is no precedent on how to do this.

### **National legislation on sexual and gender based violence**

“To the extent that it is pervasive and overwhelmingly gender specific, domestic violence both reflects and reinforces patriarchal domination, and does so in a particularly brutal form.”<sup>31</sup>

UN Women, established by the UN General Assembly in 2010, works with countries at the global level to advance the international normative framework pertaining to women and girls through support to intergovernmental processes, such as the UN General Assembly and the Commission on the Status of Women.<sup>32</sup> It also advocates for the integration of the elimination of sexual and gender based violence into international frameworks such as the post 2015 development agenda. At the country level, UN women works with governments to help them enact legal reforms in line with international standards. It works with governments to develop dedicated national action plans to prevent and address violence against women and strengthen coordination amongst diverse actors. UN Women calls for national action plans addressing sexual and gender based violence to be implemented in every State. However, plans will be insufficient without adequate resources. Ministries with responsibilities for gender and human rights issues should take responsibility in ensuring relevant programmes are fully resourced.

The first area of priority intervention in UN Women’s country level work includes developing the institutional capacities of the mechanisms that support women’s rights, such as the police and the judiciary, to ensure better justice delivery for women. The second area of priority intervention involves aligning national laws, policies and programmes with international standards and principles and, in particular, rendering formal and informal justice systems more responsive to cases of sexual and gender based violence. UN Women’s final area of priority intervention is heightened prevention of and responsiveness to violence against women in conflict and post-conflict zones, including work with governments and uniformed personnel and investment in community mechanisms that aim to protect, prevent and respond to incidences of sexual and gender based violence.

One participant said it was important for women to be clear on what it was they were advocating for, otherwise calls for change would get lost. Where there is already sexual violence legislation, advocacy efforts should focus on improving and strengthening the legislation and its implementation. Where there is not adequate legislative protection, advocacy efforts must call for that protection. Efforts should not be wasted in pursuing changes that will have little impact on women’s issues. If traditional advocacy methods are unlikely to be effective, civil society should find other ways to engage with those that can effect change. Sometimes diplomatic exchanges will be more effective than shouting loudly.

Domestic legislation that addresses sexual and gender based violence is an important tool in addressing the problem, but without proper willingness or capacity for implementation such legislation will be meaningless. Good law is necessary to ensure fair trial standards and adequate rights protection but good laws alone are not enough. Implementing legislative change is a good place to start but resources, advocacy and awareness raising efforts are also needed.

It is important for domestic legislation and jurisprudence to be established so that courts can address gender issues without solely relying on international jurisprudence that can

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<sup>31</sup> *The State v Baloyi* (1999) Case CCT 29/99 (Constitutional Court of South Africa), per Justice Albie Sachs.

<sup>32</sup> On the Commission on the Status of Women, see <http://www.unwomen.org/en/csw>.

be perceived as an imposition of alien ideals. Judges should consider how their rulings can add value to the body of jurisprudence that already exists. Judges need a minimum level of sensitivity awareness to ensure that any legislation enacted is something that will improve real and effective access to justice for victims of violence against women. Where States do not have specific sexual and gender based violence legislation, these issues can be addressed through innovative actions of bold magistrates and judges sensitive to the issues.

It was acknowledged that trying to influence legislative change can be very difficult in States where different legal systems are operational in the same area. In Nigeria, for example, a tripartite legal system exists: customary, Shari'a and statutory. Even if gender specific legislation is introduced at the highest legal level, those that follow Shari'a law may refuse to accept this because divine law is not seen as subordinate to man-made constitutional law. It was reported that lawyers often make these kinds of argument in courts and it is very difficult to respond to these.

### **Swaziland**

The Acting Chief Justice of Swaziland reassured participants that the Kingdom of Swaziland is committed in its application of international and regional instruments to combat sexual and gender based violence and hopes, with the support of the international community, for success in this regard. Domestic violence is highly problematic in Swaziland, where sexual and gender based violence occurs within a society that upholds patriarchal values and where local laws and customs often prevail above regional and international obligations. Parliament is calling for submissions towards the development of a Domestic Violence Bill. This legislation is long overdue and is something that Swazis have been working on for over a decade, but the Kingdom is now alert to the extent of the problem.

One in three women suffer some kind of sexual violence before the age of 18. Domestic violence affects both genders, but in Swaziland one in five women compared to one in 200 men are subject to domestic violence. This is not to diminish the suffering of male victims, but to ground the problem in a gendered context as something that is much more likely to affect women. What is particularly worrying is that large numbers of women in Swaziland believe there are circumstances when domestic violence is permissible. There is a dedicated centre for prosecuting sexual offences but it is inaccessible for the large numbers of women who do not live within its proximity.

Swazi participants said they were looking forward to engaging with the Sexual Offences and Domestic Violence Bill, but expressed some concerns. Currently there is no provision in the Bill addressing implementing mechanisms, whereas it is important to ensure that infrastructure is in place before the Bill is enacted into law. If there are dedicated domestic violence courts, there must be trained personnel in the courts. Training will also be required for the police who respond to reported cases. Training should not be limited to new officials involved in the justice process but extended to existing officers. A specific case was raised of a woman in Swaziland who was forced to walk around naked, which was widely reported but in respect of which judicial officers were unsure about how to intervene. It was pointed out that forced nudity is an international crime under the Rome Statute and this would be a crime of outrage against personal dignity. It is likely that there would be some sort of domestic legislation protecting against outrages to dignity or inhuman or degrading treatment that could have been applicable in this case.

The Bill currently states there will be a register of sexual offenders but it will be the responsibility of sexual offenders to notify the authorities if they change address. It was questioned how offenders would be compelled to do so. The Bill contains guidance on

issues of consent but it is unclear where this guidance will come from, noting also that this will be complex in a society where discussion of sex is taboo.

Another key concern about the proposed legislation is the necessity for involving those it will most impact on, the women who will rely on the legislation and the chiefs who may interpret the legislation in local customs. It is essential that these two groups are involved in the development of the legislation. It may otherwise fail to provide adequate protection for those it is supposed to help and may be introduced in a way that seems wholly incompatible with local traditions and will therefore not be accepted or enforced in local communities. It was also felt that it would be a wasted opportunity if this new legislation was not linked to other socio economic and cultural factors that impact on the lives of women.

### **Zimbabwe**

After a process of 16 years, resisted for so long because it was seen as an unwarranted intrusion into the private sphere, Zimbabwe adopted the Domestic Violence Act in 2007. The law is strong on paper but in reality few cases have been taken to court and incidences of sexual and gender based violence remain prevalent. The 2010-11 Zimbabwe Demographic and Health Survey (three years after enactment of the Act) reported that 27 per cent of women surveyed aged 15-49 had experienced sexual violence at some point in their lives and that 22 per cent of those said their first sexual encounter was against their will.<sup>33</sup>

One concern regarding the legislation is the seeming conflict between protecting children from abuse and the age of consent. The Zimbabwe Constitution asserts that a child is anyone below the age of 18 but the Act's provisions on sex with a minor appear inconsistent with this. Sex with a minor under 12 constitutes an automatic charge of rape with a maximum sentence of life imprisonment, whereas sex with a minor aged between 12 and 16 has no automatic charge of rape and the maximum sentence is 10 years imprisonment. There are question marks around who is being protected and whether the courts are protecting the victim or the perpetrator of the offence. The prosecutor prepares the charge but has no guidelines to help decide whether a 13 year old girl is capable of giving consent.

Participants noted similar problems in other States. For example, in Nigeria sexual acts with minors are held to be criminal offences but contradictory legislation considers a girl to be an adult when married, even if married illegally at an early age. A 10 year old who has been married and is forced to have sex therefore does not have the same legal recourse available to her if she was not married, regardless of the fact that the marriage should not be legally valid.

Another problem is the lack of adequate resources. Zimbabwe's Domestic Violence Act refers to the establishment of sexual violence counsellors and safe houses for victims of sexual violence,<sup>34</sup> but these are not provided for. There are also failures to provide adequate training for those administering domestic violence cases. Without adequate training the legislation is used as a middle path between criminal remedies and civil solutions, which creates uncertainty and impacts negatively on justice delivery. With a claim of marital rape, many police officers encourage complainants to seek a protection order rather than a criminal trial. Whether this is because they lack the willingness or resources to actively investigate claims, the result is that too many civil cases overburden magistrates. When there are conflicting issues around allocation of State resources, gender issues consistently lose out. NGOs need to consider how to better

<sup>33</sup> Zimbabwe National Statistics Agency, *Zimbabwe: Demographic and Health Survey 2010-11*, URL: <http://dhsprogram.com/pubs/pdf/FR254/FR254.pdf>, pp.252-274.

<sup>34</sup> Domestic Violence Act 14/2006 (Zimbabwe), sections 15 and 16(9)(f).

advocate for the resources needed to support the effective implementation of gender specific legislation.

One participant said that even though there was domestic violence legislation, they still felt that there was a culture of silence around sexual and gender based violence in Zimbabwe and that it needs a lot of people, including victims and rights defenders, to highlight the issue. Greater international involvement, including interventions from the International Criminal Court or African Commission, would be welcomed by certain sectors.

### **South Africa**

South Africa has had domestic violence legislation in place since the introduction of the Domestic Violence Act in 1998, yet the Act still faces a lot of problems in terms of implementation. The issue is not that there is no support for addressing sexual and gender based crimes, but that there is not the infrastructure in place to effect this. South Africa continues to be known as the rape capital of the world and in addition to the high rates of sexual and gender based violence that continues to occur, a 2014 report estimated the economic impact of not addressing this problem as costing between 28.4-42.4 billion Rand a year.<sup>35</sup>

There is a lack of support in dealing with the procedural aspects of the Act. Complainants may be helped by clerks who are not legally trained and the burden of pursuing a claim then falls onto victims who are given documents from the court with the onus to progress these themselves despite their uncertainty in how to do so.

There are no specific domestic violence courts although magistrates may be able to take measures to address this themselves, by dividing cases between themselves and allocating set dates solely for dealing with domestic violence claims. This allows magistrates to consolidate the support and infrastructure required to deal with domestic violence cases. This kind of magisterial innovation was welcomed as a solution that could be replicated in other places where judges want specialised courts but lack the resources for their formal creation.

### **The International Criminal Court**

Two representatives from the International Criminal Court (ICC) gave presentations providing an overview of the ICC and how it operates, and considering the ICC's engagement with sexual and gender based violence. They explained that armed conflict today is mainly governed by a number of international treaties: the Hague Conventions, the four Geneva Conventions and their two Additional Protocols and the Rome Statute of the International Criminal Court.

The ICC is one mechanism of international criminal justice, created by the Rome Statute. The jurisdiction of the ICC is not universal as it only applies to the 123 States that have signed and ratified the Rome Statute, albeit that the UN Security Council may refer matters to the Court even with respect to non-States parties. It is not possible to refer individuals to the ICC. Rather, situations where violations of human rights are suspected to have occurred or be occurring, and where these may constitute one or more of the offences under the Rome Statute, can be referred by any of the States parties or by the UN Security Council. The lack of universal jurisdiction of the ICC and lack of Security Council referrals is politically motivated, which presents challenges and invites criticism of the Court.

<sup>35</sup> KPMG Human and Social Services, *Too costly to ignore - the economic impact of gender-based violence in South Africa* (2014), [Violence against women in SA \(PDF 4.72MB\)](#).

Ratification of the Rome Statute and commitment to the Court is desirable to States because it demonstrates their strong commitment to human rights. States should not be concerned that committing to the ICC invites intervention, because the ICC operates under the principle of 'complementarity'. This means that States parties have the primary responsibility to investigate and prosecute Rome Statute crimes. The Court only has jurisdiction to intervene if States lack the will or capacity to themselves address Rome Statute crimes involving human rights violations. Where States lack capacity then ICC involvement, particularly in a supportive role, may be welcomed.

When a situation is referred to the ICC, the Office of the Prosecutor (OTP) will conduct an analysis and a preliminary investigation of the situation before deciding whether there is sufficient evidence to proceed to trial. When the OTP decides there is a situation that warrants further investigation, it respects that the primary responsibility for this investigation belongs to the State concerned. If States are unwilling or unable to undertake this investigation, the ICC will commence an active examination of the situation. The ICC has a specific legal test for admissibility of a case to an active examination. Where there is a genuine investigation of the crime at the national level, the ICC will let States proceed. If not, the ICC will intervene.

The kinds of barriers to genuine proceedings that may entail the ICC's involvement would include a lack of political will, discriminatory attitudes, inadequate domestic law or the existence of immunity laws, manifestly insufficient steps in investigation and prosecution, and/or deliberate focus of proceedings on low level perpetrators despite evidence against those with greater responsibility. Due to resource constraints, the OTP cannot prosecute all perpetrators so the policy is to prosecute the most responsible persons.

Where States demonstrate a genuine willingness to proceed but lack capacity to do so, the ICC will support State investigations. This may include sharing evidence, subject to security caveats. The OTP may also engage with States to raise awareness of the ICC's jurisdiction, encourage ratification of the Rome Statute and share lessons learned to support domestic prosecution strategies. Cooperation and complementarity with other regional and international legal systems are essential, but the minimum thresholds for complementarity are yet to be developed.

It was asked what actions the ICC could take against faceless groups such as Boko Haram and the Islamic State. The ICC is working with the Nigerian Government to investigate alleged crimes in Nigeria, not only by Boko Haram but also by Government forces. Participants discussed the meaning of 'State' and who this applies to. It was suggested that academics address the question of statehood in line with understandings of applicability of international law.

The prosecution of sexual and gender based crimes has always been important to the ICC and charges for these crimes have been brought before the Chamber. The OTP encourages States parties to address sexual and gender based crimes through the adoption of appropriate domestic legislation that protects the interests of victims, supporting domestic legislation and prosecutions and strengthening political support to end immunity and prevent recurrence of these crimes. The current Prosecutor of the ICC, Fatou Bensouda, remains committed to tackling the problem. One of the first policies she adopted following her assumption of office was the Sexual and Gender Based Crimes Policy.<sup>36</sup>

'Sexual crimes' that fall under the subject-matter jurisdiction of the ICC are listed under Articles 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi) of the Rome Statute. An act of a

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<sup>36</sup> International Criminal Court, *Policy Paper on Sexual and Gender Based Crimes* (June 2014), URL: [www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf](http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf) (ICC Policy Paper on Sexual and Gender Based Crimes).

sexual nature is not limited to physical violence and may not involve any physical contact. Sexual crimes cover both physical and non-physical acts with a sexual element. The OTP seeks to react promptly to outbreaks of violence, including sexual and gender based violence, by reinforcing early interactions with States and other international organizations to verify information and encourage genuine national engagement at an early stage.

The crime of rape is clearly specified as a crime against humanity in Article 7 of the Rome Statute. When the acts of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or other forms of sexual violence of comparable gravity are carried out against a civilian population in a widespread and systematic manner, these acts are recognized and can be prosecuted as crimes against humanity. Perpetrators should know that sexual and gender based crimes will not be tolerated and those who either engage in, or permit the engagement of others in, these crimes will be liable to serious consequences.

In 1994, the UN Security Council established the International Criminal Tribunal for Rwanda (ICTR). The ICC and the ICTR are charting new ground in the prosecution of rape as a constitutive act of genocide that can be prosecuted as a crime against humanity or as a war crime. The ICTR's first judgement was in the Akayesu case which broke new ground in the definition of rape as an international crime and recognized that sexual violence could be inflicted in various forms, defined as "any act of a sexual nature which is committed on a person under circumstances that are coercive."<sup>37</sup> Unfortunately, in spite of the pioneering definition of rape in this judgment, several international chambers have since used more restrictive definitions of rape.

Article 54(1)(b) of the Rome Statute requires the Prosecutor to respect the interests of victims. The OTP will include charges for sexual and gender based crimes wherever there is sufficient evidence to do so. The OTP proposes sentences that consider sexual and gendered dimensions of crimes, the impact on victims, families and communities as an aggravating factor.

The ICC often faces criticism for appearing to be unfairly focussing on and targeting Africa, despite there being States parties to the Rome Statute from other continents. However, it was recalled that the Rome Statute requires complementarity and the ICC therefore prefers to allow States to lead on any investigations of human rights violations that have occurred within their jurisdictions. One of the reasons there may have been more cases in Africa is because the States involved have either lacked the willingness or the capacity to undertake genuine investigations themselves. Participants expressed concerns that if this perceived bias persists there may be arguments for the ICC to reduce the resources it currently commits to combatting impunity in Africa. Those that have been affected by or are subject to risk of human rights violations (such as families of the disappeared Chibok schoolgirls and survivors of sexual assault in the Democratic Republic of Congo (DRC)) want to see more, not less, scrutiny. Congolese rights groups told the ICC that to see Bosco Ntaganda in hearings before the ICC was a powerful image and a profound warning to commanders of other armed groups.

It was suggested that criticisms of bias levelled at the ICC may have the effect of pushing the Court to act on behalf of perpetrators rather than the victims of human rights offences. The ICC was set up to intervene on behalf of the most vulnerable and should continue to do so regardless of which continent these victims are based in. Participants agreed that greater efforts should be made to support the ICC when it is subject to criticisms of bias to categorically dismiss any attempts to undermine it as a Court of last resort that is safeguarding the rights of the most vulnerable Africans. Civil

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<sup>37</sup> *The Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Decision 2 September 1998 (United Nations International Criminal Tribunal for Rwanda), para 598.



society organizations within Africa could more actively strive to demonstrate support for the Court when it is subject to attack.

### ***Prosecutions for crimes against humanity in Africa***

Germain Katanga, former President of the *Forces de Résistance Patriotique d'Ituri* (FRPI) operating in the DRC, was convicted of the murders and pillaging he should have had the foresight to know his men would carry out. However, he was not convicted for the rapes and other sexual offences that his men carried out, even though it is likely he would also have recognised these as a tool of war. For these sexual offences it was felt that something more than reasonable foresight was required, involving a higher standard for conviction than for the other offences.

Jean-Pierre Bemba, former Presidential Candidate in the DRC, faces charges under Article 28 of the Rome Statute. It is alleged that, in his capacity as military commander, he failed to take the necessary steps to prevent sexual based crimes committed by his subordinates. Under his command more rapes took place than murders.

Bosco Ntaganda, military chief of staff of the National Congress for the Defense of the People (CNDP) operating in the DRC, was the first person in respect of whom the ICC confirmed charges for the commission of sexual offences against child soldiers within his own military group by members of the same military group.

### **Cross-sector collaboration**

At any given time in cases of sexual and gender based violence, victims will require more than one service. A victim will require assistance from the police and from medical services, she may need provision of a safe house if the violence was committed by someone she lives with, she may need assistance in continuation of her or her children's education, counselling may be required, she may need training or other help in finding employment if she was dependant on an abusive partner and so on. One magistrate explained that she often finds victims in the courts in need of help but without the help of other service providers there is little that can be done.

Sexual and gender based violence is a pandemic that requires a collaborative effort across a variety of sectors beyond lawyers, judges and civil society in order to effectively address the issue. There is a greater need for coordinated efforts between different societal partners including civil society, private sectors and governments. There is a need for community building partnerships and training for educators. Experience shows that it is possible, but often difficult, to bring different stakeholders together. In Zambia a National Council Against Gender Based Violence was formed, but political willingness to address the issue is core. Organizations such as UN Women recognize a need for survivors to have access to multi-sectoral services covering safety, shelter, health, justice and other essential services. Collaborative events between civil society and government, such as the 16 Days of Activism Against Gender-Based Violence Campaign,<sup>38</sup> are increasingly important. Collaboration between sectors should not only address the symptoms of the problem but consider the causes and invest in prevention, the most cost-effective long-term means to stop violence.

Legal professionals that work with victims of sexual and gender based violence need to develop working relationships with medical professionals so that it is understood what is needed in terms of medical evidence to establish whether or not a sexual offence took

<sup>38</sup> Rutgers Centre for Women's Global Leadership, 16 Day of Activism, URL: <http://16dayscwgj.rutgers.edu/>.

place and to ensure legal professionals fully comprehend the medical reports they are provided with.

Participants also discussed the need to develop relationships with the media. The way the media reports incidences of sexual and gender based violence plays an important role in how the problem is understood and responded to within communities.

Participants said it is easy to discuss issues of sexual and gender based violence in the context of the colloquium but dialogues need to be opened up across African society, including within rural communities. Many victims of sexual or gender based violence lose faith in the justice system because of procedural problems and general misconceptions about how the judicial system should work. More judges and lawyers should involve themselves in public awareness-raising and other outreach activities to help build a better relationship between those who deliver justice and those to whom justice delivery is meant to serve.

### **Recommendations**

Against the background of these reflections, colloquium participants identified the following recommendations:

#### **3. Implementing international standards on sexual and gender based violence**

- 3.1 States that have not already done so must become party to the Convention on the Elimination of Discrimination against Women.**
- 3.2 States that have not already done so must become party to the Maputo Protocol.**
- 3.3 States that have not already done so must adopt, implement and provide adequate resources for national action plans on combatting sexual and gender based violence.**
- 3.4 Civil society organizations, the judiciary and States should support the International Criminal Court when it is criticized for focusing on Africa. They should encourage greater scrutiny on the region, not less.**
- 3.5 Lawyers and judges need to be innovative in applying regional and international law and jurisprudence in cases where domestic legislation is inadequate.**

#### **4. National legislation on sexual and gender based violence**

- 4.1 States developing or strengthening legislation must think about how this will be implemented and ensure adequate resources and services are in place, including the provision of training to affected public officials.**
- 4.2 Where resources continue to be limited, judges should be innovative in the way they organize their cases and courtrooms.**
- 4.3 Civil society organizations should lobby governments to set aside adequate resources for effectively implementing legislation on sexual and gender based violence.**

- 4.4** When developing legislation, States must make efforts to ensure that those who will be affected, including women, religious and other traditional leaders, are able to participate in the process.
- 4.5** When legislation has been enacted, public awareness efforts must be undertaken to ensure that those who may be protected as well as those who may be prosecuted under the legislation understand the new law.

## **5. Cross-sector collaboration**

- 5.1** Recognizing that there are many actors with an interest in sexual and gender based violence cases, efforts should be made to bring different sectors of society together to establish an ongoing dialogue and to elaborate strategies for prosecuting and preventing sexual and gender based violence offences.
- 5.2** Different stakeholders should be aware of the different services provided by each other and where possible look to complement and reinforce each other. For example, prosecutors that are aware of an organization that provides counseling services could put victims in touch with that organization.
- 5.3** Civil society, governments, private actors, medical professionals, legal professionals, education professionals, community leaders, religious leaders and the media should consider ways to work with one another to eradicate sexual and gender based violence and ensure appropriate societal attitudes to that end.
- 5.4** Opportunities should be created for human rights academics to pair up and share expertise with judges in different jurisdictions.
- 5.5** Regular forums should be established where members of the judicial process can engage with civil society organizations and those that are currently working on cases of sexual and gender based violence to share expertise and elaborate effective strategies.

## IV. ADDRESSING THE CAUSES OF SEXUAL AND GENDER BASED VIOLENCE

This section of the report was primarily informed by the following presentations:

- Doo Aphane, *Prevalence of SGBV in Swaziland and local response to combat the scourge: Critical Evaluation of Domestic Violence Bill*
- Azubike Onuora, *Fighting SGBV in domestic courts: Nigeria's experience*

### Sexual and gender based violence as a genderless problem

"We are seeing a situation as we are responding to sexual and gender based violence of a tap that has been opened and is flooding water, we are consistently mopping the floor without closing the tap."<sup>39</sup>

Women are most often the subject of sexual violence and it is to women that the stigma of having suffered such violence usually attaches itself. However, this does not mean that the problem is a woman's problem. Victims of sexual and gender based violence may be of any gender and of any age. Offences are usually committed by men and are allowed to flourish in a patriarchal society that is dominated by men. However, those attempting to address cultural attitudes around violence against women should not assume that victims of sexual and gender based violence will necessarily identify themselves as victims. Changing attitudes should not only focus on potential perpetrators but also potential and existing victims. Patriarchal models of society do not continue to flourish solely at the hands of men. The mothers, sisters, wives and daughters of men also have a role in propagating patriarchal attitudes and notions of gender inferiority.

Factors that affect attitudes towards sexual and gender based violence are wide-ranging and varied and these include media perceptions, cultural and social contexts, historical background, physical challenges, economic factors and unjust judiciaries. Women that suffer sexual and gender based violence may suffer at a variety of levels because of multiple ways in which they are discriminated against: because they are women, poor, part of an ethnic minority, disabled, etc. Different individuals and groups experience sexual violence in different ways.

Clear warnings that sexual and gender based violence will not be tolerated through legal prosecution at a regional, international and national level will serve as a deterrent to some, but fear of criminal reprisals is insufficient to address the problem if people do not understand what is wrong with the behaviour. To really tackle the scourge of sexual and gender based violence, it is necessary to address the attitudes that enable these crimes to flourish.

A collaborative approach is required where governments, UN agencies, civil society organizations and other institutions come together in an effort to change norms and behaviours of men and boys towards women and girls. Different stakeholders must work together to change the attitudes that allow sexual violence to occur. In addressing the causes of sexual and gender based violence it is important to ensure that efforts involve working with customary judicial systems and finding ways to ensure that customary processes are consistent with national, regional and international obligations to provide full protection for women's rights.

### Changing cultural attitudes

When legislation is introduced to combat sexual and gender based violence this must be accompanied with a public awareness campaign so that those who are likely to be

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<sup>39</sup> Colloquium participant.

victims or perpetrators of these offences, or who may be involved in different forms of formal or informal interaction with them, understand the nature and implications of the new law. Potential perpetrators need to have an understanding of the full extent of their crimes and of the impact these crimes have on their victims.

"I have met many young men who have been convicted and sentenced for many years for sexual offences but they told me they actually did not understand why they were there, they do not know what they did."<sup>40</sup>

It was agreed that awareness raising is important, but at the same time noted that despite a number of awareness raising initiatives having been undertaken over the years by a variety of international and local organizations, this did not seem to be having the desired effect. Many of the people that these organizations have worked with know that violence is wrong, but acts of sexual violence continue to occur. Participants questioned whether organizations were dealing with these issues in the right way and approaching the right people. It was established that there is a need to redefine masculinity in the current era, but participants were unclear as to how to change yesterday's perceptions to achieve the desired results of today.

The male participants at the colloquium were asked what they thought could be done to change the attitudes of men and boys. One participant said it was important to take a deliberative approach to keep talking about and confronting these issues. The participant explained that when he was confronted with homophobic attitudes his response was to open up a discourse that might encourage the person he was communicating with to rethink their attitudes. The participant gave an example of when he received a call from a local pastor questioning his Christian values after he had written a paper on same-sex marriage and in response asked the pastor: 'if your child was sick and the only specialist doctor that could help was gay, then would you not allow that specialist to save your child?' The pastor hung up. He believes that deliberately asking the questions that confront harmful attitudes is a step in the right direction. This approach has resulted in positive changes of attitude in other areas and will, it was proposed, eventually be effective on issues of gender equality. Another participant said working with and developing strong societal role models who can encourage men and boys to live up to the minimum values of gender equality that we aspire to was an effective means of changing attitudes too.

Advocates for change cannot only speak generally about the need for change but must address this in a way that applies locally to specific contexts of the communities they want to effect change in. It is essential to increase efforts to speak to society about these issues and to open up a dialogue with people in rural African societies, not only so that they are aware of the issues but also to learn from them since they may have solutions of their own.

Changing attitudes must not only focus on men and boys but also on the women and girls of the same society. Participants discussed how often women will come out in support of perpetrators of sexual violence. The trial of Oscar Pistorius was cited as a good example of this, amongst many stories about sexual violence where women are reported to support violent men including threatening women that are victims of sexual offences. This is alarming and creates an atmosphere where victims are afraid to come forward. However, these women who support perpetrators of sexual and gender based violence are also victims of a patriarchal system and themselves need help, even if they do not see themselves as victims. Efforts should be made to educate women and girl children of their rights so that girls are taught from an early age about bodily integrity and their rights of autonomy over their own bodies. This should be done with the assistance of educators and community and religious leaders. Judges and lawyers, and others involved in justice delivery, including the police, also have a role to play in

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<sup>40</sup> Colloquium participant.

educating people about sexual offences legislation and how to report offences, and the like.

“We must think about what we believe is our culture today, not the culture of our forefathers, because culture is dynamic.”<sup>41</sup>

Some States are reluctant to adopt sexual and gender based violence legislation based on the claim that adopting such legislation would be contrary to their traditional values and would go against their culture. In Uganda, research was undertaken with men and women of different age groups concerning societal understandings of rape. The research found that understandings of what constituted rape did not vary much according to the sex of participants in the research, but instead according to the age of participants. Older men and women had more restrictive views of what constituted rape than younger men and women, which indicates that cultural attitudes may evolve over time. Participants were asked to consider the following examples of when a man forced a woman to have sexual intercourse against her will: when the man had taken the woman out and she agreed to go to his house and where the man spent money on the woman. Men and women over 40 years old concluded that these examples did not amount to rape, whereas younger men and women concluded that they did. However, whilst many participants agreed that culture can change over time, it was suggested that some legal systems, such as Shari’a, do not have the ability to evolve because they are based on immutable divine law.

## Recommendations

Against the background of these reflections, colloquium participants identified the following recommendations:

### 6. Changing cultural attitudes

- 6.1 Those reluctant to address sexual and gender based violence because of cultural objections must be reminded that culture and tradition constantly evolves.**
- 6.2 Recognizing that women who support male perpetrators of sexual and gender based violence are also victims of gender inequality, such women should be helped by civil society organizations to realize their rights.**
- 6.3 A dialogue should be opened and maintained with local communities, including men and boys, to identify the causes of discriminative attitudes towards women.**
- 6.4 Efforts should be made to support positive male role models to encourage and keep encouraging other men to adopt attitudes of gender equality.**
- 6.5 Media leaders should be engaged with to positively influence cultural attitudes.**

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<sup>41</sup> Colloquium participant.

## V. APPLYING A GENDER PERSPECTIVE

This section of the report was primarily informed by the following presentations:

- Shamila Batohi, *Challenging the culture of impunity for sexual and gender based violence: Complementarity between international efforts and domestic justice systems*
- Justice Profesor Lillian Tibatemwa-Ekirikubinza, *Confronting sexual assaults and violent crime against women in Uganda: Gender and women's rights perspective*

### A gender sensitive lens

"Different rights and privileges are attributed to men and women by virtue of their sex."<sup>42</sup>

The Beijing Declaration and Platform for Action states: "In addressing violence against women, Government and other actors should promote an active and visible policy of mainstreaming a gender perspective in all policies and programmes so that before decisions are taken an analysis may be made of their effects on women and men, respectively".<sup>43</sup> The ICC's Sexual and Gender Based Violence Policy Paper commits the ICC to take a gender perspective in all aspects of its work and to conduct a gender analysis in the context of its mandate.<sup>44</sup> In the Policy Paper, 'gender perspective' is defined as "requiring an understanding of difference in status, power roles and needs between males and females, and the impact of gender on people's opportunities and interactions".<sup>45</sup> This gives the Office of the Prosecutor a better understanding of the different experiences of communities, and individuals within communities that it works with. The Paper defines 'gender analysis' as examining the "underlying differences and inequalities between women and men, and girls and boys, and the power relationship and other dynamics which determine and shape gender roles in a society and give rise to assumptions and stereotypes".<sup>46</sup>

Sexual and gender based violence can also affect men, but women make up the vast majority of victims. Too much emphasis on gender neutral laws can deny the reality of different genders experiencing the world in different ways. Gender imbalances are a primary cause of gender based violence and ignoring these differences does not help anyone. Gender roles shape men and women's access to the enjoyment of rights and an understanding of gender is critical to discussions about sexual and gender based violence. Having a gender sensitive lens, whether this is in the ICC, civil society organizations or within the judiciary, will permeate all aspects of the work that is done and will extend beyond obvious gender and women's rights issues.

### Mainstreaming a gender perspective into judicial decision making

Cultural norms and values that discriminate against women are often exemplified in the written law but one participant questioned the extent to which negative cultural attitudes towards gender are exemplified in judge-made law. Judges that follow precedent should not expect different outcomes to those that were established by patriarchal systems years ago. What is needed is a change in established systems, alongside judicial decision-making and judicial culture. A strategy to mainstream a gender perspective into judicial decision-making is essential to confront gender specific crimes. This does not mean expecting women to be given preferential treatment over men, nor does it mean expecting women judges to be doing more for women's rights than their male

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<sup>42</sup> Colloquium participant.

<sup>43</sup> Beijing Declaration and Platform for Action, para 79.

<sup>44</sup> ICC Policy Paper on Sexual and Gender Based Crimes, p.5.

<sup>45</sup> ICC Policy Paper on Sexual and Gender Based Crimes, p.3.

<sup>46</sup> ICC Policy Paper on Sexual and Gender Based Crimes, p.4

counterparts. A gender perspective in judicial decision-making requires that consideration is given to the different experiences and realities of different genders with an analysis made of how a seemingly gender-neutral decision will impact men and women, in terms of access to justice. It is neither fair nor appropriate to put the onus of change solely on the shoulders of female judges. The emphasis should be on changing the system rather than applying gendered assumptions to female judges and expecting these individuals to effect change by themselves.

The test of the reasonable person is frequently used in courts but is often applied as the test of the reasonable man. An East African case was given as an example, where a husband killed his wife after he forbade her to move abroad and she had said some words that had a "bad hidden meaning". In the eyes of the court, this provided grounds for provocation for her murder.<sup>47</sup> The judge held that any reasonable man would act as the defendant had done. The 'reasonable person' test is thus at times applied liberally to male defendants but less so to female defendants. A woman who stabbed and killed a man who tried to sexually assault her in her bedroom was unable to rely on self-defence because the judge felt she had acted with a force that was disproportionate to the lesser offence she was trying to prevent. *R v Ahluwalia* was the case of a woman who, after years of domestic violence, set fire to her sleeping husband following threats earlier in the evening of being attacked with a hot poker. The defendant could not rely on the defence of provocation because the delay in attacking her husband should have provided a cooling off period and she was sentenced for murder.<sup>48</sup> Participants expressed the view that, if a test of how a reasonable woman would have acted in the defendant's circumstances had existed and been applied, the outcome may have been different. The test of the reasonable person should be gender neutral, but in gender specific crimes it is not always so. Participants suggested that if legal professionals spoke of a test of the reasonable woman, this may force the judiciary to consider cases differently.

Research was conducted on 91 Ugandan High Court cases of women charged with murder.<sup>49</sup> The single largest group of victims were husbands and partners, many of whom had been killed after long histories of abuse of the women. Of the 91 cases, four women were acquitted and 39 judged to have killed on grounds of self-defence or provocation. These women were offenders but they were also victims. If judicial officers had adopted a gender analysis of these cases, more women may have been able to rely on self-defence or provocation, defences which are only applicable when defendants can show there was an imminent threat of serious bodily injury and the force used by the defendant to repel that imminent threat was immediate and proportionate to that threat.

Where women subject to abuse have then killed their abusers, sometimes they have been able to make use of the 'battered woman syndrome' as a defence. This defence describes a cyclical pattern of abuse that results in violence towards the abuser. Though some have criticized this defence, claiming it was a woman's only defence, it can nevertheless be applied to men that have also been subject to similar patterns of domestic abuse. In any event, participants said that as so many of the existing defences are set up in a way that primarily favour male defendants, then why should there not be one or more defences available that favour female defendants? Many women's rights organizations work at a grassroots level and from the perspective of the organizations and those they work with, there is uncertainty regarding the dynamics of the law in domestic abuse cases. When it is reported that a woman who kills her rapist has been arrested, it is not understood and appears to many as though the justice system is further victimizing the victim and they may become disillusioned and lose faith in the system.

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<sup>47</sup> *Rex v Hussein s/o Mohamed* (1942) 9 East African Court of Appeal 52.

<sup>48</sup> *R v Ahluwalia* (1993) 96 CR App R 133.

<sup>49</sup> Lillian Tibatemwa-Ekirikubinza, *More Sinned Against than Sinning: Women's violent crime in Uganda*, København : Kriminalistisk Institut (1995).



Participants asked whether records of prior abuse can be used in the defendant's favour when abused persons then commit violent offences, but it was noted that although previous complaints may be used in some cases, in many incidences the abused partner does not report abuse because previous attempts to do so have not resulted in a change of behaviour, or because of the various stigmas attached to complaining victims, as noted earlier in this report.

## **Recommendations**

Against the background of these reflections, colloquium participants identified the following recommendations:

### **7. Applying a gender balanced perspective**

- 7.1**      **Whilst acts of sexual and gender based violence are predominantly committed against women and girl children, it should not be forgotten that men and boys can also be victims of these offences.**
- 7.2**      **There is a need to mainstream a balanced gender perspective into judicial making processes.**
- 7.3**      **When victims of sexual and gender based violence commit crimes in response to these offences, legal and medical professionals should work to raise awareness of the psychological conditions that may lead to victims committing crimes.**
- 7.4**      **Efforts should be undertaken to strengthen women's ability to rely on self-defence, provocation and battered woman syndrome as defences, or mitigating factors in sentencing, when charged with attacking a violent partner.**
- 7.5**      **Efforts should be undertaken with traditional courts to encourage the consideration of cases from a gender perspective.**
- 7.6**      **Gender sensitization training is needed for men working within the judicial process.**
- 7.7**      **Support is needed for women working within the judicial process who may be in the minority in applying a gender balanced perspective in their work.**

## VI. RECOMMENDATIONS

Against the background of the reflections in this report, colloquium participants identified the following recommendations pertaining to each of the overarching topics addressed:

### 1. Balancing rights of victims and accused at trial

- 1.1 Victims should be entitled to a lawyer, free of charge.
- 1.2 Victims should not automatically be required to give evidence, particularly when there is other evidence available.
- 1.3 Victims should be protected from the accused; mechanisms should be available to prevent victims from having to face the accused during trial.
- 1.4 Greater use of medical evidence should be used to protect the victim and the defendant. States should ensure provision of resources to enable easy access to forensic laboratories.
- 1.5 Counseling should be available to victims during the course of the trial in order to psychologically prepare and support them.
- 1.6 Medical and legal professionals should work together to highlight the psychological conditions that can affect victims of sexual and gender based violence, such as post traumatic stress disorder, which may impede their ability to give reliable evidence.
- 1.7 Judges should be proactive to call for relevant experts, including psychologists and other medical professionals, if prosecutors do not produce them.
- 1.8 Civil society organizations and victim representatives should undertake periodic trial observations to ensure that proceedings are fair towards both victims and the accused.

### 2. Protecting rights of children and other vulnerable victims at trial

- 2.1 Where victims have an inability to verbalize what has happened to them, provision of anatomically correct dolls or images should be referred to.
- 2.2 Where victims are too traumatized to give evidence in person, evidence should be given through a trusted intermediary such as a social worker.
- 2.3 Training should be provided for those taking evidence from vulnerable witnesses.
- 2.4 Where the accused resides in the same house as the victim, safe alternative accommodation enabling the continuation of a child's life, including access to education, should be provided.

### 3. Implementing international standards on sexual and gender based violence

- 3.1 States that have not already done so must become party to the Convention on the Elimination of Discrimination against Women.

- 3.2 States that have not already done so must become party to the Maputo Protocol.
- 3.3 States that have not already done so must adopt, implement and provide adequate resources for national action plans on combating sexual and gender based violence.
- 3.4 Civil society organizations, the judiciary and States should support the International Criminal Court when it is criticized for focusing on Africa. They should encourage greater scrutiny on the region, not less.
- 3.5 Lawyers and judges need to be innovative in applying regional and international law and jurisprudence in cases where domestic legislation is inadequate.

#### **4. National legislation on sexual and gender based violence**

- 4.1 States developing or strengthening legislation must think about how this will be implemented and ensure adequate resources and services are in place, including the provision of training to affected public officials.
- 4.2 Where resources continue to be limited, judges should be innovative in the way they organize their cases and courtrooms.
- 4.3 Civil society organizations should lobby governments to set aside adequate resources for effectively implementing legislation on sexual and gender based violence.
- 4.4 When developing legislation, States must make efforts to ensure that those who will be affected, including women, religious and other traditional leaders, are able to participate in the process.
- 4.5 When legislation has been enacted, public awareness efforts must be undertaken to ensure that those who may be protected as well as those who may be prosecuted under the legislation understand the new law.

#### **5. Cross-sector collaboration**

- 5.1 Recognizing that there are many actors with an interest in sexual and gender based violence cases, efforts should be made to bring different sectors of society together to establish an ongoing dialogue and to elaborate strategies for prosecuting and preventing sexual and gender based violence offences.
- 5.2 Different stakeholders should be aware of the different services provided by each other and where possible look to complement and reinforce each other. For example, prosecutors that are aware of an organization that provides counseling services could put the victim in touch with that organization.
- 5.3 Civil society, governments, private actors, medical professionals, legal professionals, education professionals, community leaders, religious leaders and the media should consider ways to work with one another to eradicate sexual and gender based violence and ensure appropriate societal attitudes to that end.

- 5.4 Opportunities should be created for human rights academics to pair up and share expertise with judges in different jurisdictions.
- 5.5 Regular forums should be established where members of the judicial process can engage with civil society organizations and those that are currently working on cases of sexual and gender based violence to share expertise and elaborate effective strategies.

## **6. Changing cultural attitudes**

- 6.1 Those reluctant to address sexual and gender based violence because of cultural objections must be reminded that culture and tradition constantly evolves.
- 6.2 Recognizing that women who support male perpetrators of sexual and gender based violence are also victims of gender inequality, such women should be helped by civil society organizations to realize their rights.
- 6.3 A dialogue should be opened and maintained with local communities, including men and boys, to identify the causes of discriminative attitudes towards women.
- 6.4 Efforts should be made to support positive male role models to encourage and keep encouraging other men to adopt attitudes of gender equality.
- 6.5 Media leaders should be engaged with to positively influence cultural attitudes.

## **7. Applying a gender balanced perspective**

- 7.1 Whilst acts of sexual and gender based violence are predominantly committed against women and girl children, it should not be forgotten that men and boys can also be victims of these offences.
- 7.2 There is a need to mainstream a balanced gender perspective into judicial making processes.
- 7.3 When victims of sexual and gender based violence commit crimes in response to these offences, legal and medical professionals should work to raise awareness of the psychological conditions that may lead to victims committing crimes.
- 7.4 Efforts should be undertaken to strengthen women's ability to rely on self-defence, provocation and battered woman syndrome as defences, or mitigating factors in sentencing, when charged with attacking a violent partner.
- 7.5 Efforts should be undertaken with traditional courts to encourage the consideration of cases from a gender perspective.
- 7.6 Gender sensitization training is needed for men working within the judicial process.
- 7.7 Support is needed for women working within the judicial process who may be in the minority in applying a gender balanced perspective in their work.

## Annex 1

### LIST OF COLLOQUIUM PARTICIPANTS

- Doo Aphane, Advocate and Activist, Swaziland
- Shamila Batohi, Senior Legal Advisor of the Prosecutor of the International Criminal Court, The Hague
- Hlobisile Dlamini, Swaziland Rural Women's Assembly, Swaziland
- Linda Dlamini, Clerk to Parliament, Swaziland
- Justice Mumcy Dlamini, High Court, Swaziland
- Phumelele Dlamini, Women and Law in Southern Africa, Swaziland
- Yolande Engelbrecht, Legal Assistance Centre, Namibia
- Professor Michelo Hansungule, ICJ Commissioner, Zambia
- Lomvula Hlophe, Senior Crown Counsel, Director of Public Prosecutions, Swaziland
- Justice Martha Koome, Court of Appeal, Kenya
- Lloyd Kuveya, ICJ Senior Legal Advisor, South Africa
- Justice Qinisile Mabuza, ICJ Commissioner, Swaziland
- Justice Lavender Makoni, High Court, Zimbabwe
- Acting Chief Justice MCB Maphalala, Swaziland
- Principal Judge S.B Maphalala, Swaziland
- Abigail Matsvai, Director Zimbabwe Women Lawyers' Association, Zimbabwe
- Maria Matui, Tanzania Women Lawyers Association, Tanzania
- Xolile Mazibuko, Nhlngano AIDS Training Information and Counseling Center (NATICC), Swaziland
- Shamiso Mbizvo, ICC International Cooperation Advisor, The Hague
- Janita Mesu, PhD Candidate and Lecturer, Women's Law Centre, Zimbabwe
- Happy Mkhabela, Lawyers for Human Rights, Swaziland
- Tenele Mkhabela, Swaziland Action Group Against Abuse, Swaziland
- Principal Magistrate Florence Msibi, Swaziland
- Constance Mukarati, ICJ Administrative Assistant, Zimbabwe
- Fadzai Muparutsa, Regional Advocacy Officer, Coalition of African Lesbians, South Africa
- Nondumiso Nsibande, Director Tshwaranang Legal Advice Centre, Republic of South Africa
- Azubike Onuora-Oguno, LLD Candidate University of Pretoria, Nigeria
- Habiba Rezman Osman, UN Women Program Specialist EAWG, Malawi
- Mary Pais Da Silva, ICJ Associate Legal Advisor, Swaziland
- Briony Potts, ICJ Programme Officer, Switzerland
- Magistrate Asha Ramlal, Acting Regional Magistrate, South Africa
- Netty Musanhu Rusere, Executive Director, Musasa Project, Zimbabwe
- Charity Simelane, Law Society Council Member, Swaziland
- Principal Magistrate Nondumiso Simelane, Swaziland
- Arnold Tsunga, ICJ Africa Director, Zimbabwe
- Wilder Tayler, ICJ Secretary-General, Uruguay
- Justice Leona Theron, Supreme Court of Appeal, Republic of South Africa
- Professor Justice Lillian Tibatemwa-Ekirikubinza, Supreme Court, Uganda
- Celly Neyda Valla, Recherche Centre for Human Rights, Universidade Eduardo Mondlane, Mozambique
- Magistrate Sindisile Zwane, Swaziland

## Annex 2

### COLLOQUIUM PROGRAMME

<b>Thursday 30 July 2015</b>	
<b>Session 1</b>	<b>Opening</b>
Chair:	Justice Qinisile Mabuza
10:00 - 10:15	Arnold Tsunga <i>Welcoming remarks</i>
10:15 - 10:30	Acting Chief Justice MCB Maphalala <i>Welcoming remarks and Official Opening</i>
10:30 - 10:45	Wilder Tayler <i>Opening remarks: ICJ's women's programme and the theme of sexual and gender based violence</i>
10:45 - 11:15	Ms Shamila Batohi <i>Keynote address: Challenging the culture of impunity for sexual and gender based violence: Complementarity between international efforts and domestic justice systems</i>
<b>Session 2</b>	<b>Regional and International Legal Framework</b>
Chair:	Mary Pais Da Silva
11:15 - 11:30	Habiba Rezwana Osman <i>Regional Perspectives on Sexual and Gender-Based Violence</i>
11:30 - 11:45	Shamiso Mbizvo <i>Charting new frontiers in accountability for rape as an international crime - highlights from the experience of the ICTR and the ICC in prosecuting rape as a constitutive act of genocide; as a weapon of war; and as a crime against humanity</i>
11:45 - 12:00	Professor Michelo Hansungule <i>Regional and sub-regional framework for the protection of women against sexual and gender-based violence</i>
12:00 - 13:00	<i>Discussion</i>
<b>Session 3</b>	<b>Complementarity: Domestic Perspectives</b>
Chair:	Happy Mkhabelah
14:15 - 14:30	Doo Aphane <i>Prevalence of SGBV in Swaziland and local response to combat the scourge: Critical Evaluation of Domestic Violence Bill</i>
14:30 - 14:45	Abigail Matsvai <i>Understanding the Dichotomy of common law rape, domestic violence and statutory rape: Critical analysis of Zimbabwe's legal response to sexual and gender-based violence</i>
14:45 - 15:00	Asha Ramlal <i>Effectiveness of South Africa's Domestic Violence Act in addressing SGBV</i>
15:00 - 15:45	<i>Discussion</i>
<b>Session 4</b>	<b>Domestic Mechanisms for fighting sexual and gender based violence</b>
Chair:	Nondumiso Simelane
16:00 - 16:15	Janita Mesu <i>Accountability for SGBV Cases: Effectiveness of Specialised Courts in the fight against SGBV</i>
16:15 - 16:30	Azubike Onuora-Oguno <i>Fighting SGBV in domestic courts: Nigeria's experience</i>
16:30 - 17:30	<i>Discussion</i>

<b>Friday 31 July 2015</b>	
<b>Session 5</b>	<b>Adjudicating sexual and gender based violence</b>
Chair:	Justice Mumcy Dlamini
9:00 - 9:15	Justice Lavender Makoni <i>The cautionary rule and corroboration in SGBV cases: Adequate protection of accused's right to fair trial?</i>
9:15 - 9:30	Justice Martha Koome <i>Ensuring fair trial in gender based violence cases involving girl children</i>
9:30 - 9:45	Justice Leona Theron <i>Sentencing in SGBV cases: Mandatory minimum sentences versus judicial independence and accused's right to a fair and proportionate sentence</i>
9:45 - 10:00	Justice Professor Lillian Tibatemwa-Ekirikubinza <i>Confronting sexual assaults and violent crime against women in Uganda: Gender and women's rights perspective</i>
10:00 - 10:15	Nondumiso Nsibande <i>Ensuring adequate remedies for SGBV victims: Need for a multi-sectoral approach</i>
10:15 - 11:00	<i>Discussion</i>
<b>Session 6</b>	<b>Closing</b>
Chair:	Lloyd Kuveya
11:15 - 12:15	Lloyd Kuveya and Briony Potts <i>Recommendations: Effective strategies for combating SGBV whilst observing right to fair trial</i>
12:15-12:30	Justice Qinisile Mabuza





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November 2015 (for an updated list, please visit [www.icj.org/commission](http://www.icj.org/commission))

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