

Sexual and Gender-Based Violence in Zimbabwe: Women Human Rights Defenders' Experiences and Legal Challenges

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EXECUTIVE SUMMARY

This report builds on the discussions held at a regional colloquium organized by the International Commission of Jurists (ICJ) in 2015 in Swaziland – as Eswatini was then known. Those discussions were outlined in an ICJ Reflection Paper titled, **“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”**.¹ This reflection paper highlighted the experiences and challenges faced by women human rights defenders (WHRDs)² when seeking legal remedies and access to justice in various Southern African countries, as well as the ways in which laws and justice institutions hampered or otherwise undermined their work and their ability to access justice .

The present report defines the term WHRDs as ‘women working in the defence of human rights, including but not limited to women’s rights’.

In light of the discussions outlined in the ICJ’s 2015 Reflection Paper, in 2019 the ICJ commissioned a study of the experiences of WHRDs in Zimbabwe based on the following research questions:

- a. Does the work of WHRDs increase their risk of being subjected to sexual and gender-based violence (SGBV)?
- b. What are the key legal challenges that WHRDs encounter when seeking redress for SGBV perpetrated against them due to or as a result of their work?

The findings of this study presented in this report confirm that WHRDs are at a heightened risk of SGBV in the course of and due to the nature of their work in defence of human rights. The risk is particularly heightened in the case of WHRDs who work on what may be considered as ‘politically sensitive cases or issues’. The threat of SGBV comes not only from male members of the communities within which WHRDs work, but also from State security officials, including the police, as well as from their own family members and, in some cases, the male HRDs with whom WHRDs work.

To a large extent, the legal hurdles faced by WHRDs when seeking redress for SGBV suffered in the course of or due to the nature of their work stem from gaps within the Zimbabwean legal framework on sexual offences. As this report discusses, these gaps arise from the moment SGBV complaints are reported and affect their investigation detrimentally; they also undermine procedural and evidentiary rules and the approach of judicial officers to sexual violence cases.

As such, the legal challenges WHRDs face in this context are not unique to them; however, WHRDs are more likely to bear the brunt of such hurdles due to the heightened risk of SGBV they face in the course of and/or because of the nature of their work in defence of human rights. In addition,

¹ Hereafter cited as the ICJ 2015 Reflection Paper, <https://www.icj.org/africa-sexual-and-gender-based-violence-fair-trial-rights-and-the-rights-of-victims/>

² The term ‘Women Human Rights Defenders’ in the 2015 Reflection paper was defined as, “both female and male human rights defenders, and any other human rights defenders who work in the defence of women’s rights or on gender issues”, which is the definition adopted by Margaret Sekaggya, the Special Rapporteur on the situation of human rights defenders in her report to the Human Rights Council, “Report of the Special Rapporteur on the situation of human rights defenders,” December 2010, Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/178/70/PDF/G1017870.pdf?OpenElement>.

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the present study found that, in cases where the WHRDs are involved in what may be considered as 'politically sensitive cases or situations', responsible officials display a general unwillingness to investigate and prosecute offences of SGBV committed against them.

The ICJ concludes by making recommendations to Parliament, the Police Service and the Judicial Service Commission. The recommendations include: amendments to the Criminal Procedure and Evidence Act [Chapter 9:07] and the Criminal Law (Codification and Reform) Act [Chapter 9:23]; development of a Police Code of Conduct based on international human rights standards on policing and made available to the public; continuous education for police and judicial officers on harmful gender stereotypes and human rights standards.

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1. RESEARCH STUDY METHODOLOGY

The findings in this report are based on 50 interviews with WHRDs from Harare, Bulawayo, Gweru, Masvingo and Mutare. The WHRDs who participated in the study were brought into the study through an open call made by various grassroots, regional and national civil society organisations on behalf of the ICJ. The interviews included women from various social, political, economic and ethnic backgrounds. Additionally, specific efforts were made to ensure diversity by including WHRDs with disabilities, WHRDs working and living in rural communities, WHRDs working with or part of sexual minorities.

The interviews with WHRDs were conducted through a combination of physical and telephonic interviews. In conducting the study, study participants were treated with sensitivity, respect and dignity in accordance with international human rights standards. Participants in this study were informed of the study's purpose; those conducting the interview underscored that participation in it was entirely voluntary, and that each participant had a right to discontinue the interview at any point. Due to the sensitivity of the study, the identities of participants have been withheld from publication in this report. Pseudonyms have instead been used for each detailed narration featured in this report.

The researchers also undertook a detailed desktop analysis and review of sexual and gender-based violence, including in particular SGBV offences, within the Zimbabwean legal framework, in light of regional and international human rights law and standards.

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2. INTRODUCTION

The Committee on the Elimination of Discrimination against Women (the CEDAW Committee) defines gender-based violence as “violence which is directed against a woman because she is a woman or that affects women disproportionately”, adding that it constitutes a violation of women’s human rights.³ In government policy, Zimbabwe adopts the same definition.⁴ In its General recommendation 19, the CEDAW Committee explained that gender-based violence “includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.”⁵ The definition of gender-based violence adopted by the CEDAW Committee reflects the power dynamics and disparities that arise from social, cultural and religious practices presenting women as inferior to men. It is a form of discrimination against women and thus is a violation of the human rights of women.

In Zimbabwe, the Criminal Law (Codification and Reform) Act [Chapter 9:23] (Criminal Code) and the Criminal Procedure and Evidence Act [Chapter 9:07] (CPEA) are the main legal tools available in combatting SGBV. However, as highlighted by WHRDs interviewed for this report (see below in Chapter 3) there are challenges arising from some of the provisions in these Acts and in how they are interpreted by the courts (see below in Chapter 4) that hinder access to justice and effective remedies for WHRDs who are subject to SGBV due to or in the course of their work in defence of women’s human rights.

The situation of WHRDs has received specific attention at the UN level, particularly through the work of the Special Rapporteur (SR) on the situation of Human Rights Defenders (HRDs). The SR on the situation of HRDs has noted that gender discriminatory social, cultural and religious practices have a distinct impact on female WHRDs.⁶ In a 2019 report the SR on HRDs expressed concern over increasing attacks against WHRDs and noted that the misogynistic, sexist and homophobic rhetoric of political leaders contributed to the increase in attacks against WHRDs.⁷ In light of this, the SR on the HRDs called on “the international community to recognize the specific issues, challenges and risks that women defenders face in diverse circumstances and to ensure that such defenders are recognized and supported and enabled to participate equally, meaningfully and powerfully in the promotion and protection of human rights”.⁸

³ General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, Paragraph 2.

⁴ Ministry of Women Affairs, Gender and Community Development, “Zimbabwe National Gender-based Violence Strategy 2012-2015”, Available at: http://www.veritaszim.net/sites/veritas_d/files/Zimbabwe%20National%20Gender%20Based%20Violence%20Strategy%202012%20-%202015.pdf

⁵ CEDAW, General Recommendation No. 19: Violence against Women, UN Doc. A/47/38 1992 para 6. See also CEDAW Committee, General Recommendation No. 35: Gender-based violence against women, updating General Recommendation No. 19, CEDAW/C/GC/35 (2017).

⁶ “Report of the Special Rapporteur on the situation of human rights defenders”, para. 6 December 2010, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/178/70/PDF/G1017870.pdf?OpenElement>,

⁷ Human Rights Council, “Situation of Women Human Rights Defenders: Report of the Special Rapporteur on the Situation of Human Rights Defenders”, January 2019; Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/004/97/PDF/G1900497.pdf?OpenElement>

⁸ Ibid, para7

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Zimbabwe does not have any laws or policies that specifically address WHRDs. However, protection for WHRDs and their work in defending women's human rights may be found in provisions on women's rights. Section 80 of Zimbabwe's Constitution, for example, proclaims the equality of men and women and denounces laws, customs, traditions and religions that infringe on the rights that the Constitution confers on women by declaring them void to the extent of their infringing on women's rights. In addition, in certain cases, the Domestic Violence Act [Chapter 5:16] has been a useful tool enabling access to justice and redress for WHRDs facing violence in their homes due to their work in the defence of women's human rights.

At an international and regional level Zimbabwe is a party to the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the African Charter on Human and People's Rights (ACHPR); the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol); the African Charter on Rights and Welfare of the Child (ACRWC) and the Southern Africa Development Community Protocol on Gender and Development among other regional and international instruments that are relevant to gender equality and non-discrimination. In light of the above, therefore, Zimbabwe has certain due diligence obligations under international human rights law to prevent, investigate, prosecute and provide access to justice and effective remedies for SGBV-related violations of women's human rights.⁹ In practice, this means:

1. The *obligation* to prevent SGBV means that Zimbabwe must "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices, customs and all other practices which are based on the idea of the inferiority or the superiority of the sexes or on stereotyped roles for men and women."¹⁰ In 2011, the Special Rapporteur on violence against women, its causes and consequences developed criteria for determining whether a State has complied with the obligation to prevent violence against women. She affirmed that "the most common first step to prevent acts of violence against women is the enactment of legislation."¹¹ Enacting legislation, however, is not enough. According to the CEDAW Committee in the case of *Vertido v. Philippines*, the State must "take appropriate measures to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women."¹²
2. The *second due diligence obligation* is to properly and effectively investigate crimes involving violence against women. This means that Zimbabwe must ensure that SGBV crimes are

⁹ Committee on the Elimination of Discrimination against Women, General Recommendation 19 (11th Session, 1992), Declaration on the Elimination of Violence Against Women, Art. 4 (UN Doc. A/RES/48/104, 20 December 1993).

¹⁰ Article 5(a) of the CEDAW

¹¹ Report of the UN Special Rapporteur on Violence Against Women, its Causes and Consequences, UN Doc. E/CN.4/1999/68 (10 March 1999), para. 25.

¹² *Vertido v. Philippines*, CEDAW Committee, UN Doc. CEDAW/C/46/D/18/2008 (1 September 2010), para. 8.4.

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investigated, and these investigations must be done “without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings.”¹³

The *third obligation* is to fairly and effectively prosecute the perpetrators of SGBV crimes. According to the Special Rapporteur on Violence Against Women, one criterion that may be used to determine whether or not a State has fulfilled this obligation is to examine the number of SGBV cases prosecuted and the types of judgments handed down in these cases.¹⁴ Prosecuting SGBV cases is very important because “low levels of prosecution of crimes against women reinforce the belief among victims that there is no systematic and guaranteed judicial response to violence against women and that there might be no punishment for their abusers.”¹⁵

Fulfilment of these obligations would allow all victims of SGBV, including WHRDs, to access justice and effective remedies to a greater extent than it is the case today in Zimbabwe.

¹³ Council of Europe’s Convention on Preventing and Combating Violence Against Women and Domestic Violence, Chapter VI, Art. 49.

¹⁴ See 1999 SR Report (note 21), para. 25.

¹⁵ 1999 SR Report, para. 63.

3. FINDINGS FROM INTERVIEWS

This section presents the findings from the interviews held with various WHRDs across the country. **The issues, allegations, reports and views presented in this chapter are solely those of the participants in the study.**

Participants in the study explained that sexual harassment is rampant within human rights movements of which WHRDs are members and in organisations where WHRDs work. Some interviewees explained that when there are political disturbances, such as massive protests, security officers often target well known women activists' homes, and that WHRDs go into hiding preemptively to avoid being found. In some cases, the hideouts where WHRDs found refuge also harbor male HRDs. In these 'safe' spaces, however, WHRDs have reported being sometimes subjected to sexual harassment and other forms of SGBV by their male colleagues. Few if any among the WHRDs choose to call SGBV out within the HRDs community, as to do so would be viewed as a betrayal of "the cause" or an attempt to tarnish the "good work" of the relevant organisation(s). In addition, "stepping out" of organisations/institutions or movements to which WHRDs are members to seek redress, would result in their ostracization from the said organisations/institutions/movements. As a result, SGBV against WHRDs within HRDs circles continues unabated.

Another finding that emerged from the study is that WHRDs are often perceived to be "indecent and licentious" women. A "decent woman" is expected to be unassuming and not come into the limelight or public space with an outspoken approach. As a result, WHRDs who do not conform to this stereotype face reprisal

"I am a grassroots political activist. I was arrested during the 14 January 2019 protests; accordingly, I am still facing a number of charges. My relatives did not take this kindly, thus my husband and his brothers were tasked by the family to talk to me and accordingly 'discipline me'. I tried explaining to these family members how these charges were meant to dissuade me from being an activist. I was viewed as a disgrace and posing security risk to the whole family and was accordingly 'disciplined'". **(Report by Tanyaradzwa)**

in connection with their activities as WHRDs, including ridiculing, name calling, labelling, questioning of morals and marital status. Unmarried WHRDs are sometimes labelled "loose" and "failed women", while married WHRDs and/or those with children are viewed as "bad mothers and/or wives". In some cases, WHRDs reported that they not only find themselves isolated by their families but also physically and verbally abused by their husbands and in-laws for engaging in activities that are viewed as bringing 'shame' to the family.

The existence of gender stereotypes around rape within families has also had a negative impact on the ability of WHRDs to seek redress where they suffer sexual abuse during the course of or because of their work. Forty per cent of the participants who reported being sexually abused by State agents during raids on HRDs stated that they had never formally complained or sought help because their partners/husbands had threatened to divorce them if they did. Moreover, some interviewees reported that they had never shared their sexual abuse experiences with anyone because they feared

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being blamed or viewed as having invited the sexual abuse because of their participation in HRD work.¹⁶

Participants who attempted to seek justice having suffered SGBV in the course of their work reported

that **questions from the police seemed accusatory and intended to shame and blame them for "putting themselves in a position resulting in abuse"**.

The police attitude deterred most victims from pursuing their cases. Moreover, some of the WHRDs involved in political activism who

"I am a political activist and a human rights defender as I always champion for free and fair elections. During the national protests of 14 January 2019 I was arrested in Mabvuku and brought before courts facing charges of public violence, arson and many other offences. Whenever there are protests or demonstrations, known activists are usually targeted for arrests.

During Initial remand stage the Magistrate made remarks to the effect that it was uncivil and uncultured for women to be running in the streets burning tyres alongside men instead of looking after children at home.

As the trial commenced, we would be made to stand in the dock together with men and it was physically uncomfortable because there was inadequate space. Using the prison truck to and from court, we would all be bundled in the prison vehicles together with male accused persons. At times the male accused persons used the opportunity to sit too close and 'grope' the female accused persons. The prison wardens would continuously use abusive language, addressing us as prostitutes". **(Report by Farisai)**

reported SGBV incidents that had occurred during the course of their work to the police stated that the **police made crude comments and openly admitted that they did not want to investigate reports against their own superiors and against politically connected people.**

WHRDs interviewed reported various incidents of what can be described as **'judicial stereotyping'**, namely, the practice of judges ascribing to an individual specific attributes, characteristics or roles by reason only of her or his membership in a social group, gender, for example. WHRDs interviewed explained that, when they reported instances of

"At the commencement of trial proceedings following our arrest during protests that occurred in January 2019, we raised several complaints of sexual harassment, verbal abuse or sexual violence by some police officers while in custody. We complained because while in custody and during transportation the male officers would fondle our breasts, backsides, make sexually charged remarks about our bodies. The Magistrate would always say *"The court has taken note of the complaints against police and investigations shall be carried out, the outcome of the investigations shall be availed in due course"*. The trial ended and we were acquitted but nothing was done about the complaints we raised". **(Report by Linda)**

sexual assault that they had suffered at the hands of prison officers while in detention to the magistrate at the initial remand stage, no one ever followed up on their complaints.

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The participants also raised concerns over the manner of questioning at trial. It was reported that the magistrate appeared **to have prioritized failure to report the SGBV incidents early** without much regard for the reasons for the delay. In cases involving sexual violence, any real or perceived delay in reporting the matter or any deviation from what is perceived to be the 'ideal victim's reaction and persona' is taken as an indication that complainant's SGBV accusations are 'mere' fabrications.

The participants who reported having sought redress by complaining formally through the justice system channels expressed regret for having put themselves through the process in the first place because they felt the investigations and trial **were not conducted with due regard for their right to privacy and dignity.**

These concerns over the criminal justice system were echoed by WHRDs working in the legal profession. They reported that **there is a general tendency by police and judicial officers to treat victims of SGBV with suspicion despite protections against such treatment within the law.**

WHRDs working in the legal profession also noted that when handling human rights cases, they are often identified with the cause of their clients and face sexual harassment by police and sometimes at the hands of their male colleagues. Visiting clients detained in police cells and detention centers as a female lawyer was described as a sometimes daunting task as custody officers deliberately use crude and sexual language in an effort to

"I represented a male political activist and I was labelled and called names like prostitute, slut, etc. because of the professional services I offered to my client. I got accused of being his mistress. It was *splashed all over local tabloids*".
(Report by Prisca)

make female lawyers uncomfortable. It was highlighted that some of the abusive language included remarks about the lawyers' body and how they had the "perfect body type to pleasure the men sexually". However, many women lawyers explained that the fear of damaging their reputation and appearing weak prevents them from making any formal complaints about those incidents. Instead, most lawyers interviewed reported that they had long accepted sexual harassment as part of the job.

The study confirmed the assertion by participants of the 2015 Regional Colloquium¹⁷ that WHRDs are at a greater risk of SGBV in the course of and as a result of their work. However, the forms of SGBV are not peculiar to WHRDs and the legal challenges they face, though sometimes heightened in politically sensitive matters, are not unique to WHRDs.

¹⁷ Ibid 1.

4. KEY LEGAL CHALLENGES TO ACCESSING JUSTICE IN SGBV CASES

Introduction

Chapter two recalls that Zimbabwe, as a party to a number of international human rights treaties, has certain, binding due diligence obligations under international human rights law to prevent, investigate, prosecute and provide access to justice and effective remedies for SGBV-related human rights violations.¹⁸ The findings from, among others, the in-depth interviews with 50 WHRDs highlighted in Chapter three point to significant legal challenges affecting the ability of WHRDs who experience SGBV in the course of and because of their work to access justice and effective remedies. The findings point to legal challenges in the three main areas:

- (i) reporting and investigations;
- (ii) evidentiary rules; and
- (iii) judicial approaches to SGBV cases.

4.1 REPORTING AND INVESTIGATIONS

Reporting and investigation of all criminal cases, including SGBV offences, is the sole purview of the police. The Zimbabwe Republic Police is established pursuant to section 219 (1) of the Constitution which provides that: - *“There is a Police Service which is responsible for*

- (a) Detecting, investigating and preventing crime;*
- (b) Preserving the internal security of Zimbabwe;*
- (c) Protecting and securing the lives and property of the people;*
- (d) Maintaining law and order; and*
- (e) Upholding this Constitution and enforcing the law without fear or favor.”*

The Police Act [Chapter11:10] establishes the organisational structure of the Police Service. The obligation to uphold and enforce the Constitution in enforcing the law under section 219 of the Constitution when read with section 44 of the same which obligates all institutions, public and private, as well as all persons to respect and promote the fundamental rights as provided for in the Constitution, means that the conduct of the police must respect the Bill of Rights and the Constitution. In practice, in turn, this entails the adoption of a Police ‘Code of Conduct’. Unfortunately, no such Code of Conduct exists in Zimbabwe.¹⁹ The closest existing document to a Code of Conduct is what is referred to as “The Police Client Service Charter²⁰”(PCSC). The PSCS broadly outlines the vision, mission and values of the different departments of the Police Service. The only reference to the rights of the clients is in paragraph 9 which states that:

“Every client has a right to enter the police station or public enquiry counter (PEC) and make a report if he/she feels his/her rights have been infringed by some other person;

¹⁸ Committee on the Elimination of Discrimination against Women, General Recommendation 19 (11th Session, 1992), Declaration on the Elimination of Violence Against Women, Art. 4 (UN Doc. A/RES/48/104, 20 December 1993).

¹⁹ Zimbabwe Legal Information Institute, “The Police and Their Powers”, Available at; <https://zimlii.org/content/3-police-and-their-powers>

²⁰Zimbabwe Republic Police, “ Police Client Service Charter”, Available at; http://www.zrp.gov.zw/index.php?option=com_phocadownload&view=category&id=2:police-client-service-charter&Itemid=768

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Right to have his/her report recorded by police and be given a reference number;
Right to follow up on the position of reported cases and be given sufficient explanation by the police;
Right to seek recourse when not satisfied with the service rendered by police officers;
Right to carry out an arrest of any individual for the commission of crimes as empowered by Sections 27 – 31A of the Criminal Procedure and Evidence Act Chapter 9:07.”

The challenges highlighted in Chapter 3 related to reporting and investigation arise mainly because of the attitude of the police towards SGBV cases in general and those involving WHRDs in particular. Additionally, the WHRDs expressed concern about a lack of independence in how the police treat WHRDs involved in political activism. The above PCSC ‘client rights’ are inadequate as they do not fully embody international human rights standards binding on Zimbabwe which require that investigations in SGBV cases be prompt, independent impartial, thorough, effective and capable of leading to identification and prosecution of those responsible²¹.

I. 4.1.2. Gender Stereotypes in Reporting and Investigation of SGBV

The CEDAW Committee in its General recommendation 33 has interpreted the treaty obligation of equality between men and women to include an obligation on the State to ensure that women have access to a justice system “free from myths and stereotypes...”²² Among the findings that emerged as a result of the 50 interviews conducted in the course of the present study, Chapter 3 outlined with concern the prevailing myths and harmful gender stereotypes about the ‘role of women’ in society, as well as the detrimental impact that these in turn have on WHRDs who are victims of SGBV in the course of and/or because of their work. For example, WHRDs have been subjected to insensitive questioning and, sometimes, have denied services when seeking redress for the harm suffered as a result of SGBV. Such instances are clearly contrary to the CEDAW Committee’s recommendation that States must, “take effective measures to protect women against secondary victimization in their interactions with law enforcement and judicial authorities”.²³

“A victim-centered approach to SGBV”

“For SGBV victims/survivors, the pursuit of justice can prove a traumatic endeavor, potentially exposing them to further human rights violations and abuses that will ultimately compound the pain and suffering they have already experienced. This is commonly referred to as “secondary victimization.” According to the UN General Assembly (UNGA), secondary victimization occurs not as a direct result of the criminal act, but through the inadequate response of institutions and individuals to the victim/survivor²⁴. For example, interviewing victims/survivors several times or

²¹ International Commission of Jurists, “Sexual Violence Against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Law and practice”, April 2015, p.6. Available at: <https://www.ici.org/wp-content/uploads/2015/04/Universal-GenderStereotypes-Publications-Thematic-report-2015-ENG.pdf>

²² CEDAW Committee, *General Recommendation No. 33*, para. 28

²³ *Ibid*, para 51

²⁴ UNGA, *Resolution on strengthening crime prevention and criminal justice responses to violence against women*, 2011, para. 15(c).

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obliging them to relay and recount their statement repeatedly during the same investigation, can greatly contribute to their secondary victimization and should be avoided. Ineffective criminal justice responses can bring about the victimization of victims/survivors, which, as a result, may induce them into abandoning the criminal process altogether²⁵. Successfully prosecuting SGBV is therefore especially contingent upon the way in which victims/ survivors are received by 1st responders. For this reason, integrating a victim-centered approach that minimizes the chances of secondary victimization at the stage of investigation, which is victims'/survivors' entry point to the criminal justice process, is vital. States are strongly encouraged to design and develop comprehensive systems that ensure supportive and sensitive responses throughout the investigation of SGBV incidents which could, in turn, "increase the likelihood of successful apprehension, prosecution and conviction of the offender, contribute to the well-being and safety of the victim and prevent secondary victimization".²⁶

While Zimbabwe has established Victim Friendly Services (VFS) which are comprised of Victim Friendly Units (VFU) within the Police Service as well as Victim Friendly Courts²⁷, the VFS are limited to assisting women and girls who are victims of sexual offences.²⁸ As a result, WHRDs who are subjected to acts of gender-based violence not of a sexual nature are not entitled to assistance from VFS; therefore, they are left to their own devices in a context in which the ordinary system has not prioritized any particular sensitivity in the manner in which it deals with victims of gender-based violence. Additionally, there are only 22 Victim Friendly Courts in Zimbabwe that are found at the regional level. Such a number is inadequate given that there are Zimbabwe has a population of approximately 14 million this gives an average of 636 000 people per court²⁹.

Furthermore, while the VFS mechanisms have the potential to greatly improve access to justice in sexual offences cases, they have significant gaps and inconsistencies in their overall set up and are generally poorly resourced resulting in complaints that they are ineffective.³⁰ Indeed, they are understaffed with poorly trained officials and this in some cases means victims do not get the comprehensive services that they need, that is, sensitivity during reporting, counselling etc.

4.1.3 Lack of Independence: Politically Sensitive Cases

WHRDs interviewed for this report indicated that when they are subjected to SGBV in the course of

²⁵ UNGA, *Resolution on strengthening crime prevention and criminal justice responses to violence against women*, 2011, para. 15(c).

²⁶ International Commission of Jurists, "Accountability for Sexual and Gender-Based Violence in Lebanon Guidance and Recommendations for Criminal Justice Actors", October 2020, p.32. Available at; <https://www.icj.org/lebanon-ensure-accountability-for-gender-based-violence-icj-new-report/>

²⁷ For the Victim Friendly Unit in the Police Service, see; http://www.zrp.gov.zw/index.php?option=com_content&view=article&id=86&Itemid=766; For Victim Friendly Courts, see; <https://www.chronicle.co.zw/22-victim-friendly-courts-set-up/>

²⁸ Zimbabwe Police Service, "Victim Friendly Unit", Available at; http://www.zrp.gov.zw/index.php?option=com_content&view=article&id=86&Itemid=741

²⁹ Zimbabwe National Statistics Agency, "Inter-Censal Demographic Survey 2017", Available at; http://www.zimstat.co.zw/wp-content/uploads/publications/Population/population/ICDS_2017.pdf

³⁰ Anthony Shuko Musiwa, "How Has the Presence of Zimbabwe's Victim-Friendly Court and Relevant Child Protection Policy and Legal Frameworks Affected the Management of Interfamilial Child Sexual Abuse in Zimbabwe? The Case of Marondera District", *Journal of Interpersonal Violence*, Available at; <https://journals.sagepub.com/doi/abs/10.1177/0886260517752154?journalCode=jiva>

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or as a result of their involvement in what may be considered “politically sensitive” activities, such as political protests against the government, the police are generally unwilling to open a case or conduct an investigation despite WHRDs’ complaints of SGBV. Such unwillingness gives rise to concern about the police’s lack of independence from the authorities. In addition, the police’s refusal to investigate WHRDs’ SGBV complaints and give effective assistance to WHRDs working on political issues goes against the constitutional obligation of the police service to uphold the Constitution and the law “without fear or favor”.³¹ Furthermore, it is contrary to policing standards enshrined in various international human rights instruments as captured by the United Nations “International Human Rights Standards for Law Enforcement: A Pocket Hand Book for the Police”.³² The UN International Code of Conduct for Public Officials (Code of Conduct for Public Officials) states that public officials have a duty to act in the public interest.³³ Para 2 of the Code of Conduct for Public Officials makes it clear that performing duties in the public interest entails, among other things, refraining from actions that “improperly discriminate against any group or individual, or otherwise abuse the power and authority vested in them”.³⁴ There is an urgent need for these standards -- as well as the obligation enshrined in section 219 of the Constitution (i.e., to uphold and enforce the Constitution in enforcing the law) -- to find expression in a legally binding instrument detailing the expected conduct of the police. A comprehensive legally binding Code of Conduct that captures Zimbabwe’s obligations under international human rights treaties would allow the police to be better placed to handle SGBV cases with the seriousness, independence and sensitivity that they require. This would protect the human rights of all women who experience SGBV, including WHRDs.

4.2 EVIDENTIARY RULES

4.2.1 Character Evidence

Section 260 of the CPEA³⁵ protects the rights of women complainants in certain criminal cases concerning SGBV charges (i.e., “any rape or assault with intent to commit a rape or indecent assault”) by providing that, as a general rule, no evidence as to their character be admissible.³⁶ This is in line with the constitutional imperatives on equal protection of the law. However, bias and harmful gender stereotypes based on cultural, religious and other beliefs have been reported to make their way into the adjudication of SGBV cases, particularly at the lower courts, that is, the

³¹ Section 219 (1) (e) of the Constitution of Zimbabwe

³² United Nations High Commissioner for Human Rights Centre for Human Rights, “International Human Rights Standards for Law Enforcement: A Pocket Hand Book for the Police”, Available at; <https://www.ohchr.org/documents/publications/training5add1en.pdf>

³³ United Nations General Assembly Resolution (A/51/61), Actions Against Corruption, Annexure: “International Code of Conduct for Public Officials”, Available at; <https://undocs.org/pdf?symbol=en/A/RES/51/59>

³⁴ Ibid, para 2.

³⁵ Chapter 9:07. Specifically, section 260 reads as follows “260 Evidence of character — when admissible

Except as is provided in section two hundred and ninety, no evidence as to the character of the accused or as to the character of any woman on whose person any rape or assault with intent to commit a rape or indecent assault is alleged to have been committed shall, in any such case, be admissible or inadmissible if such evidence would be inadmissible or admissible- in any similar case depending in the Supreme Court of Judicature of England.”

³⁶ Except as is provided in section two hundred and ninety, no evidence as to the character of the accused or as to the character of any woman on whose person any rape or assault with intent to commit a rape or indecent assault is alleged to have been committed shall, in any such case, be admissible or inadmissible if such evidence would be inadmissible or admissible in any similar case depending in the Supreme Court of Judicature of England

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Magistrates' Courts. Indeed, WHRDs interviewed for this report recounted various incidents where the presiding Magistrate made statements about their character in court that they believe influenced the outcome of the cases.

Instances where section 260 of the CPEA is contravened go largely unreported because the Zimbabwe Magistrates' Court does not keep a published record of cases it hears and decides upon. Any information on any case may only be found in the actual file, which can be accessed through the clerk's office. However, this, in turn, requires knowledge of the name of the case and file number.³⁷ As a result, the extent to which contraventions of section 260 of the CPEA occur remains unknown and the problem unaddressed.

4.2.2 Prompt Complaint Requirement

Under Zimbabwean common law, the promptness or otherwise of a victim lodging a complaint may be considered by a court in adjudicating over sexual offenses cases. The common law position as set out in *S v Banana*³⁸ is as follows;

*"Evidence that a complainant in an alleged sexual offence made a complaint soon after the occurrence, and the terms of that complaint, are admissible to show the consistency of the complainant's evidence and the absence of consent. The complaint serves to rebut any suspicion that the complainant has fabricated the allegations.... It must have been made without undue delay and at the earliest opportunity in all the circumstances, to the first person to whom the complainant could reasonably be expected to make it".*³⁹

This approach of giving relevance to length of delay in reporting sexual offences has been followed in many subsequent cases including the case of *S v Madombwe*,⁴⁰ where the purported "lack of spontaneity in the complainant's report" led to the acquittal of the accused person. The drawing of adverse inferences based on the length of delay between the alleged commission of the offence and the lodging of complaint is inconsistent with the provisions on equality and equal protection of the law in the Constitution and in international human rights law and standards, and with the right of access to justice and effective remedies. The CEDAW Committee has explained that equality and non-discrimination provisions entail a duty to "not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence"⁴¹. The ICJ has noted in its publication "Sexual Violence Against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Law and practice" that legal requirements of prompt complaints in

³⁷ Magistrates Court Act [Chapter11:10], section 5(2)(b)

³⁸ *S v Banana* 2000 (1) ZLR 607 (S) at 616 A – C

³⁹ *Ibid*, See also *R v C* 1955 (4) SA 40 (W) at 40 G – H; *S v Makanyanga* supra at 242 G – 243 C [1996 (2) 2LR 231 (H)

⁴⁰ *S v Madombwe* (HH 45-2002) [2002] ZWHHC 45

⁴¹ *Vertido v. The Philippines*, CEDAW Communication No. 18/2008, Views of 16 July 2010, UN Doc. CEDAW/C/46/D/18/2008, Para. 8.4

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SGBV cases, “embody the belief that “real” victims of sexual violence will report the violence quickly and give legal form to inaccurate and impermissible assumptions as to what is to be “expected from a rational and ideal victim,” or what is considered “to be the rational and ideal response of a woman in a rape situation. These beliefs are incorrect. There is no evidence that delayed reports of sexual violence are less truthful. In fact, statistics indicate that most crimes of sexual violence are never reported at all”.⁴² The ICJ observes that there are three main routes that States have taken in addressing the discriminatory nature of “prompt complaint” requirements in SGBV cases. Some States, such as Lesotho, include provisions specifically prohibiting drawing of any adverse inferences by the court from the length of the delay from the alleged commission of the sexual offence and the lodging of a complaint about the said offence.⁴³ New Zealand’s 2006 Evidence Act states that if any evidence, comment, or question at trial suggests that there may have been a delay in reporting the crime, “the Judge may tell the jury that there can be good reasons for the victim of an offence of that kind to delay making or fail to make a complaint in respect of the offence”.⁴⁴ Other jurisdictions require that judges must both warn juries that a delay is not relevant to the credibility of complainant and inform the jury that there are good reasons why a complainant may delay.⁴⁵

4.2.3 Cautionary Rule and Corroboration

The cautionary rule is a now outdated rule of legal practice that enjoins judicial officers to generally treat the evidence of complainants of sexual violence with suspicion. Closely linked to this rule is the requirement for corroboration, which requires that a court should not convict an accused person in a sexual offense case solely on the evidence of a single witness. In Zimbabwe the requirement for corroboration has since been removed through section 269 of the CPEA⁴⁶ and the cautionary rule was removed in the case of *S v Banana*.⁴⁷

Despite the removal of these requirements in sexual offences cases, the idea that the complainant’s evidence in those cases should be treated with a measure of suspicion not warranted in other crimes remains prevalent in practice as highlighted by WHRDs interviewed for this study. Their concern appears to be corroborated by the dicta of the court in cases such as *Mushore v State*, where the court stated that the evidence of children in rape cases needs to be treated with caution.⁴⁸ In its study entitled “Sexual Violence Against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Law and practice”, the ICJ has highlighted with concern the continued practice of exercising additional “caution” with respect to complainant’s evidence in SGBV cases. As the ICJ noted in that study “In some jurisdictions, this rule [the cautionary rule] may also derive from another false assumption: that in sexual assault crimes judges and jurors may be inclined to convict

⁴² Ibid 21, pg. 6

⁴³ Sexual Offences Act 2003 § 20 (Lesotho).

⁴⁴ Evidence Act 2006 § 127 (New Zealand).

⁴⁵ Sexual Offences Act Cap. 154 1992 § 29 (Barbados); Criminal Procedure Act 1986 § 294 (New South Wales, Australia).

⁴⁶ Section 269 Criminal Procedure and Evidence Act [Chapter 9:07] states that, “It shall be lawful for the court by which any person prosecuted for any offence is tried to convict such person of any offence alleged against him in the indictment, summons or charge under trial on the single evidence of any competent and credible witness”.

⁴⁷ Ibid, 37

⁴⁸ *S v. Mushore* (2011) HH 181-11.

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on too little evidence. In such scenarios, the warning is intended to remind the court and jurors to be skeptical. However, once again, studies show that this is a mistaken belief; in fact, courts and jurors often go out of their way to excuse the defendant's behavior. Thus cautionary instructions further entrench pejorative beliefs that women alleging sexual assault are unreliable and untrustworthy".⁴⁹

The continued practice of the cautionary rule by the courts in Zimbabwe brings forward the need for education and training of judicial officers.

4.3 JUDICIAL APPROACHES TO SGBV CASES

Bias and stereotyping by judicial officers go against constitutional and international human rights law and standards on equality and may result in denial of justice and effective remedies for WHRDs who are complainants in SGBV criminal cases. As highlighted above, the CEDAW Committee has emphasized the need to ensure that domestic institutions tasked with protecting the human rights of women are free from myths and stereotypes.⁵⁰ For example, in its General recommendation 35 the CEDAW Committee has noted that, "the application of preconceived and stereotyped notions of what constitutes gender-based violence against women, what women's responses to such violence should be and the standard of proof required to substantiate its occurrence can affect women's right to the enjoyment of equality before the law, fair trial and the right to an effective remedy established in articles 2 and 15 of the Convention".⁵¹ The State has an obligation to ensure that "all legal procedures in cases involving allegations of gender-based violence against women are impartial and fair, and unaffected by gender stereotypes or discriminatory interpretation of legal provisions, including international law"⁵².

In the interviews conducted for this report, interviewees identified the conduct of judicial officers as being one of the major deterrents to access to justice in SGBV cases. Key legal areas highlighted by participants relate to failure by judicial officers to investigate complaints against police and prison officers made at the commencement of a trial and the failure by judicial officers to comprehensively consider the surrounding circumstances in sexual offences cases.

4.3.1 Investigations of SGBV Complaints During Criminal Trials

In fulfilment of section 50 of the Constitution on the rights of arrested and detained persons, it is the practice in the Magistrates court for the Magistrate to ask the accused person if they have any complaints against the police or prison officers in terms of the treatment received during arrest and/or detention. Where an accused person registers a complaint for which he/she is entitled to a legal remedy the Magistrate advises the accused person of their rights in relation to the complaint. While this is a commendable practice that gives an accused person knowledge of their rights, it is

⁴⁹ Ibid, 41

⁵⁰ Ibid, 22

⁵¹ Committee on the Elimination of All Forms of Discrimination Against Women, "General Comment No.35 on Gender-based Violence Against Women, Updating General Recommendation No.19", CEDAW/C/GC/35, July 2017. Available at; https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf

⁵² Ibid, para.26(c)

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ineffective and in most cases useless because it is not followed up by any mechanism to either assist the accused person to pursue legal remedies for the violations complained of or bring the complaint before the responsible body e.g. the police so that the perpetrators are held accountable. The lack of a robust mechanism to achieve the full protection of the rights of an accused person who makes a complaint against the police or prison services through this enquiry means there is impunity for known abuse of accused persons. As such, the registering of a complaint leaves the accused person open to persecution for making the report. This is a very problematic situation for WHRDs who in the course of or because of their work find themselves arrested and experience SGBV during the arrest and/or detention. As highlighted by WHRDs interviewed, the general expectation is for the court having made the enquiry to at least present it to relevant authorities for further investigations and not rely solely on the accused who has already faced abuse from public officials to take action against the same public officials. There is a need for the Judicial Service Commission to engage Parliament to expedite the establishment of an independent complaints mechanism which 'allows the public to bring complaints about misconduct on the part of security services and for remedying harm caused by such misconduct', as envisaged by section 210 of the Constitution⁵³.

4.3.2 Consent and Sexual Offences Cases

SGBV offences are set out in the Criminal Code of Zimbabwe under Chapter V: Part III.

As highlighted above, there is concern about the approach of some judges, in particular in the Magistrates' court, to adjudicating sexual offenses as a result of bias and harmful gender stereotypes. In the case of WHRDs who face sexual violence during the course of and/or because of their work, harmful gender stereotypes and myths associated with women who participate in public affairs may lead to aspersions being cast on their character and to judges' unwarranted cautiousness and skepticism with respect to their evidence. WHRDs interviewed noted that there is a general perception that were a woman, more so a WHRD, reports a rape, it is just "a false cry by a loose woman jilted by her lover".⁵⁴ This stance is especially taken where the victim's response during or after the unlawful conduct does not fit the stereotype of the "ideal victim's reaction".

Unfortunately, the criminal law in Zimbabwe on consent is severely restricted in scope such that it does not fully give expression to what consent is. As a result, victims of sexual offences find themselves unable to access justice or are denied justice and effective remedies because the law fails to account for all situations where consent is impossible and judicial officers fail to take full account of circumstances that may vitiate consent, such as the coercive context in which the offending may have taken place.

Section 69 of the Criminal Code provides that a person shall not be deemed to have given consent to sexual intercourse in various circumstances. The relevant circumstances are defined as follows:

⁵³ Section 210 of the Constitution provides that;

"Act of Parliament must provide for an effective and independent mechanism for receiving and investigating complaints from members of the public about misconduct on the part of members of security services, and for remedying any harm caused by such misconduct"

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“where the person charged with the crime--

- (a) uses violence or threats of violence or intimidation or unlawful pressure to induce the other person to submit; or
- (b) by means of a fraudulent misrepresentation induces the other person to believe that something other than sexual intercourse or an indecent act, as the case may be, is taking place; or
- (c) induces the other person to have sexual intercourse or to submit to the performance of the indecent act, as the case may be, by impersonating that other person’s spouse, or lover; or
- (d) has sexual intercourse or performs an indecent act upon the other person while that other person is asleep, and that other person has not consented to the sexual intercourse or the performance of the act before falling asleep; or
- (e) has sexual intercourse or performs an indecent act upon the other person while that other person is hypnotized or intoxicated from the consumption of drugs or alcohol so as to be incapable of giving consent to the sexual intercourse or the performance of the act, and that other person has not consented to the sexual intercourse or the performance of the act before becoming so hypnotized or intoxicated.”

Some of these factors may place undue pressure on the survivor to conform to myths and stereotypes about the “ideal” survivor, including whether violence was used and how they resisted.⁵⁵

Underlying section 69 is the presumption that force persists as a key element of the crime of rape. In Zimbabwe the analysis of coercive circumstances by the courts has not been applied uniformly or as a matter of legally expected practice. In some cases, judges have focused on coercive circumstances to infer lack of consent. For example, in the case of *S v Chiguma*⁵⁶ the appeals court ruled that “the previous concession to sexual intercourse by a complainant cannot be said to have been given for future un contemplated violation”. In the *Chiguma* case, the complainant and appellant were formerly married but had since separated. When the complainant visited appellant’s house to collect a debt owed to her, the appellant raped her. The appellant argued that the complainant had given consent for the sexual encounter. The court was satisfied that the complainant did not consent to the sexual act, and she expressed this through body conduct, verbally and by reporting the rape to the police and family members.

Unfortunately, there have been several cases decided by courts where a coercive environment was not taken into account, including social and economic circumstances that are exacerbated by gendered expectations. In *S v Mugomba*,⁵⁷ the complainant, a house maid accused her employer’s husband of raping her and the court did not take into account the power dynamics between the victim and the perpetrator in adjudicating the case.

⁵⁵ Dowds E, (2018) “Conceptualizing the role of consent in the definition of rape at the international criminal court: a norm transfer perspective”, *International Feminist Journal of Politics*, 20:4, 624-643, p 629. Available at: <https://doi.org/10.1080/14616742.2018.1447311> (Accessed 20 March 2020)

⁵⁶ *S v Chiguma*⁵⁶ (HMT 28-20, CA 86/19 Ref CRB RSPR 123/19) [2020] ZWMTHC 28 (05 February 2020)

⁵⁷ Prosper Dembedza “Judge’s hubby acquitted of raping maid” *The Herald* 28 September 2019 <https://www.herald.co.zw/judges-hubby-acquitted-of-raping-maid/> Accessed 25 August 2020)

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In the case of *S v Chimankire*,⁵⁸ on appeal, the Court quashed the rape conviction as the evidence led by the State did not rebut the possibility of consensual sexual intercourse having taken place between the parties. Counsel for the appellant stated that the conviction should not stand because the complainant did not raise any alarm at the time of the sexual encounter, even though other persons were passing nearby. Moreover, there was no sign of any struggle at the scene of the alleged rape. Through this decision the court made physical resistance a requirement to prove rape when in fact victims respond differently to attacks of a sexual nature. The approach by the court goes against findings on how a victim may react as noted in the case *M.C. v Bulgaria* where the European Court of Human Rights (ECHR), which relied on expert psychiatric evidence that had found that there were "...two patterns of response by rape survivors to their attacker...violent physical resistance and "frozen fright" (also known as "traumatic psychological infantilism syndrome")",⁵⁹ demonstrating that the lack of resistance is not indicative of consent of the victim. The ECHR held that "any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy".⁶⁰ Echoing the ECHR, the Special Court of Sierra Leone (SCSL) reiterated that, "...force is not an element per se of rape and there are factors other than force which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim. This is necessarily a contextual assessment",⁶¹ adding that, "...continuous resistance of the victim and physical force or even threat of force by the perpetrator are not required to establish coercion..."⁶²

In *Karen Vertido v. the Philippines*,⁶³ the CEDAW Committee recommended that States should remove any requirement in legislation that sexual assault be committed by force or violence. CEDAW recommended that States should enact a definition of sexual assault that is premised on a notion of consent that:

- (a) requires the existence of unequivocal and voluntary agreement to the sexual act/s in question, requiring, in turn, proof by the accused of steps taken to ascertain whether the complainant/victim was consenting to such acts; or
- (b) is negated when the act take place in coercive circumstances (and includes a broad range of coercive circumstances).

This was the approach taken in the *Gacumbitsi* judgment of the International Criminal Tribunal of Rwanda (ICTR) which held that:

"The prosecution can prove non-consent beyond a reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible. But it is not necessary as a legal matter, for the Prosecutor to introduce evidence concerning the words or conduct of the victim

⁵⁸ *S v Chimankire* (ca 4/06) [2006] zwhhc 72 (04 July 2006)

⁵⁹ *M.C. v. Bulgaria*, Appl. No. 39272/98, Council of Europe: European Court of Human Rights, December 3, 2003, para 70. Available at: <https://www.refworld.org/cases,ECHR,47b19f492.html> (Accessed 22 March 2020)

⁶⁰ *M.C v Bulgaria*, para 166.

⁶¹ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kama, Santigie Borbor Kanu*, Special Court of Sierra Leone, SCSL-04-16-T, June 20, 2007, para 694. Available at: <http://www.rscsl.org/Documents/Decisions/AFRC/613/SCSL-04-16-T-613s.pdf> Accessed 22 March 2020

⁶² *Ibid.*

⁶³ CEDAW/C/51/D/28/2010, 22 September 2010

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or the victim's relationship to the perpetrator. Nor need it introduce evidence of force. Rather, the Trial Chamber is free to infer non-consent from the background circumstances...."⁶⁴

The International Criminal Tribunal of the former Yugoslavia (ICTY) stated, the overarching spirit of rape legislation worldwide is to penalize "...violations of sexual autonomy", that is, criminalizing situations where victims of sexual violence are rendered helpless.⁶⁵ The Special Court of Sierra Leone (SCSL) in the *RUF* case argued that rape can be committed under coercive circumstances, "...such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or another person or by taking advantage of a coercive environment."⁶⁶

Rule 70 (Principles of evidence in cases of sexual violence) of the Rules of Procedure and Evidence of the International Criminal Court codifies the current international law on consent, adding that, the credibility, character or predisposition to sexual availability of a victim cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim.⁶⁷

The disparity in Zimbabwean jurisprudence on assessment of coercive circumstances demonstrates the need to train police and prosecutors in the investigative and prosecutorial process, so that they are alive to the presence of coercive circumstances in the commission of the offences. This will help police to conduct sound investigations and gather the necessary evidence on coercive circumstances that can be used by the prosecutor when making submissions in court. There may also be a need to legislate so as to require judges and magistrates presiding over sexual assault cases, including instances of rape, to take into account the possibility that coercive circumstances may have existed at the relevant time.

Furthermore, section 69(1)(d) and section 69(1)(e) envisage circumstances in which lawful consent to the relevant sexual acts may be given prior to falling asleep, becoming hypnotized or intoxicated. It should generally be presumed by a court that when someone is either asleep, intoxicated, hypnotized and otherwise incapacitated, they are incapable of providing consent, or consensually engaging in an ongoing sexual act. The fact that they may have been capable of lawfully consenting to the said sexual act/s before falling asleep, becoming intoxicated, being hypnotized or becoming incapacitated in any other way is totally irrelevant. The provisions deny the sexual autonomy of a victim by failing to recognize that an incapacitated person being subjected to sexual act while unconscious or in an altered state of mind is incapable of providing consent.

⁶⁴ Prosecutor v. Gacumbitsi, Judgment, Case No. ICTR-2001-64-A, July 7, 2006, para.153

⁶⁵ Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment), IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), February 22, 2001, para 440-441. Available at: https://www.refworld.org/cases/ICTY_3ae6b7560.html (Accessed 22 March 2020)

See also: UN Women, "Handbook on Legislation on Violence Against Women", 2012, p 24. Available at: <https://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf> (Accessed 19 March 2020)

⁶⁶ Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-04-15-T, Trial Chamber I, Judgement, para 144-45 (Mar. 2, 2009). The full elements of the crime of rape were stated thus by the Court: "I. The Accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the Accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;

ii. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or another person or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent;

iii. The Accused intended to affect the sexual penetration or acted in the reasonable knowledge that this was likely to occur; and

iv. The Accused knew or had reason to know that the victim did not consent."

⁶⁷ International Criminal Court Rules of Procedure and Evidence, second edition 2013, The Hague, available at: www.iccpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf (Accessed 19 March 2020)

Conclusion and Recommendations

Having interviewed WHRDs in Zimbabwe and analyzed key legal challenges arising from their personal experiences in seeking to access justice in SGBV cases occurring in the course of and /or due to their work, the ICJ makes the following recommendations:

RECOMMENDATIONS

Recommendations to Parliament

1. Amend language in section 69 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] to cater for “coercive circumstances” as negating consent

The wording in section 65 and 69(1) must be amended to add explicit language of “coercive circumstances” in which sexual offences may occur.

In addition, section 69 should be amended to make it clear that the fact that someone may have been capable of lawfully consenting to sexual activity before falling asleep, becoming intoxicated, being hypnotized or becoming incapacitated in any other way is totally irrelevant.

2. ENACT LEGISLATION ESTABLISHING AN INDEPENDENT COMPLAINTS MECHANISM IN ACCORDANCE WITH SECTION 210 OF THE CONSTITUTION

The legislature must enact legislation establishing an effective and independent mechanism for receiving and investigating complaints from members of the public about misconduct on the part of members of security services and other law enforcement officials, such as police officers, and for remedying any harm caused by such misconduct, in accordance with section 210 of the Constitution, and relevant international human rights standards about the investigation into credible allegations of human rights violations.

3. Amend CPEA to Expressly Prohibit Drawing of Adverse Inferences Due to Delays in Reporting Sexual Violence Cases Especially Rape

The legislature must expressly prohibit any “prompt complaint” requirement, as well as the drawing of adverse inferences from any delay in reporting by victims of sexual violence. There is no basis to infer that a delay in reporting is an indication of an untruthful allegation or witness.

Recommendations to the Police Service

1. Develop a Comprehensive Code of Conduct Based on Human Rights Principles

The Police Service must develop a comprehensive code of conduct that articulates how individual officers are supposed to conduct themselves in line with international human rights obligations when receiving reports, recording and investigating SGBV cases.

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2. Invest in Continued Education and Training of Police on SGBV

Training on handling of sexual offences cases availed to police officers working in the Victim Friendly Unit must be up scaled and made available to all officers. The training should:

- a. Be in line with international human rights norms;
- b. Include information on gender-based violence issues that are not necessarily of a sexual nature;
- c. Be continuous and comprehensive.

The Police Service should also avail regular and continuous training aimed at dispelling myths and stereotypes on gender and SGBV.

3. Invest More Resources into the Victim Friendly Unit

There is an urgent need to fully equip VFUs with the resources they need to offer a comprehensive and sensitive service to clients. The resources include trained officers, counselling services amongst others.

Additionally, the scope of the services under the VFU must be expanded to include other forms of gender-based violence which fall outside of sexual offences.

Recommendations to the Judicial Service Commission

1. Invest in Continuous Training and Education of Judicial Officers on SGBV and Human Rights

Judicial officers must have a sound understanding of the harmful nature of judicial bias and gender stereotypes and human rights. They must also be sufficiently trained on how to separate their own bias from the cases before them.

2. Expand and Strengthen Victim Friendly Courts

There is a need to make Victim Friendly Courts more widely accessible and to ensure that they are staffed with well-trained individuals. The VFCs must also be properly resourced and equipped with all the services that sexual violence victims require to protect their rights as their matters are being heard and avoid traumatization. Additionally, the services offered by VFCs should be extended to victims of gender-based violence outside sexual offences.

3. Devise Accountability Mechanisms Direct at Collecting, Recording and Analyzing Instances of Judicial Bias

This report highlights evidence of continued harmful practices many of which have been outlawed

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yet the continued use of these are leading to unfair and unjust outcomes. There is need for an accountability mechanism which allows quick identification of potential bias influencing decisions leading to the appropriate relief including, where necessary, investigations and re-trial. If necessary, the JSC must approach parliament for enactment of an enabling law.

Commission Members

March 2021 (for an updated list, please visit www.icj.org/commission)

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Ms Hadeel Abdel Aziz, Jordan

Mr Reed Brody, United States

Justice Azhar Cachalia, South Africa

Prof. Miguel Carbonell, Mexico

Justice Moses Chinhengo, Zimbabwe

Prof. Sarah Cleveland, United States

Justice Martine Comte, France

Mr Marzen Darwish, Syria

Mr Gamal Eid, Egypt

Mr Roberto Garretón, Chile

Ms Nahla Haidar El Addal, Lebanon

Prof. Michelo Hansungule, Zambia

Ms Gulnora Ishankanova, Uzbekistan

Ms Imrana Jalal, Fiji

Justice Kalthoum Kennou, Tunisia

Ms Jamesina Essie L. King, Sierra Leone

Prof. César Landa, Peru

Justice Ketil Lund, Norway

Justice Qinisile Mabuza, Swaziland

Justice José Antonio Martín Pallín, Spain

Prof. Juan Méndez, Argentina

Justice Charles Mkandawire, Malawi

Justice Yvonne Mokgoro, South Africa

Justice Tamara Morschakova, Russia

Justice Willly Mutunga, Kenya

Justice Egbert Myjer, Netherlands

Justice John Lawrence O'Meally, Australia

Ms Mikiko Otani, Japan

Justice Fatsah Ouguergouz, Algeria

Dr Jarna Petman, Finland

Prof. Mónica Pinto, Argentina

Prof. Victor Rodriguez Rescia, Costa Rica

Mr Alejandro Salinas Rivera, Chile

Mr Michael Sfard, Israel

Prof. Marco Sassoli, Italy-Switzerland

Justice Ajit Prakash Shah, India

Justice Kalyan Shrestha, Nepal

Ms Ambiga Sreenevasan, Malaysia

Justice Marwan Tashani, Libya

Mr Wilder Tayler, Uruguay

Justice Philippe Texier, France

Justice Lillian Tibatemwa-Ekirikubinza, Uganda

Justice Stefan Trechsel, Switzerland

Prof. Rodrigo Uprimny Yepes, Colombia

