

A Comparative Analysis of the Application of the 1951 Refugee Convention to Victims of Sexual Violence in South Africa, Tanzania and Uganda

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Abstract

This article seeks to ascertain whether refugees who are victims of sexual violence in contracting states enjoy access to courts per Article 16 of the United Nations (UN) *Convention Relating to the Status of Refugees* (1951 Refugee Convention). It does so by comparing the situation of urban refugees in South Africa with that of refugees in camps in Tanzania and settlements in Uganda, beginning with a description of what "accessing courts" entails in the respective domestic criminal justice systems and of what mechanisms are in place for addressing sexual offences. It further uses the qualitative analysis of documented prosecuted cases of sexual violence in South African, Tanzanian and Ugandan courts between 2013-2017, 2009-2016 and 2013-2017 respectively to establish if these countries prosecute cases of sexual violence suffered by their citizens and whether claims of such violations affecting refugees also enjoy the same treatment. The enquiry found that of 328 documented prosecuted cases of sexual offences in South Africa, victims who were citizens were a majority in number. In Tanzania there appeared to be few prosecuted cases of sexual violence against refugees, but given that limited documentation is available, it is difficult to assess the actual figures. In Uganda the 187 recorded prosecuted cases of sexual offences in the years of investigation all related to citizens, despite the introduction of a mobile court to refugee settlements. Overall, this paper recommends that the countries under review adopt measures to ensure the prompt prosecution of cases of sexual violence against refugees and thereby enable them to access courts and testify against their assailants.

Keywords

Access to courts; refugees; sexual violence.

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1 Introduction

Female refugees hosted in camps, settlements, urban areas, and reception, detention and repatriation centres¹ suffer sexual violence.² Even though sexual offences can lead to manslaughter, fatal injuries, undesired or premature gravidness, sexually transmitted diseases or infections (STD/STIs), barrenness, HIV/AIDS, cervical cancer, and venereal disease,³ most of the time the perpetrators are not held accountable.⁴ Victims also suffer from psychological trauma, mental health problems,⁵ post-traumatic stress disorders (PTSD),⁶ spontaneous abortions if raped and pregnant, protracted haemorrhaging, vesicovaginal and rectovaginal fistulas, insomnia, nightmares, chest and back pains, dysmenorrhea, and death resulting from unsafe abortions and suicide.⁷

In many instances, refugees who are victims of the sexual violence mentioned above do not have access to courts despite the provision of Article 16 of the 1951 Refugee Convention,⁸ which explicitly states:

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.
2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*.

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¹ Eberечи *Access to Justice* 3; <https://data2.unhcr.org/en/country/uga>; https://www.unicef.org/appeals/files/UNICEF_Tanzania_Humanitarian_Situation_Report_August_2018.pdf; HRW *Prohibited Persons* 83-92.

² UNHCR 1995 <https://www.refworld.org/docid/3ae6b33e0.html> 1.3(b)(c); Eberечи *Access to Justice* 6-7.

³ Eberечи *Access to Justice* 1; UNHCR 1995 <https://www.refworld.org/docid/3ae6b33e0.html> 1.3(b)(c); UNHCR 1991 <https://www.unhcr.org/publications/legal/3d4f915e4/guidelines-protection-refugee-women.html> para 94.

⁴ Eberечи *Access to Justice* 6-7.

⁵ UNHCR 1995 <https://www.refworld.org/docid/3ae6b33e0.html> 1.3(b)(c); Ramji-Nogales 2011 *Int CLR* 820.

⁶ UNHCR 1995 <https://www.refworld.org/docid/3ae6b33e0.html> 1.3(b)(c); Ramji-Nogales 2011 *Int CLR* 821.

⁷ Mabuwa *Seeking Protection* 39; Vigaud-Walsh 2015 <https://static1.squarespace.com/static/506c8ea1e4b01d9450dd53f5/t/5678aee07086d7cddecf1bab/1450749707001/20151222+Tanzania.pdf> 1.

⁸ *Convention Relating to the Status of Refugees* (1951) (hereafter the 1951 Refugee Convention).

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.⁹

Article 16 provides that a refugee who requires judicial intervention in a country of refuge, in the same way as that enjoyed by that country's citizens, should be granted unhindered access to domestic courts.¹⁰ Such access includes legal aid and exemption from any cautionary fees. Article 16 stipulates that the jurisdiction for addressing the legal needs of refugees is the domestic court system of host states. As such, host states have the responsibility to respond to all human rights violations against refugees in their territories.

Generally, treaties become law if they have been ratified, signed, deposited and domesticated by parties.¹¹ However, the countries of study differ in their application of international treaties in their internal judicial systems depending on whether they follow a monist or dualist approach,¹² or both. In the monist approach, international law is part of municipal law and enforceable in domestic courts without any legislative enactment.¹³ In the dualist approach, international and municipal laws are separate legal systems, and treaties must be legislated into local law to be applicable and enforceable in national courts.¹⁴ South Africa adopts both a dualist¹⁵ and a monist system. In terms of sections 231 and 232 of the Constitution of South Africa, customary international law is applied directly to municipal law, as long as it does not contravene the provisions of the constitution or any acts of parliaments.¹⁶ Tanzania adopts an exclusively dualist system.¹⁷ Uganda,

⁹ 1951 Refugee Convention.

¹⁰ Articles 16(1) and (2) of the 1951 Refugee Convention.

¹¹ Articles 11-16 of the *Vienna Convention on the Law of Treaties* (1969).

¹² Jennings and Watts *Oppenheim's International Law* 53.

¹³ Jennings and Watts *Oppenheim's International Law* 53.

¹⁴ Jennings and Watts *Oppenheim's International Law* 53; Ferreira and Ferreira-Snyman 2014 *PELJ* 1471.

¹⁵ Eberechi *Access to Justice* 201-202; s 231(2)(3) of the *Constitution of the Republic of South Africa, 1996* (hereafter the Constitution) provides that "an international agreement binds the republic only after it has been approved by a resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in sub-section (3)". S 39(1)(b) of the Constitution; *S v Makwanyane* 1995 3 SA 391 (CC) para 35; Ferreira and Ferreira-Snyman 2014 *PELJ* 1477; *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) para 88.

¹⁶ Sections 231(3) and 232 of the Constitution declare customary international law to be law in the country.

¹⁷ Eberechi *Access to Justice* 203; Art 63(3)(c) of the *Constitution of the United Republic of Tanzania, 1977*.

too, is dualist in its approach to the application and enforcement of international treaties in its internal laws.¹⁸

South Africa, Tanzania and Uganda ratified and domesticated the 1951 Refugee Convention on 12 January 1996, 12 May 1964, and 27 September 1976 respectively.¹⁹ South Africa was host to 89,285 refugees as at mid-2018,²⁰ while Tanzania was accommodating 326,942 refugees in three refugee camps as at 31 December 2018.²¹ Uganda was host to 1,205,913 refugees in more than 11 settlements as at 31 January 2019.²² These countries reflect the hosting facilities for refugees in Africa and one can appreciate the magnitude of the problem. For instance, South Africa does not host refugees in camps or settlements, which means that refugees are living amongst the citizens - a more liberal type of hosting,²³ while Tanzania and Uganda host refugees in camps and settlements respectively.²⁴ By virtue of their incorporation of refugee law into their domestic laws, these countries are bound to fulfil their obligation to grant refugees who are victims of sexual violence access to court just as they do their citizens who suffer sexual violence.

The question to be considered in this article is: Do refugees who are victims of sexual violence have free access to courts in contracting states? In attempting to arrive at an answer, the article first enquires retrospectively whether nationals of these countries who are victims of sexual violence have free access to court, which it does by analysing laws, criminal procedures and decided cases and examining how these countries handle cases of sexual violence involving their citizens, in comparison with

¹⁸ Eberechi *Access to Justice* 203-204; Art XXVIII(i)(a)(b) of the *Constitution of the Republic of Uganda*, 1995; *Ratification of Treaties Act*, 1998 (Cap 204); *Wethered v Calcutt* (1842) 4 Man & G 566; *Concorp International Ltd vs East and Southern Development Bank* 2010 UGSC 19 (18 October 2010); *Obitre-Gama* 2000 <https://www.who.int/tobacco/media/en/JUDY2000X.pdf>.

¹⁹ UNHCR 2016 <https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>; *Protocol Relating to the Status of Refugees* (1967).

²⁰ UNHCR 2018 <https://www.unhcr.org/afr/statistics/unhcrstats/5c52ea084/mid-year-trends-2018.html>.

²¹ UNICEF 2018 https://www.unicef.org/appeals/files/UNICEF_Tanzania_Humanitarian_Situation_Report_August_2018.pdf.

²² UNHCR 2019 <https://data2.unhcr.org/en/country/uga>.

²³ Section 18(6) of the *Refugees Amendment Act* 11 of 2017 provides that refugees may be assessed in accordance with the ability for sustain themselves, while ss 18(7) and 18(8)(b) of the *Refugees Amendment Act* provide that the UNHCR or NGOs may provide shelter for indigent refugees. This shows that the government of South Africa does not in itself provide shelter for refugees.

²⁴ Obodoruku "Multiculturalism of Tanzanian Refugees" 29, 31; Obodoruku *Human Information Behavior* 137; Dawa 2019 <https://www.accord.org.za/conflict-trends/conflict-dynamics-in-the-bidibidi-refugee-settlement-in-uganda/>.

refugees who suffer the same fate in their countries. This article further undertakes a comparative analysis of the treatment received by refugees in South Africa, Tanzania and Uganda to ascertain whether there is compliance with Article 16 of the 1951 Refugee Convention.

2 The problem of sexual violence against refugees²⁵

Sexual violence against women in South Africa is rife, but its incidence amongst migrant women is even higher due to the inadequacy of state policy in preventing and combating it.²⁶ Refugees who suffer sexual violence in South Africa, seldom report these incidents for fear of not being taken seriously by the authorities.²⁷

Similarly, refugees in Tanzania live in fear of rape, sexual harassment and other forms of sexual violence while away from home for several hours a day as they source firewood for cooking²⁸ or go in search of food due to the inadequate supply of food items in the camps.²⁹ If they have been raped, the women have unwanted pregnancies and are jilted by their suitors.³⁰ Documentation and statistics regarding the incidence of sexual violence are scarce, but they reported a total of 319 new cases in all camps in October 2016.³¹

Refugees in Uganda also suffer sexual abuse and exploitation, rape, defilement, early and forced marriages.³² Although it is more prevalent among women and girls, sexual violence is also common among men and boys in refugee settlements.³³ The data are again inaccurate owing to the non-reporting of certain cases,³⁴ but by the end of December 2018 they recorded, 1,152 cases of rape, 351 of forced and early marriage, and 254 of sexual assault.³⁵ These human rights violations occur as a result of there being insufficient security lighting in the settlements; limited funding for

²⁵ Note that these statistics are not exhaustive.

²⁶ FIDH 2008 <https://www.fidh.org/IMG/pdf/za486a.pdf>.

²⁷ Doctors Without Borders 2010 <https://www.doctorswithoutborders.org/what-we-do/news-stories/research/lives-survival-migrants-and-refugees-south-africa>.

²⁸ Obodoruku "Multiculturalism of Tanzanian Refugees" 29, 31; Obodoruku *Human Information Behavior* 137.

²⁹ Obodoruku *Human Information Behavior* 17, 22.

³⁰ Obodoruku *Human Information Behavior* 23.

³¹ UNHCR 2016 <https://data2.unhcr.org/en/documents/download/52601> 2.

³² UNHCR 2018 <https://data2.unhcr.org/en/documents/download/66524> 5; UNHCR Uganda 2014 <https://data2.unhcr.org/es/documents/download/48494>.

³³ UNHCR 2018 <https://data2.unhcr.org/en/documents/download/66524> 6; UNHCR Uganda 2014 <https://data2.unhcr.org/es/documents/download/48494>.

³⁴ UNHCR 2018 <https://data2.unhcr.org/en/documents/download/66524> 5.

³⁵ UNHCR 2018 <https://data2.unhcr.org/en/documents/download/67864>.

prevention and response; a limited police presence;³⁶ alcohol abuse resulting from idleness among the male refugees; and the lack of water and firewood close to settlements, which compels refugees to trek long distances in search of these essential commodities.³⁷ Also, owing to the scarcity of means for adults to earn a livelihood, refugees send their children to work for local people. In the course of the work they are often sexually abused. Trading sex for money and services is also prevalent as a means of survival.³⁸

In addition, poverty and the existence of cultural norms that downplay the importance of the girl child's education lead to secondary-school drop-out among girls, thereby contributing to early and forced child marriage and consequent sexual violence.³⁹ Another factor predisposing towards sexual violence against refugees is the lack of occupational training and jobs for female heads of households. As a result, they suffer sexual exploitation and abuse, and they resort to survival sex.⁴⁰ Recreational facilities for youths in settlements are also in short supply, leading to drunkenness and the sexual violence regularly associated with it.⁴¹

Despite the efforts of the UNHCR and its implementing partners,⁴² records on the incidence of sexual violence are scarce, due to under-reporting, which arises from fear of stigmatisation, humiliation and negative responses from families; the perception that sexual violence is a "private matter"; and a "lack of confidence in reporting channels".⁴³ Furthermore, lesbian, gay, bisexual and transgender (LGBT) victims of sexual violence do not report cases given Uganda's legislation against LGBT and the negative attitudes of Ugandans towards LGBT individuals.⁴⁴

Some of the perpetrators of sexual violence against refugees are familiar to the victims. They include the inhabitants of the contracting states,⁴⁵ the staff

³⁶ UNHCR 2018 <https://data2.unhcr.org/en/documents/download/66524> 5; Eberечи *Access to Justice* 5.

³⁷ UNHCR 2018 <https://data2.unhcr.org/en/documents/download/66524> 5; UNHCR Uganda 2014 <https://data2.unhcr.org/es/documents/download/48494>.

³⁸ UNHCR 2018 <https://data2.unhcr.org/en/documents/download/66524> 5; UNHCR Uganda 2014 <https://data2.unhcr.org/es/documents/download/48494>.

³⁹ UNHCR 2018 <https://data2.unhcr.org/en/documents/download/66524> 6.

⁴⁰ UNHCR 2018 <https://data2.unhcr.org/en/documents/download/66524> 5.

⁴¹ UNHCR 2018 <https://data2.unhcr.org/en/documents/download/66524> 6.

⁴² UNHCR 2018 <https://data2.unhcr.org/en/documents/download/66524> 7.

⁴³ UNHCR 2018 <https://data2.unhcr.org/en/documents/download/66524> 5.

⁴⁴ UNHCR 2018 <https://data2.unhcr.org/en/documents/download/66524> 5.

⁴⁵ Eberечи *Access to Justice* 5; Mabuwa *Seeking Protection* 46; Vigaud-Walsh 2015 <https://static1.squarespace.com/static/506c8ea1e4b01d9450dd53f5/t/5678aee07086d7cddecf1bab/1450749707001/20151222+Tanzania.pdf> 1; UNHCR 2018

in charge of refugees,⁴⁶ intimate partners, family members, teachers, influential individuals, "politicians and friends".⁴⁷ Refugees also suffer sexual violence from bootleggers,⁴⁸ "security forces", peace-keepers, members of law enforcement agencies and country boundary pickets.⁴⁹ Amongst the sexual violence offenders against refugees are "aid employees, national and international NGOs, UN agencies, state officials and a host of others".⁵⁰

3 Access to courts

Access to courts is a prerequisite for an applicant to institute an action in a court of law. Considerations in this regard may include *locus standi*, "mootness", and the exhaustion of other legal remedies.⁵¹ The ability of a juristic person to bring a matter before a court of law encompasses the right to sue, to defend, to appear before a self-governing and unbiased court of law, and to have access to legal representation.⁵²

Chapter Two of the South African Constitution enshrines the Bill of Rights that lists the basic rights of everyone in the country.⁵³ Section 9(1) provides for equality and equal protection before the law.⁵⁴ Section 34, in turn, declares that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.⁵⁵ The Constitution provides furthermore that anyone who suffers a violation of his or her constitutional rights may seek redress at a court of competent jurisdiction.⁵⁶

<https://data2.unhcr.org/en/documents/download/66524> 5; UNHCR Uganda 2014 <https://data2.unhcr.org/es/documents/download/48494>.

⁴⁶ UNHCR 2003 https://www.unicef.org/emerg/files/gl_sgbv03.pdf 12.

⁴⁷ Eberечи *Access to Justice* 9; UNHCR 2003 https://www.unicef.org/emerg/files/gl_sgbv03.pdf 12.

⁴⁸ Eberечи *Access to Justice* 9; The New Arab 2016 <https://www.alaraby.co.uk/english/society/2016/1/18/europe-female-migrants-refugees-face-violence-and-sexual-harassment>.

⁴⁹ Eberечи *Access to Justice* 138; UNHCR 2003 https://www.unicef.org/emerg/files/gl_sgbv03.pdf 15.

⁵⁰ Eberечи *Access to Justice* 138; UNHCR 2003 https://www.unicef.org/emerg/files/gl_sgbv03.pdf 15.

⁵¹ Rathjen and Spaeth 1979 *Am J Pol Sci* 361.

⁵² *Mandela v Minister of Prisons* 1983 1 SA 938 (A) 957.

⁵³ *Constitution of the Republic of South Africa*, 1996.

⁵⁴ Section 9 of the Constitution.

⁵⁵ Section 34 of the Constitution.

⁵⁶ Section 38 of the Constitution.

For the victim of a crime to have access to courts in criminal proceedings, the victim or complainant needs to lay charges against the offender with the police, whose responsibility it is to avert, combat or "investigate crime ..." and to defend and carry out the law.⁵⁷ If upon investigation the police officer believes the testimony of the complainant, the suspect is arrested and taken into custody for further investigation.⁵⁸ The law requires that a suspect be taken before a court of competent jurisdiction for a bail hearing not more than 48 hours after the arrest.⁵⁹

Continued access to courts for a victim of crime is dependent on the prosecution of the case by the Director of Public Prosecution, who prosecutes the suspect on behalf of the state.⁶⁰ Thus, if the prosecutor decides not to prosecute, a victim of crime will not have the opportunity to access courts to testify as to the guilt of the assailant.

In South Africa the *Thuthuzela Care Centre* simplifies court access for victims of rape, in particular. It is a multidisciplinary facility run by the National Prosecution Authority's (NPA's) Sexual Offences and Community Affairs Unit (SOCA). Branches have been established near communities with a high prevalence of rape, as have courts, police stations and medical facilities intended to cater for the needs of victims of sexual violence.⁶¹ *Thuthuzela* is the Xhosa word for "comfort". The purpose of the organisation is to assist the victims of rape in South Africa, and branches are located in all provinces as a response to the prevalence of the scourge of rape.⁶²

It is aimed at protecting victims against secondary trauma, the prevention of victimisation, and the improvement of the conviction rate.⁶³ Some of the services it provides include medical examination and the collection of evidence, interviewing and counselling, the treatment and prevention of sexually transmitted infections/diseases including HIV and AIDS, the safe transportation of victims to their homes, the provision of an alternate safe

⁵⁷ Sections 205(3) of the Constitution.

⁵⁸ Sections 38(a)(e) of the *Criminal Procedure Act* 51 of 1977.

⁵⁹ Section 50(1) of *Criminal Procedure Act* 51 of 1977.

⁶⁰ Section 179 of the Constitution.

⁶¹ NPA 2009 https://www.npa.gov.za/sites/default/files/resources/public_awareness/TCC_brochure_august_2009.pdf 2.

⁶² NPA 2009 https://www.npa.gov.za/sites/default/files/resources/public_awareness/TCC_brochure_august_2009.pdf 1.

⁶³ Item 545 in Gen N 862 in GG 39131 of 28 August 2015.

place for the victim, and the preparation of the victim for the prosecution of the case, amongst others.⁶⁴

Legal Aid of South Africa is an institution that facilitates access to courts in South Africa. It is mandated to provide indigent litigants with legal advice, representation, education and information paid for by the State.⁶⁵ The South African Constitution also provides for the allocation of a legal practitioner to a detained suspect at the expense of the State, to avoid injustice.⁶⁶ While the *Refugees Amendment Act (2017)*⁶⁷ does not provide for access to courts, it does provide for appeals to the Refugee Appeals Authority against the decisions of a Refugee Status Determination officer.⁶⁸

Turning to the United Republic of Tanzania, Article 13(1) of the Constitution provides for equality and equal protection before the law, without discrimination.⁶⁹ Article 13(6) instructs state authorities to create facilities for the determination of the rights and duties of individuals; ensures a fair hearing; provides for the freedom to appeal against decisions by judicial and administrative institutions; and provides legal remedies against such decisions.⁷⁰

In addition, the Constitution guarantees the preservation of rights as well as equality and dignity during criminal investigations and proceeding.⁷¹ However, the *Refugee Act* of Tanzania explicitly provides for the prosecution and punishment of refugees who are violators of the provisions of the *Refugee Act* and perpetrators of other unlawful acts.⁷² What the Act does not cater for is how a refugee or an asylum-seeker can institute criminal proceedings such as sexual violence-related offences.

Similar to South Africa and Uganda, the Tanzanian Constitution empowers the Director of Public Prosecutions to prosecute and supervise all criminal cases in the country.⁷³ The police report to the prosecutor all verbal or written complaints received regarding all types of criminal cases, intended

⁶⁴ NPA 2009 https://www.npa.gov.za/sites/default/files/resources/public_awareness/TCC_brochure_august_2009.pdf 7.

⁶⁵ Sections 3(a), (b) and (c) of the *Legal Aid South Africa Act* 39 of 2014.

⁶⁶ Section 35(2)(c) of the Constitution.

⁶⁷ *Refugees Amendment Act* 11 of 2017.

⁶⁸ Section 22(1) of the *Refugees Amendment Act* 11 of 2017.

⁶⁹ *Constitution of the United Republic of Tanzania*, 1977.

⁷⁰ *Constitution of the United Republic of Tanzania*, 1977.

⁷¹ *Constitution of the United Republic of Tanzania*, 1977.

⁷² Sections 24-26 of the *Refugee Act* 9 of 1998.

⁷³ Article 59B(2) of the *Constitution of the United Republic of Tanzania*, 1977; s 90(1)(a), (b) and (c) of the *Criminal Procedure Act*, 1985 (Cap 20); s 9(1)(a)(e) of the *National Prosecutions Service Act* 27 of 2008.

to be committed or already committed.⁷⁴ If upon investigation a police officer has enough evidence to warrant it, he or she can arrest the suspect⁷⁵ and commence the procedures that lead to an appearance in court.

This process begins with an oral or written complaint, or the presentation of an accused person to a magistrate with competent jurisdiction. Such a complaint can be made by anyone who believes the accused has committed a crime.⁷⁶ After that, a formal charge containing the alleged offence is laid and is signed by the magistrate. This leads to a preliminary hearing.⁷⁷ If the formal charge does not suggest the commission of a crime, the magistrate can reject the complaint and document the reasons for the refutation.⁷⁸ Conversely, where an offence exists, the complainant (the victim) is called to witness⁷⁹ at the trial.

Before the trial and throughout the proceedings of the trial the defendant receives legal representation,. Without this, access to the courts would be meaningless. In Tanzania legal assistance can be applied for by any indigent individual who requires legal services in civil or criminal proceedings.⁸⁰ The service is not mandatory in all cases.⁸¹ Advocates and paralegals provide the service, and they guide litigants and defendants through the process of accessing the court, they educate them on their rights and how to enforce them, how to obtain legal documents, and the nature of the procedures of the court,⁸² and they provide legal representation⁸³ in the actual court proceedings.

Article 21(1) of the Ugandan Constitution provides for access to court implicitly⁸⁴ by stating that everyone is equal before the law and shall enjoy equal protection before the law. Furthermore, Article 28(1) declares that every individual is entitled to a fair, prompt and public hearing before a self-governing, neutral court of law in the resolution of disputes relating to his or her "civil rights and obligations or any criminal charge".⁸⁵ Likewise, Article

⁷⁴ Section 7(1)(a) of the *Criminal Procedure Act*, 1985 (Cap 20); s 9(1)(a)(e) of the *National Prosecutions Service Act* 27 of 2008.

⁷⁵ Section 10(1)(a) of the *Criminal Procedure Act*, 1985 (Cap 20).

⁷⁶ Sections 128(1), (2) and (4) of the *Criminal Procedure Act*, 1985 (Cap 20).

⁷⁷ Sections 128(5) and (6) of the *Criminal Procedure Act*, 1985 (Cap 20).

⁷⁸ Section 129 of the *Criminal Procedure Act*, 1985 (Cap 20).

⁷⁹ Section 142(1) of the *Criminal Procedure Act*, 1985 (Cap 20).

⁸⁰ Sections 21(1), 27 and 33 of the *Legal Aid Act* 1 of 2017.

⁸¹ Section 33 of the *Legal Aid Act* 1 of 2017.

⁸² Section 20 of the *Legal Aid Act* 1 of 2017.

⁸³ *Moses Muhagama Laurance v The Government of Zanzibar* 2003 TZCA 3 (31 October 2003) 3,12-13.

⁸⁴ *Constitution of the Republic of Uganda*, 1995.

⁸⁵ *Constitution of the Republic of Uganda*, 1995.

42 provides for fair and just treatment when appearing before an administrative tribunal and for the right to recourse to courts concerning administrative decisions made against an individual.⁸⁶

Similarly, Article 50(1)⁸⁷ ensures the right to seek redress in a competent court for the threat to or actual violation of the rights of a citizen, and empowers anyone who desires to seek redress in courts for the violation of his or her constitutional rights to do so. The right to engage in a class action in court is provided for in Article 50(2).⁸⁸ Concerning access to the courts for refugees in the territory, section 29(h) of the *Refugee Act* declares that refugees are to have free access to the courts, including legal assistance under the applicable laws.⁸⁹

In criminal proceedings, the power to bring cases before the courts is vested in the Director of Public Prosecution,⁹⁰ who is empowered to authorise the police to investigate any criminal case, report back to him or her, and institute criminal action against an accused person or authority in a competent court, except in the event of a court-martial.⁹¹ Equally, the Director of Public Prosecution is empowered to take over criminal actions initiated by other individuals or authorities or to stop any criminal prosecution at any stage.⁹² The police are seized with the duty to "protect life and properties", "preserve law and order", foil and identify crime, and cooperate with the security and civilian authorities.⁹³

4 Sexual violence under domestic laws

4.1 South Africa

South Africa's *Criminal Law (Sexual Offences and Related Matters) Amendment Act*⁹⁴ prohibits a range of sexual acts, including rape and "compelled rape",⁹⁵ sexual assault, compelled sexual assault and

⁸⁶ *Constitution of the Republic of Uganda*, 1995.

⁸⁷ *Constitution of the Republic of Uganda*, 1995.

⁸⁸ *Constitution of the Republic of Uganda*, 1995.

⁸⁹ Ugandan *Refugee Act* 21 of 2006; ss 23 and 25(a) of the *Advocates (Legal Aid to Indigent Persons) Regulations*, 2007.

⁹⁰ Article 120 of the *Constitution of the Republic of Uganda*, 1995.

⁹¹ Articles 120(3)(a) and (b) of the *Constitution of the Republic of Uganda*, 1995.

⁹² Articles 120(3)(c) and (d) of the *Constitution of the Republic of Uganda*, 1995.

⁹³ Articles 212(a)-(d) of the *Constitution of the Republic of Uganda*, 1995.

⁹⁴ *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

⁹⁵ Sections 3 and 4 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

compelled self-sexual assault.⁹⁶ The Act proscribes forcing or instigating individuals who are less than or older than 18 to observe sexual offences, sexual acts or self-masturbation; the exposure, exhibition or display of genital organs, anuses, female breasts, and child pornography; and engaging the sexual services of persons who are under or above the age of 18 years.⁹⁷ The Act also proscribes incest, bestiality and sexual acts with a corpse.⁹⁸

In addition, the *Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 5 of 2015*⁹⁹ outlaws statutory rape, statutory sexual assault, and sexual offences against persons living with disabilities.¹⁰⁰ The *Prevention and Combating of Trafficking in Persons Act* also addresses sexual violence, prohibiting human trafficking for sexual exploitation, prostitution and profiting by such acts.¹⁰¹

The jurisdiction for the prosecution of sexual offences in South Africa is the Magistrate's Court; the proceedings of cases of sexual violence can take place in a jurisdiction other than that where the crime was committed, and under South African law there is no lapse of time for the prosecution of these offences.¹⁰² The minimum penalty for convicted sex offenders is life imprisonment; but the court can impose a lower sentence provided the Judge believes that there are important and persuasive conditions which validate the decree of a slighter punishment. Such information.¹⁰³ Additional sanctions include fines, the declaration of the convict as a dangerous criminal, committal to rehabilitative institutions established by law, and correctional supervision.¹⁰⁴

⁹⁶ Sections 5, 6 and 7 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*.

⁹⁷ Section 8, 9, 10, and 11 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*.

⁹⁸ Sections 12, 13 and 14 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*.

⁹⁹ Section 1 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 5 of 2015*.

¹⁰⁰ Sections 15 and 16 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 5 of 2015*.

¹⁰¹ Section 4(1) of the *Prevention and Combating of Trafficking in Persons Act 7 of 2013*.

¹⁰² *Levenstein v Estate of the Late Sidney Lewis Frankel* 2018 ZACC 16 (14 June 2018) 89.

¹⁰³ Section 51(1) of the *Criminal Law Amendment Act 105 of 1997*.

¹⁰⁴ Sections 276(1)(d), (e), (f) and (h) of the *Criminal Procedure Act 51 of 1977*.

4.2 Tanzania

Tanzania prohibits sexual violence as an offence against morality listed in the *Penal Code of the United Republic of Tanzania* (the Penal Code).¹⁰⁵ The Penal Code outlaws rape, attempted rape, abduction with the intent to marry or for sexual purposes, the marriage of a girl under 16 years of age against the will of her parents or guardian, with the penalty for this ranging from seven years' to life imprisonment with or without corporal punishment.¹⁰⁶ The indecent assault of a woman or girl is also prohibited, while the attempted or actual rape of a child under 14 is punishable by life imprisonment, with or without corporal punishment.¹⁰⁷ Furthermore, the rape of a person with a disability is punishable by 14 years in jail, a sentence that may include corporal punishment.¹⁰⁸

Likewise, sexual relations with a 12 year-old girl is prohibited, irrespective of whether she consented to it or if the act was perpetrated by her husband or authorised by parents who gave her out for sexual purposes.¹⁰⁹ Where a husband commits sexual violence, he will serve five years in prison, while the parents and the procurer of such an act will serve two years in prison.¹¹⁰ The Code outlaws the prostitution or procurement for prostitution of a person, as well as aiding, compelling or benefitting from the prostitution.¹¹¹ Persons committing these offences are guilty of a misdemeanour and are subject to imprisonment with or without corporal punishment.¹¹² The law also punishes obtaining sexual favours through threats and intimidation,¹¹³ conspiracy and inducement, and obtaining sexual favours through false pretences or fraud makes the perpetrator liable to three years' imprisonment.¹¹⁴ Likewise, the Code reprovves the owners of premises used for purposes of sexual exploitation.¹¹⁵

Tanzania's anti-trafficking law penalises the trafficking of persons for sexual exploitation and the introduction of them into foreign forced marriages for the purposes of prostitution, the making of pornography, or sexual

¹⁰⁵ Chapter XV of the *Penal Code of the Republic of Tanzania*, 1945 (Cap 16) (the Penal Code).

¹⁰⁶ Sections 130-34 of the Penal Code.

¹⁰⁷ Sections 135 and 136 of the Penal Code.

¹⁰⁸ Section 137 of the Penal Code.

¹⁰⁹ Section 138(1)(2) of the Penal Code.

¹¹⁰ Section 138(1)(3) of the Penal Code.

¹¹¹ Sections 145 and 146 of the Penal Code.

¹¹² Sections 139 and 143 of the Penal Code.

¹¹³ Section 140 of the Penal Code.

¹¹⁴ Section 148 of the Penal Code.

¹¹⁵ Sections 141 and 142 of the Penal Code.

exploitation, with a fine of between five million shillings to one hundred million shillings, or imprisonment of 2-10 years, or both as punishment.¹¹⁶

4.3 Uganda

In Uganda the trial court responsible for dealing with sexual offences is the High Court.¹¹⁷ The Ugandan *Penal Act* prohibits sexual violence under a list of offences against morality.¹¹⁸ Rape carries the death penalty, while attempted rape is punishable with life imprisonment, which may include corporal punishment.¹¹⁹ Abduction with the intent to have carnal knowledge with or to marry the victim attracts seven years in prison;¹²⁰ the indecent assault of women and girls attracts 14 years in prison, which may include corporal punishment; and those who say vulgar words to women may receive a year in prison.¹²¹ Defilement and the attempted defilement of a girl under 18 years of age carries the death penalty and 18 years' imprisonment, which may include corporal punishment.¹²² The defilement of persons living with disabilities attracts 14 years in prison, while obtaining persons for defilement, or employing threats or drugs, and false pretences and misrepresentation are misdemeanours.¹²³

Furthermore, abduction or an attempt to abduct a woman under the age of 21 years for sexual purposes and prostitution will attract seven years in jail.¹²⁴ The Penal Code also applies punitive measures to any homeowner who authorises the defilement of a girl under the age of 18. The penalty, in this case, is five years' imprisonment.¹²⁵ Anyone who detains a woman or girl for sexual intent is liable to seven years' imprisonment, while the sexual exploitation of persons in detention by those in authority or other persons attracts capital punishment.¹²⁶ Any conspiracy to defile a woman or girl is punishable with seven years in jail.¹²⁷ Similarly, the *Prevention of Trafficking in Persons Act* bans the introduction or matchmaking of a person to a

¹¹⁶ Section 4(1)(6) of the *Anti-Trafficking in Persons Act* 6 of 2008.

¹¹⁷ *Ntambala v Uganda* 2018 UGSC 1 (18 January 2018) para 2.

¹¹⁸ The sexual-offences aspect of the Act is currently under review by way of the *Sexual Offences Bill* (2016) as at 15 March 2019. Note that the Bill had passed its first reading. See Parliament Watch 2019 <http://parliamentwatch.ug/bills/the-sexual-offenses-bill-2016/#.XluoWCgzY2w>; Ch X1V of the *Penal Code Act*, 1950 (Cap 120).

¹¹⁹ Section 125 of the *Penal Code Act*, 1950 (Cap 120).

¹²⁰ Section 126 of the *Penal Code Act*, 1950 (Cap 120).

¹²¹ Section 128 of the *Penal Code Act*, 1950 (Cap 120).

¹²² Section 129 of the *Penal Code Act*, 1950 (Cap 120).

¹²³ Sections 130 and 132(1) of the *Penal Code Act*, 1950 (Cap 120).

¹²⁴ Section 131 of the *Penal Code Act*, 1950 (Cap 120).

¹²⁵ Section 133 of the *Penal Code Act*, 1950 (Cap 120).

¹²⁶ Section 134 of the *Penal Code Act*, 1950 (Cap 120).

¹²⁷ Section 140 of the *Penal Code Act*, 1950 (Cap 120).

foreigner for marriage,¹²⁸ recruitment, transportation, harbouring and reception of an individual for sexual exploitation and sex tourism.¹²⁹ Persons convicted of these acts may be subject to a jail term ranging from 5-15 years, with or without the option of a fine.¹³⁰

The analysis of the laws above shows that South Africa, Tanzania and Uganda have legislation combating sexual violence in their territories. Nevertheless, do refugees enjoy the protection of such laws? The article now attempts to establish whether cases of sexual violence get to the courts in these territories and whether cases of the same violence affecting refugees receive the same treatment.

5 Access to courts in the contracting states

Section 4 of this article analysed the law and procedures for dealing with sexual violence in South Africa, Tanzania and Uganda. However, this section will analyse documented decided cases of sexual violence in these countries of study, and ascertain whether they involve both their citizens and refugees.

5.1 Data analysis

Data were collected from documented decided court cases accessible online. In South Africa and Uganda, the data collected pertained to the period 2013 and 2017, while the available data for Tanzania pertained to the period 2009 to 2016. Therefore, the figures here are a mere representation of the treatment of cases of sexual violence in these countries.

5.2 Findings

The data also revealed that both sexes suffered sexual violence. South Africa recorded five incidents involving male victims¹³¹ while the rest involved female victims, while Tanzania recorded one,¹³² and there was no record of male cases in Uganda.

¹²⁸ Sections 8(e) of the *Prevention of Trafficking in Persons Act 7 of 2009*.

¹²⁹ Sections 3(1)(a) and (b) of the *Prevention of Trafficking in Persons Act 7 of 2009*.

¹³⁰ Sections 3(1) and 8 of the *Prevention of Trafficking in Persons Act 7 of 2009*.

¹³¹ *S v Wamo* 2013 JDR 0804 (GNP); *S v Maseko* 2013 JDR 0986 (GNP); *S v Coetzee* 2015 JDR 1979 (NCK); *S v Mendile* 2016 JDR 2010 (ECG); *S v Gcaza* 2017 JDR 0995 (SCA); *S v AR* 2017 JDR 1219 (WCC)

¹³² *Waziri Saldi v The Republic* Criminal Appeal Case No 39 of 2012 (30 April 2015).

The perpetrators of sexual violence in all three countries, as round in this study, were fathers, mothers (aiding and abetting), foster fathers, adopted fathers, pastors, grandfathers, stepfathers, brothers, spouses and uncles.¹³³ Other relatives were former spouses and boyfriends, customary spouses and mothers' boyfriends. Acquaintances included neighbours, visitors to families, and friends of the family.¹³⁴ Strangers included robbers, kidnappers, street people, persons in positions of trust such as clergymen, doctors, sports coaches, teachers, prophets, church members and taxi drivers, amongst others.¹³⁵

| Country | Ages of victims | Ages of offenders |
|---------------------|------------------------------|------------------------------|
| South Africa | 2 - 85 years ¹³⁶ | 17 - 75 years ¹³⁷ |
| Tanzania | 3 – 35 years ¹³⁸ | 18 – 45 years ¹³⁹ |
| Uganda | 17 – 66 years ¹⁴⁰ | 2 – 75 years ¹⁴¹ |

Table 1: Age distribution of victims and perpetrators¹⁴²

Table1 demonstrates the different ages of the victims and perpetrators of the act of sexual violence in the three countries. It attests to the fact that both children and adults are victims of this crime.

In addition, the types of sexual violence committed against all victims in cases prosecuted in South Africa included rape, gang-rape, defilement, rape of under 16 years of age, rape and murder, the exposure of children to pornography, Indecent assault, consensual penetration with a child, being an accomplice to an assailant in an act of rape, grievous bodily harm, sexual offences, sexual assault, and the grooming of children.¹⁴³ There were also cases of assault grievous physical harm, rape with the mother as an accessory, anal and oral indecent assault, and the attempted rape of a boy.¹⁴⁴ There were also cases of masturbation of the self and the victim,

¹³³ See the Appendix; Eberечи *Access to Justice* 222-225, 237-238, 250-252.

¹³⁴ See the Appendix; Eberечи *Access to Justice* 222-225, 237-238, 250-252.

¹³⁵ See Appendix; Eberечи *Access to Justice* 222-225, 237-238, 250-252.

¹³⁶ Note that the exact ages of the victims were omitted from the judgement.

¹³⁷ Note that the exact ages of the offenders were omitted from the judgement.

¹³⁸ Note that the exact ages of the victims were omitted from the judgement.

¹³⁹ Note that the exact ages of the offenders were omitted from the judgement.

¹⁴⁰ Note that the exact ages of the victims were omitted from the judgement.

¹⁴¹ Note that the exact ages of the offenders were omitted from the judgement.

¹⁴² See the Appendix; Eberечи *Access to Justice* 222-225, 237-238, 250-252.

¹⁴³ See the Appendix for a list of the cases; Eberечи *Access to Justice* 222-225.

¹⁴⁴ See the Appendix for a list of the cases; Eberечи *Access to Justice* 222-225.

compelling the victim to witness this and sexual assault, including hitting the victim on the mouth, throttling, grabbing a breast, pulling down the skirt, sexual assault, and forcefully touching the breasts and vagina.¹⁴⁵ The species of sexual violence cases in Tanzania are unnatural offences and rape, attempted rape, and the sexual assault of a woman,¹⁴⁶ and Uganda witnessed cases of rape, aggravated rape, aggravated defilement and simple defilement, amongst others.¹⁴⁷

| Country | Years of study | Total number of decided cases | Citizens who are victims | Refugees | Other nationals |
|---------------------|-----------------------|--------------------------------------|---------------------------------|-----------------|---|
| South Africa | 2013-2017 | 328 | 326 | None | One victim US citizen One Mozambican offender |
| Tanzania | 2009-2016 | 50 | 50 | None | None |
| Uganda | 2013-2017 | 187 | 187 | None | None |

Table 2: Prosecuted instances of sexual offences in the countries under study (see the Appendix for a list of the cases)

As shown in table 2, the inquiry into the prosecuted cases of sexual violence in South Africa¹⁴⁸ shows that, between 2013 and 2017, 326 of 328 documented prosecuted decided occurrences of sexual offences concerned citizens and that, of the remaining two, one victim was a citizen of the United States of America and the other a Mozambican who was trafficking young girls for sexual purposes. No documented case pertains to a refugee.¹⁴⁹

¹⁴⁵ See the Appendix for a list of the cases; Eberечи *Access to Justice* 222-225.

¹⁴⁶ See the Appendix for a list of the cases; Eberечи *Access to Justice* 237-238.

¹⁴⁷ See the Appendix for a list of the cases; Eberечи *Access to Justice* 250-252.

¹⁴⁸ Note that the figures in this subsection may not be comprehensive. The data were harvested from information that was accessible to the author in all three countries from decided court cases. See the Appendix below; Eberечи *Access to Justice* 222-225, 237-238, 250-252.

¹⁴⁹ Eberечи *Access to Justice* 226; *S v De Wee* 2017 JDR 0005 (ECG) 8; *S v Dos Santos* 2017 JDR 2053 (GP).

While the study in Tanzania could not cover an equivalent period of five years in succession,¹⁵⁰ the data revealed the documentation of more than 50 cases of sexual violence between 2009 and 2016. All of the cases involved citizens, with there being no record of one involving a refugee.¹⁵¹ As for Uganda, the investigation found that in 2013 and 2017 there were 187 documented prosecuted cases of sexual violence. However, all cases involved citizens, and none concerned refugees.¹⁵²

Based on Table 2, therefore, the author argues that refugees in South Africa and Uganda who are victims of sexual violence do not experience the prosecution of their assailants, while there are prosecuted cases that concerned other residents. In the case of Tanzania, it is not possible to draw any firm conclusions because of the poor documentation of the lack of documentation.

6 Refugees and access to courts in contracting states

To access basic amenities in South Africa, you need a passport, a permit or a South African identity document. Refugees in South Africa require an asylum permit to access facilities. The South African Urban Refugee Policy is applauded for its progressive nature, because it does not confine refugees to camps.¹⁵³

Nevertheless, refugees' living conditions have been described as very poor,¹⁵⁴ which defeats the objective of the liberal policy of integration. Some asylum seekers still have difficulty in either renewing or obtaining asylum permits due to the closure of some reception centres.¹⁵⁵

In regard to access to courts, there are few documented cases relating to asylum status.¹⁵⁶ Police personnel discriminate against and do not trust the

¹⁵⁰ This was due to a lack of access to documentation.

¹⁵¹ Eberечи *Access to Justice* 250-252.

¹⁵² Eberечи *Access to Justice* 237-238.

¹⁵³ Zamfir 2017 [https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608698/EPRS_BRI\(2017\)608698_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608698/EPRS_BRI(2017)608698_EN.pdf).

¹⁵⁴ HRW 2009 <https://www.hrw.org/report/2009/12/07/no-healing-here/violence-discrimination-and-barriers-health-migrants-south-africa>.

¹⁵⁵ *Scalabrini Centre, Cape Town v Minister of Home Affairs* 2018 4 SA 125 (SCA) para 12; Chambers 2017 <https://www.timeslive.co.za/news/south-africa/2017-09-29-reopen-cape-town-refugee-centre-appeal-court-orders-home-affairs/>; Washinyira 2017 <https://www.groundup.org.za/article/home-affairs-ordered-re-open-cape-town-refugee-office/>.

¹⁵⁶ *Mohammed v President of the Republic of South Africa* 2001 3 SA 893 (CC); *Lawyers for Human Rights v Minister of Home Affairs* 2004 4 SA 125 (CC).

complaints received from refugees who are victims of sexual violence.¹⁵⁷ Thus, documented prosecuted cases of sexual violence against refugees in South Africa are yet to become available. As shown in Table 2, of the 328 prosecuted cases of sexual violence between 2013 and 2017, one victim was a US citizen and one perpetrator a Mozambican perpetrator. Otherwise all the cases related to South African citizens, with no case involving a refugee.¹⁵⁸

The report indicates that female refugees were easy targets for sexual violence during the xenophobic attacks in South Africa, because they had less recourse to the criminal justice system and less protection than South African women.¹⁵⁹ Further, the report states that despite an increase in the provision of health, psychosocial and legal services by the state and civil society organisations, refugee women still experience problems of access to protection, justice and services following sexual violence.¹⁶⁰ Some of these problems are due to a lack of proper management of the cases and "[an absence of a] formal or consistent approach to referral". Also, survivors are charged for or denied access to free medical services, including post-exposure prophylaxis, and there is a lack of shelter that complies with minimum standards.¹⁶¹ Most female refugees who suffer sexual violence in South Africa do not report the incident for fear of deportation.¹⁶²

Based on the above analysis, the author submits that those female refugees who are victims of sexual violence do not have the same access to the courts as their South African counterparts.¹⁶³ As such, South Africa may not be fulfilling its obligation to refugees as per the provisions of Article 16 of

¹⁵⁷ Kasaman 2017 <http://solidaritysummit.gou.go.ug/content/sexual-and-gender-based-violence-refugee-context>.

¹⁵⁸ Kasaman 2017 <http://solidaritysummit.gou.go.ug/content/sexual-and-gender-based-violence-refugee-context>.

¹⁵⁹ POWA and ALN 2010 https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ZAF/INT_CEDAW_NGO_ZAF_48_10364_E.pdf 12.

¹⁶⁰ POWA and ALN 2010 https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ZAF/INT_CEDAW_NGO_ZAF_48_10364_E.pdf; CSVR 2014 <https://www.csvr.org.za/index.php>.

¹⁶¹ POWA and ALN 2010 https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ZAF/INT_CEDAW_NGO_ZAF_48_10364_E.pdf; CSVR 2014 <https://www.csvr.org.za/index.php>.

¹⁶² POWA and ALN 2010 https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ZAF/INT_CEDAW_NGO_ZAF_48_10364_E.pdf 12; HRW *Prohibited Persons* 83.

¹⁶³ Doctors Without Borders 2010 <https://www.doctorswithoutborders.org/what-we-do/news-stories/research/lives-survival-migrants-and-refugees-south-africa> Table 1, 2 and 3.

the 1951 Refugee Convention. The author recommends that these South Africa should extend the protection of these laws to refugees in its territory.

Turning to Tanzania, a study conducted in refugee camps by Women's Legal Aid of Tanzania in 2008¹⁶⁴ found that despite the presence in camps of law enforcement officers and human rights NGOs,¹⁶⁵ it remains problematic for refugee women and children to access the courts. Reports reveal that access to the services available in cases of sexual violence at the sexual and gender-based violence centre is limited to the deterring of exploitation, "awareness-raising, psychological and legal counselling".¹⁶⁶ Perpetrators are let free by the police; the courts sometimes disregard reported cases on grounds not understood by the victims; and some victims may not want to report violations to the authorities for fear of not been taken seriously or discounted.¹⁶⁷

Discrimination against refugees and the deficiency of qualified staff accounts for the lack of the prosecution of cases. For instance, the district courts of Kibondo, which are responsible for the trial of cases of sexual violence from the Mtendeli, Kanembwa, Nduta and Mkugwa refugee camps, has two male police prosecutors, a male magistrate and a male interpreter with no training on how to handle cases of sexual violence.¹⁶⁸ A lot of the prosecuted cases of such violence end in the acquittal of perpetrators because of shoddy investigation and inept prosecution.

In the Kibondo, Kasulu, Ngara and Kigoma refugee camps and districts courts one presiding magistrate complained of a lack of paper for the maintenance of the court record.¹⁶⁹ The report also exposes the fact that it is difficult to attract qualified lawyers and prosecutors to those areas owing to their underdevelopment and inaccessibility,¹⁷⁰ a difficulty which in turn limits access to the courts. Of about 50 decided cases of sexual violence studied during this research, there are no documented prosecuted cases of sexual violence against refugees in camps in Tanzania, as shown in Table 2 above. The author maintains that although there are few prosecuted cases of sexual violence against refugees in refugee camps in Tanzania, as reported by Human Rights Watch,¹⁷¹ the government of Tanzania needs to

¹⁶⁴ WLAC *Access to Justice* viii.

¹⁶⁵ WLAC *Access to Justice* vii.

¹⁶⁶ WLAC *Access to Justice* 13.

¹⁶⁷ WLAC *Access to Justice* 14.

¹⁶⁸ *Mabuwa Seeking Protection* 60-61.

¹⁶⁹ *Mabuwa Seeking Protection* 62.

¹⁷⁰ *Mabuwa Seeking Protection* 62.

¹⁷¹ *Mabuwa Seeking Protection* 50.

improve its compliance with the implementation of article 16 of the 1951 Refugee Convention.

Similarly, in a bid to facilitate court access for refugees in settlements, the government of Uganda, in collaboration with the UNHCR, established a mobile court to visit the Nakivale refugee settlement.¹⁷² Despite this initiative, court access for refugees remains a challenge for all refugees in the settlements in terms of the long distances complainants have to travel and the over-stretched national judiciary.¹⁷³ At any rate, the mobile court serves only the Nakivale refugee settlement.¹⁷⁴

However, prosecuted cases of sexual violence by the mobile courts in Uganda's refugee settlements are yet to be reported.¹⁷⁵ Of about 187 prosecuted cases of sexual offences reviewed between 2013 and 2017 in Uganda, none involved refugee victims of sexual violence.¹⁷⁶ Thus, the article submits that while the Ugandan government is taking steps to extend the prosecution of sexual violence to refugees in the various settlements, these efforts are yet to yield the desired result. The author therefore argues that Uganda has not fully complied with the provisions of Article 16 of the 1951 Refugee Convention.

7 Conclusion

Access to courts is a challenge for refugees who are victims of sexual violence in that they are typically uninformed about or unaware of the legal recourse and support available to them.¹⁷⁷ The police presence in settlements is scant, with no means of effecting arrest on the assailants, and no transport and holding cells. Consequently, victims are reluctant to report violations and instead seek recourse through traditional dispute resolution, which usually leads, however, to re-victimisation.¹⁷⁸ Other barriers to accessing courts include the cost of accessing government services and the scarcity of police medical examination forms for the examination of victims and offenders for the court trial.¹⁷⁹ Police also lack a working knowledge of the resources available for addressing sexual

¹⁷² UNHCR Uganda 2014 <https://data2.unhcr.org/es/documents/download/48494>; Powell 2013 <http://learningenglish.voanews.com/a/south-africa-rape-uganda-refugee-camp-drc-unhcr/1794666.html>.

¹⁷³ UNHCR Uganda 2014 <https://data2.unhcr.org/es/documents/download/48494>.

¹⁷⁴ UNHCR Uganda 2014 <https://data2.unhcr.org/es/documents/download/48494>.

¹⁷⁵ UNHCR Uganda 2014 <https://data2.unhcr.org/es/documents/download/48494>.

¹⁷⁶ Eberечи *Access to Justice* 250-252.

¹⁷⁷ UNHCR 2018 <https://data2.unhcr.org/en/documents/download/67864>.

¹⁷⁸ UNHCR 2018 <https://data2.unhcr.org/en/documents/download/66524> 6.

¹⁷⁹ UNHCR 2018 <https://data2.unhcr.org/en/documents/download/66524> 6.

violence, which contributes to victims' ignorance of the procedures to follow in accessing courts.¹⁸⁰

This article reveals that South Africa, Tanzania and Uganda of a necessity facilitate access to courts for refugees who are victims of sexual violence in their territories since they have ratified and domesticated the 1951 Refugee Convention and its Protocol of 1967. Therefore they are bound under the treaty to protect and enforce the rights of refugees.

Regarding access to court, the three countries provide their citizens with such access, and all prohibit sexual violence, imposing penalties ranging from years of imprisonment to life and death sentences. In Tanzania and Uganda an additional punishment is corporal punishment, as determined by the court. The jurisdiction for addressing sexual violence in South Africa and Tanzania is Magistrate Courts; in Uganda, it is the High Court. The procedures for reporting the crime to the police are similar. South Africa has its Thuthuzela Care Centres, which are close to a one-stop facility located in hospitals and close to a police station, where victims of rape report and have access to facilities. In Tanzania, South Africa and Uganda, the victim is the complainant and principal witness, and the state prosecutes cases.

With regard to the treatment of refugees, there are as yet no documented prosecuted cases of sexual violence against refugees in South Africa. Tanzania reports prosecuting a few instances of sexual violence against refugees, but records are hard to find owing to poor documentation.¹⁸¹ Uganda has a mobile court dedicated to addressing the problem of sexual violence against refugees in settlements, but they are yet to record the prosecution of such cases.¹⁸²

The author argues, therefore, that the contracting states should protect refugees against sexual violence, create a conducive environment for the reporting of such cases, and ensure that they hold perpetrators to account for such crimes so that the victims can have access to a court to testify against their assailants. Also, the author suggests that a one-stop model facility should be included in refugee camps/settlements design as recommended by Eberechi.¹⁸³ The article recommends that states in breach of the article should be encouraged to comply with their obligations.¹⁸⁴

¹⁸⁰ UNHCR 2018 <https://data2.unhcr.org/en/documents/download/66524> 6.

¹⁸¹ *Mabuwa Seeking Protection* 62.

¹⁸² UNHCR Uganda 2014 <https://data2.unhcr.org/es/documents/download/48494>.

¹⁸³ Eberechi *Access to Justice* 383-387.

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List of Abbreviations

| | |
|--------------|---------------------------------------|
| AIDS | Acquired Immunodeficiency Syndrome |
| ALN | AIDS Legal Network |
| Am J Pol Sci | American Journal of Political Science |

| | |
|---------|---|
| CSV | Centre for the Study of Violence and Reconciliation |
| FIDH | International Federation for Human Rights |
| HIV | Human Immunodeficiency Virus |
| HRW | Human Rights Watch |
| Int CLR | International Criminal Law Review |
| LGBT | lesbian, gay, bisexual and transgender |
| NGO | non-governmental organisation |
| NPA | National Prosecuting Authority |
| PELJ | Potchefstroom Electronic Law Journal |
| POWA | People Opposing Women Abuse |
| PTSD | Post-traumatic stress disorder |
| SOCA | Sexual Offences and Community Affairs Unit |
| STD | Sexually transmitted disease |
| STI | Sexually transmitted infection |
| UN | United Nations |
| UNCHR | Office of the United Nations High Commissioner for Refugees |
| UNICEF | United Nations Children's Fund |
| WLAC | Women's Legal Aid Centre |

APPENDIX

South Africa

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- S v AR* 2013 JDR 2186 (SCA)
- S v AR* 2017 JDR 1219 (WCC)
- S v Amerika* 2017 JDR 0025 (WCC)
- S v Baadjies* 2017 JDR 1010 (WCC)
- S v Bangala* 2014 JDR 0919 (GSJ)
- S v Bari* 2015 JDR 1951 (ECG)
- S v Bopape* 2016 JDR 0652 (GJ)
- S v Booysen* 2013 JDR 0789 (GNP)
- S v Calvin* 2014 JDR 2020 (SCA)
- S v Cebekhulu* 2016 JDR 0649 (GJ)
- S v Chake* 2013 JDR 2184 (SCA)
- S v Chauke* 2014 JDR 0351 (GNP)
- S v Chauke* 2015 JDR 1522 (GP)
- S v Chinridze* 2014 JDR 1516 (GP)
- S v Cock* 2015 JDR 0155 (ECG)
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- S v Dube* 2016 JDR 1760 (SCA)
- S v Duma* 2016 JDR 0232 (KZP)
- S v Enslin* 2017 JDR 0241 (GP)
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- S v FFD* 2013 JDR 0007 (GNP)
- S v Flietor* 2013 JDR 0931 (FB)
- S v FM* 2016 JDR 1564 (GP)
- S v Fongoqa* 2015 JDR 0947 (WCC)
- S v Ganga* 2015 JDR 2561 (WCC)
- S v Gcaza* 2016 JDR 1896 (ECG)
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- S v LP* 2014 JDR 0231 (WCC)
- S v Lunga* 2014 JDR 1193 (GP)
- S v Luruli* 2013 JDR 2553 (GSJ)
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- S v Mabula* 2013 JDR 1137 (GNP)
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- S v Madisha* 2016 JDR 0049 (GP)
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- S v Magano* 2014 JDR 0720 (GNP)
- S v Magazi* 2016 JDR 1027 (FB)
- S v Magezi* 2013 JDR 2716 (SCA)
- S v Mahinje* 2014 JDR 2571 (ECB)
- S v Mahlaba* 2016 JDR 1594 (FB)
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- S v Makamo* 2015 JDR 0045 (GJ)
- S v Makaringe* 2016 JDR 1327 (NWM)
- S v Makatu* 2013 JDR 2422 (SCA)
- S v Makgai* 2013 JDR 1626 (GNP)
- S v Makhakha* 2013 JDR 1935 (WCC)
- S v Makhhalima* 2016 JDR 0157 (GP)
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- S v Makhendlana* 2015 JDR 0788 (ECG)
- S v Makoa* 2014 JDR 2612 (GP)
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- S v Maleka* 2015 JDR 0524 (GP)
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- S v Mali* 2015 JDR 0662 (GP)
- S v Manana* 2014 JDR 0732 (GNP)
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- S v Masiteng* 2016 JDR 0818 (GP)
- S v Masuku* 2013 JDR 1093 (GNP)
- S v Maswanganyi* 2013 JDR 2521 (GNP)
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