

ACCESS TO JUSTICE AND THE REFUGEE WOMAN IN AFRICA

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ABSTRACT

Refugee women flee from their countries of residence for reasons including war, violence, conflict, harmful cultural practices, and persecution. They cross international borders to escape the violence from their countries of origin and find safety in their destination countries. For these women, they hoped that the countries of destination would offer the much-needed safety generally lacking in their countries of origin. However, is this significantly required safety generally attainable in the countries of destination in Africa? Could it be that, in most cases, the vulnerability of these women has exposed them to further violence, often with no criminal accountability? Using South Africa as a case study, this paper examines the vulnerability of refugee women to violence. It also discusses the various forms of violence they experience and the challenges they encounter in accessing justice. This article demonstrates that the cross-cutting expressions of violence against refugee women across the African continent, as well as the challenges they face in accessing justice, explain the expectation of safety they generally envisage in deciding to cross international borders. The paper draws on some best practices across the African continent to suggest ways of ensuring that refugee women are not only protected from violence but also that they can access criminal justice when violence does occur.

1. INTRODUCTION

Women¹ in Africa are vulnerable and suffer multitudes of violence of various degrees in their lifetime. In South Africa, violence against women is a pandemic.² In Sub-Saharan Africa, it is

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¹ Note that the word “women” includes girls.

² Adebayo, Bukola ‘South Africa has the continent's highest Covid-19 cases. Now it has another pandemic on its hands’ CNN (Published 5:43 AM EDT, Fri 19 June 2020) <<https://edition.cnn.com/2020/06/19/africa/south-africa-gender-violence-pandemic-intl/index.html>> accessed 21 October 2023.

regarded as the ‘tip of the iceberg or silent epidemic’ because people are disinclined to report its prevalence.³

This ‘Male-Perpetrated Violence’ and war against women is cosmetically played down as gender-based violence (GBV) or Sexual and Gender-Based Violence (SGBV).⁴ Gender-based violence against women is a species of violence perpetuated to make them inferior in the social order, which inflicts ‘physical, sexual or psychological harm or torment on women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life’.⁵ These acts include ‘physical, sexual and psychological violence occurring in the family’, as well as ‘battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices,’ destructive to ‘women, non-spousal violence and violence related to exploitation.’⁶ These acts also extend to corporal, sexual and emotional brutality against women in the community, with ‘rape, sexual cruelty, harassment and bullying at work, in educational institutions and elsewhere, marketing in women and forced prostitution.’⁷ This violence also involves physical,⁸ sexual and psychological violence perpetrated or not adequately addressed by the State where it strikes.⁹ They classified the violence as intimate partner violence (IPV)¹⁰ or non-intimate partner violence

³ Tia Palermo, Jennifer Bleck, and Amber Peterman Palermo, ‘Tip of the iceberg: Reporting and gender-based violence in Developing countries’ (2014) 179 (5) *American Journal of Epidemiology* 602–612.

⁴ Kieswetter Edward ‘I write with a sense of shame’: Kieswetter's letter to SARS staff about gender-based Violence’ (News 24 13 Sep 2019) <<https://www.news24.com/fin24/i-write-with-a-sense-of-shame-kieswetters-letter-to-sars-staff-about-gender-based-violence-20190913-2>> accessed 21 October 2023; UN General Assembly, Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104, art 1.

⁵ UN General Assembly, Declaration on the Elimination of Violence Against Women (n4) art 1.

⁶ *ibid* art 2 (a).

⁷ *ibid* art 2 (b).

⁸ *ibid* art 2 (c); Bright Opoku Ahinkorah, Richard Gyan Aboagye, Abdul-Aziz Seidu, James Boadu Frimpong, John Elvis Hagan Jr, Eugene Budu, Sanni Yaya, ‘Physical violence during pregnancy in sub-Saharan Africa: why it matters and who are most susceptible?’ [2023] *BMJ Open* 1.

⁹ UN General Assembly, Declaration on the Elimination of Violence Against Women (n 4) art 2 (c).

¹⁰ Mannell J and Guta A. The ethics of researching intimate partner violence in global health: A case study from global health research. [2018] *Glob Public Health* 13, 1035–49; Deda Ogum Alangea, Adolphina Addoley Addo-Lartey, Yandisa Sikweyiya, Esnat Dorothy Chirwa, Dorcas Coker-Appiah, Rachel Jewkes, Richard Mawuena Kofi Adanu, ‘Prevalence and risk factors of intimate partner violence among women in four districts of the central region of Ghana: Baseline findings from a cluster randomised controlled trial’ (2018) *PLoS ONE* 13(7) 2.

(non-IPV).¹¹ Women globally experience ‘sexual abuse and harassment, trafficking, femicides, intimate partner violence’ and imposed sex trade.¹²

A refugee is a person who escaped from their home country of origin to seek haven in a reasonably secure country for fear of persecution and various human rights violations.¹³ These refugees are accommodated in camps,¹⁴ settlements¹⁵ and urban arrears.¹⁶ They suffer further violations in these host facilities. Therefore, this work is divided into five segments, the first ambit introduces the topic and discusses the challenges of sexual violence against women including refugee women both in South Africa and Africa, followed by the difficulty in accessing justice by refugee women in South Africa and parts of Africa, thirdly the paper will discuss general legal protection of refugees and the protection of refugee women against violence and the legal provisions for accessing justice when violated. The paper will also look at some best practices in accessing justice for refugee women in Africa, draw conclusions and proffer the way forward.

1.1 The Challenges of sexual violence in South Africa

Records show in South Africa that between April 2022 and March 2023, 53 498 sexual offences with 42 780 rape included; also 99 of 100,000 women and children between 1 April 2014 and 31 March 2015 suffered sexual violence and Assault; in addition, 1 out of 4 women reported the violence, while three declined to report the horror of the pillory.¹⁷ ‘Femicides and sexual

¹¹ Muluken Dessalegn Muluneh, Virginia Stulz, Lyn Francis and Agho Kingsley, ‘Gender Based Violence against Women in Sub-Saharan Africa: A Systematic Review and Meta-Analysis of Cross-Sectional Studies’ (2020)17 *International Journal Environmental Research Public Health* 903 1.

¹² UN, (1993). Declaration on the elimination of violence against women; Memela Sinenhlanhla & Maharaj Brij ‘Refugees, ‘Violence and Gender: The Case of Women in the Albert Park Area in Durban, South Africa’ (2018) *Urban Forum* 29; Jewkes, R ‘Intimate partner violence causes and Prevention (2002) *The Lancet* 359, 1423-1429.

¹³ Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"), 1001 U.N.T.S. 45, 10 September 1969, art 1.

¹⁴ UNHCR ‘TANZANIA - Nyarugusu Camp Profile - 30 June 2017’ <https://data.unhcr.org/en/documents/details/58702>> accessed 27 November 2024.

¹⁵ Naohiko Omata and Josiah Kaplan, Refugee livelihoods in Kampala, Nakivale and Kyangwali refugee settlements: patterns of engagement with the private sector, Working Paper Series No. 95, Refugee Studies Centre, October 2013,6, <https://www.refworld.org/reference/countryrep/rsc/2013/en/106686> (accessed 27 November 2024).

¹⁶ Beverly Goldberg ‘Refugees in South Africa: What You Need to Know’ HIAS.org (2 October, 2024) <https://hias.org/news/refugees-south-africa-what-you-need-know/> accessed 27 October 2024.

¹⁷ South African Police Service ‘South African Police Service Annual Report 2022/2023’ (2023) <https://www.saps.gov.za/about/stratframework/annual_report/2022_2023/Annual-Report-2022-23-final-draft-2023-10-12.pdf> accessed 27 November 2024; Institute for Security Studies, ‘Assault and sexual offence: an

abuse'.¹⁸ These figures of violent behaviours are more prevalent amongst female refugees.¹⁹ A study conducted between 2008 and 2019 on GBV in Sub-Saharan African (SSA) countries amongst women discovered that the frequency of gender inequality in regions for reasons such as male perceptions of women as property, lenient insolences of the public to IPV, inadequate education of women, feminine disenfranchisement and inadequate law prosecution of incidences in SSA as a possible cause of the rise in IPV occurrences.²⁰ This report further disclosed that 44% of women suffered from IPV, while 35.5% experienced IPV in the previous collective year; on the other hand, 14% suffered non-IPV.²¹ Additionally, emotional IPV was 29.40%, whereas 25.87% accounted for physical and 18.75% sexual violence occurrences.²² The sub-regional investigation discovered that West and East African women encountered 30% and 25% emotional violence, respectively, more than women in other SSA regions occurrences.²³

1.2 Challenges faced by refugee women who are survivors of violence in accessing justice

In South Africa, refugees live amongst citizens, a more liberal form of accommodating. However, this progressive pattern of hosting does expose them to Xenophobia and discrimination.²⁴ Refugee women in Africa are more vulnerable to all species of violence than other women living in the same country, but literature on the violence against refugee women is scarce.²⁵ In South Africa, the violence²⁶ they suffer includes 'physical attacks, verbal abuse and

overview of the official statistics: 2014/15' 3, <<https://oldsite.issafrica.org/uploads/SA-Crime-Stats-2015-Assault-and-sexual-offences-fact-sheet.pdf>> accessed 9 July 2020; Sinenhlanhla & Brij 'Refugees, 'Violence and Gender: The Case of Women in the Albert Park Area in Durban, South Africa' (n12) 429; Abrahams, N., & Gevers, A. 'A rapid appraisal of the status of mental health support in post-rape Care services in the Western Cape (2017) 23 South African Journal of Psychiatry 1–10.

¹⁸ Sinenhlanhla & Brij 'Refugees, 'Violence and Gender: The Case of Women in the Albert Park Area in Durban, South Africa' (n12) 429.

¹⁹ *ibid* 430.

²⁰ Muluken Dessalegn Muluneh, Virginia Stulz, Lyn Francis and Agho Kingsley, 'Gender Based Violence against Women in Sub-Saharan Africa: A Systematic Review and Meta-Analysis of Cross-Sectional Studies' (2020) *International Journal Environmental Research Public Health* 13 of 21.

²¹ *ibid*.

²² *ibid* 1 of 21.

²³ *ibid* 1 of 21.

²⁴ Bond, Patrick, & Hinely, Rebecca & Meth, Oliver 'Great White Shark mauls Albert Park refugees' *Eye on Civil Society* (2008) *The Mercury* <http://ccs.ukzn.ac.za/default.asp?3,28,11,4238>. accessed 1 August 2020.

²⁵ Memela Sinenhlanhla & Memela Brij, 'Refugees, Violence and Gender: The Case of Women in the Albert Park Area in Durban, South Africa' (2018) *Urban Forum* 29, 429; Palmary, I. Mothering women: refugee women's trauma and trauma service delivery (2006) 17 *International Journal of Critical Psychology*, 119–139.

²⁶ Bond, P., Hinely, B., & Meth, O. 'Great white shark mauls Albert Park refugees' (n20) 28,11,4238; Desai, A. 'Between the push and the shove: everyday struggles and the re-marking of Durban' (2010) 69(3) *African Studies* 423–437.

sexual harassment from refugees, local people and taxi drivers, conductors and police officers.²⁷ They also experience domestic violence and failure of police protection.²⁸ A poem by refugee women (Agnes Mahachi and Tafadzwa Chikandiwa) is a typical example of the difficulty in accessing justice expressed by refugee women.²⁹

Refugee women who suffer violence dread the police station in South Africa for fear of exposure to Xenophobia, discrimination and gender thoughtlessness; police do not protect them against intimate partner violence.³⁰ They go through harassment and are tagged lawbreakers for lack of permits.³¹

Additional challenges to accessing court in some African countries³² is the distance between the courts and the refugee camps in some countries; for instance, some refugees travel over 100

²⁷ Memela Sinenhlanhla & Maharaj Brij, 'Refugees, Violence and Gender: The Case of Women in the Albert Park Area in Durban, South Africa' (2018) *Urban Forum* 430.

²⁸ *ibid* 429.

²⁹

Will I Be Turned Away?

If I walked through the bush, And in chest-high water through the river, And through more thick bush,
And I crawled under the wire And climbed over the electric fence To reach South Africa

If I came through the river because I had no money for the documents, nor
To bribe the officials at the border post, But I was so desperate

WILL I BE TURNED AWAY?

If I was attacked and Gang raped by the guma-gumas As I made my way through the river,
And I arrived in South Africa With no documents

WILL I BE TURNED AWAY?

If I seek medical help and counselling If I cannot identify the rapists and the evidence of the rape was washed
away in the river

WILL I BE TURNED AWAY?

If I report the rape to the police and ask that The rapists are caught and they should be Made to pay for Their
terrible deeds,

And if I cannot identify them, and I am regarded as illegal, and I fear the police,
And I fear deportation, and I fear going to the hospital, I fear being raped again In South Africa,

And I feel so alone and Unprotected

WHERE DO I GO FOR HELP?

People Opposing Women Abuse (POWA) with the AIDS Legal Network (ALN) on behalf of the One in Nine Campaign and

the Coalition for African Lesbians (CAL) "Criminal Injustice: Violence against Women in South Africa, Shadow Report on Beijing + 15 March

2010

<https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH01f0/096c6521.dir/POWA_OthersSouthAfrica48_enga.pdf> accessed

21 November 2024.

³⁰ Memela, S., Maharaj, B. Refugees, 'Violence and Gender: the Case of Women in the Albert Park Area in Durban, South Africa' (2018) *Urban Forum* 29, 439.

³¹ *ibid*.

³² ARC International 'Gender-Based Violence Legal Aid: A Participatory Toolkit (2005) 7 <<https://www.endvawnow.org/uploads/browser>

/files/Gender-based%20Violence%20Legal%20Aid.pdf> accessed 26 August 2024.

kilometres from camps to access justice, and thus, they fear retaliation.³³ Limitations on movements from camps to the city, lack of means of movement, rough and unsafe roads, and difficulty getting witnesses to court constitute obstacles to accessing justice.³⁴ Also hindering access to justice is the traditional court systems in some refugee camps, a means of dispute resolution, they are a male-dominated system, sometimes with just one woman who is not allowed to speak during the proceedings and tailored according to the Sudanese customary court.³⁵ Where the pendulum of justice always tilts in favour of the male offender;³⁶ for instance, if an unmarried is raped, the ‘Bench Court may rule that the perpetrator should pay compensation and bride price.’³⁷ Once the offender pays the fine to the girl’s parent, she is requested against her will to go and live with the rapist against her will; the Bench court annals the issue as resolved and the verdict or conviction change from rape to ‘elopement’ or lack of payment of bride price.³⁸

Similarly, the Somali *Maslaxad* (justice) system comprises only males, a mixture of customary and Sharia laws; they do not believe in using imprisonment as punishment; therefore, they resort to fines and compensations as penalties.³⁹ They decide cases like the Sudanese Bench Court, but amid individuals or disputes between clans, unfortunately, justice is cash and carry; thus, wealthy clans commit crimes with ‘impunity.’⁴⁰ Women cannot represent themselves or testify as a witness; a man has to do that for her; the court perceives rape as a disgrace to the victim and her family. Therefore, they will force the victim to marry the predator, and the perpetrator will pay the bride price and compensation to the male members of the rape victim’s family and not to the victim.⁴¹ Her failure to marry the predator is disobedience to authority, which attracts the penalty of persecution and exile.⁴² Additional challenges to accessing justice

³³ Ilse Griek, ‘Traditional Systems of Justice in Refugee Camps: The Need for Alternatives’ Refugee Reports Summer/Autumn (2006) 27 (2) 2, <<https://reliefweb.int/report/world/refugee-reports-summerautumn-2006>> accessed 26 November 2024; Rosa da Costa, ‘The Administration of Justice in Refugee Camps: A Study of Practice’ Research Paper No.10, UN High Commissioner for Refugees (UNHCR), March 2006, <<https://www.refworld.org/reference/lpr/unhcr/2006/en/20714>> accessed 26 November 2024.

³⁴ Griek, ‘Traditional Systems of Justice in Refugee Camps: The Need for Alternatives Refugee Reports’ (n 29) 2; Rosa da Costa, ‘The Administration of Justice in Refugee Camps: A Study of Practice’ (n 33) 28.

³⁵ Griek, ‘Traditional Systems of Justice in Refugee Camps: The Need for Alternatives Refugee Reports’ (n29) 3

³⁶ *ibid.*

³⁷ *ibid.* 4.

³⁸ *ibid.*, 3-4.

³⁹ *ibid.* 4.

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² *ibid.*

include societal pressure on victims not to lay charges against offenders to the domestic justice mechanism, intimidation of victims, threats from refugee camp leaders and lack of documentation of the proceeding of the traditional courts.⁴³ There is also the lack of knowledge about the host legal system and the absence of legal assistance and representation, compounded by the nature of camping.⁴⁴

2. LEGAL PROTECTION OF REFUGEES

Various international law instruments protect Refugees against all species of human rights violations.⁴⁵ The basis of their protection is Article 14 (1) of the 1948 Universal Declaration of Human Rights (UDHR), which provides that ‘everyone has the right to seek and to enjoy asylum from persecution’ in other countries.⁴⁶ Article 44 of Geneva Convention IV declares that, in times of hostilities, refugees who do not enjoy the protection of any nation, whose countries are parties to the war and who find themselves detained in the hands of the enemy should not be treated as enemies by the detaining power.⁴⁷ The International Criminal Court in the *Prosecutor v Duško Tadić* held refugees as protected persons during conflict in these subtle situations.⁴⁸ Also protecting refugees is Article 73 of Protocol 1 Additional (AP 1) to the Geneva Conventions.⁴⁹ The current protection of refugees is based on Article 33 Refugee Convention which outlaws the expulsion or return of a refugee to a country where they will be in danger of human rights violations.⁵⁰

⁴³ *ibid.*

⁴⁴ Rosa da Costa, ‘The Administration of Justice in Refugee Camps: A Study of Practice’ (n 29), 28; Griek, ‘Traditional Systems of Justice in Refugee

Camps: The Need for Alternatives Refugee Reports’ (n29) 4.

⁴⁵ Convention relating to the Status of Refugees: (adopted July 28, 1951, entered into force April 22, 1954) 189 UNTS 137 (Refugee Convention) art 1 A (2); UN General Assembly, Protocol Relating to the Status of Refugees, United Nations, Treaty Series, vol. 606, p. 267, 31 January 1967.

⁴⁶ UN General Assembly, Universal Declaration of Human Rights, 217 A (III), 10 December 1948.

⁴⁷ International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 75 UNTS 287, 12 August 1949.

⁴⁸ Sinenhlanhla Memela and Brij Maharaj Refugees, ‘Violence and Gender: The Case of Women in the Albert Park Area in Durban, South Africa Urban Forum’ (2018) 29:429.

⁴⁹ International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, 8 June 1977; Protocol 1 Additional (AP 1) to the Geneva Conventions. Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979.

⁵⁰ Convention relating to the Status of Refugees (n 45).

The African Charter on Human and Peoples' Rights, authorises a persecuted person a right to seek asylum in any country of choice per state and international laws.⁵¹ The principal legislation for the protection of refugees in South Africa is the Refugees Act, of 1998.⁵² Section 2 prohibits the prevention of entry into South Africa, the expulsion and extradition of a person who flees a country where their life is in danger of persecution and various human rights violations and seeks protection in the Republic.⁵³ While section 3 advances the right to asylum to qualified persons.⁵⁴

2.2 Protection against violence

Article 12 of the Universal Declaration of Human Rights prohibits attacks on honour and protects against intrusion and attacks.⁵⁵ States are to hold accountable perpetrators of violence against women and prevent them from engaging in violence against women.⁵⁶ Also, prohibiting and destroying all species of violence against women and girls is Article 29 of the Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women.⁵⁷ Further protecting women against violence is Article 36 (8) (c) of the Rome Statute, which urges States to employ the services of Judges who are knowledgeable about violence against women.⁵⁸

Article 3(2) of the African Charter on Human and Peoples Rights afford women, including female refugees, protection against violence,⁵⁹ it guarantees all humans a parallel shield before the law. Article 4 also declares that all persons should be free from violations involving their lives and their privileges of honour.⁶⁰ Article 12 (3) provides for the right to seek refugee status,

⁵¹ Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) art 12 (3).

⁵² The Refugees Act, 1998.

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ Universal Declaration of Human Rights (n 46).

⁵⁶ UN General Assembly, Declaration on the Elimination of Violence against Women Art 4 (a-b).

⁵⁷ United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995, <<https://www.refworld.org/docid/3dde04324.html>> accessed 28 October 2023.

⁵⁸ UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, art 36 (8) b, <<https://www.refworld.org/docid/3ae6b3a84.html>> accessed 29 October 2023.

⁵⁹ African Charter on Human and Peoples' Rights (n 51).

⁶⁰ *ibid.*

and Article 18 (3) guarantees the protection of women against all forms of perceptions and their rights under all international conventions.⁶¹

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa affords specific protection to African women.⁶² Article 3 (1) expressly promotes the respect and dignity of a woman, and Article 3(3) mandates states to take on and execute proper ways to outlaw any exploitation or dreadful conditions in opposition to women.⁶³ Article 3 (4) also compels members of the union to assume and effect applicable procedures to safeguard the security of every woman's right, to show respect for her dignity and to protect them from all forms of violence, principally 'sexual and verbal violence'.⁶⁴ Additionally, Article 4 (1) orders the regard for the life, integrity and safety of every woman in the region, and it outlaws every act that is abusive, vicious, inhumane or degrading retribution and dealing against them.⁶⁵ Furthermore, Article 4 (2) makes it obligatory for states to adopt mechanisms to enforce these rights and the rights of women under this article and international refugee law.⁶⁶ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, article 11, provides for the protection of women during war and requests states to give Asylum to women fleeing from conflicts and protect them against all forms of violence.⁶⁷

The foundation for addressing violence in South Africa are sections 10 to 12 of the Constitution of the Republic of South Africa, which provides for the enjoyment of human dignity, establishes the right to existence and promise freedom and security of persons,⁶⁸ respectively. These provisions of the Constitution of South Africa lay the foundation for everyone, including women, to enjoy a life that is devoid of violence and respect for our biological privacy. Domestic Violence Act 116 of 1998 generally provides for the protection of women against violence in domestic relationships and makes it a duty for law enforcement

⁶¹ *ibid.*

⁶² African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, -, African Union, 11 July 2003, <<https://www.refworld.org/legal/agreements/au/2003/en/18176>> (accessed 21 November 2024).

⁶³ *ibid.*

⁶⁴ *ibid.*

⁶⁵ *ibid.*

⁶⁶ *ibid.*

⁶⁷ *Ibid.*

⁶⁸ Constitution of the Republic of South Africa, 1996.

agencies to protect victims who report cases; it provides for an interim protection order.⁶⁹ Empower the courts to issue protection orders in section 7.⁷⁰ Also outlawing violence against women is the Criminal Law (Sexual Offences and Related Matters) Amendment Act, which extended the definition of rape to include sexual offence against women to proxy rape, object rape and Gender-Based Violence, for instance, the digital distribution of pornography etc.⁷¹ For efficient trial and guilty verdict of perpetrators, section 56 A of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.⁷² Additionally, protecting the victim of violence against untoward sufferings after a protection order is section 29 of the Maintenance Act,⁷³ which provides for the attachment of the payments to those who fail to maintain the partner as a result of the protection order.⁷⁴

To further protect women and facilitate access to justice for women who suffer violence in South Africa, the Sexual Offences Courts, also known as MATTSO Courts, in 116 locations within South Africa as of 29 April 2022.⁷⁵ There are two types of MATTSO courts: a regional court that deals exclusively with cases of sexual offence' and a hybrid MATTSO court, which is a regional court dedicated to adjudicating sexual offence cases in any specified area. It is a court established to prioritise sexual offences cases whilst permitted to deal with other cases.⁷⁶

Another mechanism for addressing violence against women in South Africa is the National Crime. Prevention Strategy (NCPS) of 1996,⁷⁷ the NCPS declared violence against women and children a national crime concern.⁷⁸

2.3. Legal Mechanism for access to justice for refugee women and girls

⁶⁹ Domestic Violence Act 116 of 1998, preamble, s 2-6.

⁷⁰ *ibid* s7.

⁷¹ Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.

⁷² Criminal Law (Sexual Offences and Related Matters) Amendment Act 6 of 2012.

⁷³ Maintenance Act 99 of 1998.

⁷⁴ *ibid*.

⁷⁵ Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2015 s 55A, Department of Justice and Constitutional Development 'List of MATTSO Courts [116 Countrywide]' 2022, <<https://www.justice.gov.za/vg/sxo-SOC-list.html>> accessed 6 November 2023.

⁷⁶ *ibid*.

⁷⁷ The National Crime Prevention Strategy (NCPS) of 1996; Justice Mandisa Maya 'Judicial and Legal Responses to Gender Based Violence and Femicide' Gender Violence and Femicide Summit, Pretoria 1 November 2018, <https://www.judiciary.org.za/images/speeches_from_the_judiciary/Gender_Based_Violence_and_Femicide_Summit_Speech.pdf> accessed 6 November 2023.

⁷⁸ *ibid*.

Access to justice is defined as “the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards’.⁷⁹ It encompasses accessibility to effective reporting mechanisms for the disadvantaged injured party and reception of appropriate responses from authorised bodies.⁸⁰ The access could be ‘procedural’, consisting of gaining a ‘fair hearing’ before a court of law and ‘substantive’ involving the ‘reception of a fair and just remedy for violating one’s rights’, including reimbursements.⁸¹ The access should also encompass the protection of the victim throughout all the segments of the proceedings.⁸²

The Universal Declaration of Human Rights (UDHR) is the footing for access to justice.⁸³ It begins with conferring all humans, including women and girls, with legal personality under Article 6.⁸⁴ The UDHR provision implies that all humans, including women and girls, have a standing before a court. In addition, Article 7 declares all humans as equal before the law and must enjoy equal protection before the law.⁸⁵ This protection must exclude all forms of discrimination relating to violating this assertion or provoking such discrimination.⁸⁶ Article 8 empowers persons who suffer violations to seek operative remedy for any act of violation of their legal rights in a national court.⁸⁷ Article 10 provides for a fair hearing.⁸⁸ The declaration urges States to enforce the right to equal protection under the law, develop policies, investigate

⁷⁹ United Nations Development Programme (UNDP) ‘Access to Justice’ <<https://www.undp.org/content/undp/en/home/2030-agenda-for-sustainable-development/peace/rule-of-law-justice--security-and-human-rights/access-to-justice.html>> accessed 3 August 2020; Eberechi OE Access to Justice for Victims of Sexual Violence in Refugee Camps (LLD-dissertation University of Pretoria 2017).

⁸⁰ Eberechi OE Access to Justice for Victims of Sexual Violence in Refugee Camps (n 79); Bedner & JAC Vel ‘An analytical framework for empirical research on access to justice’ (2010) *Law, Social Justice & Global Development Journal (LGD)* 1, 4 - 9; M Cappelletti, and B Garth, ‘Access to Justice: The worldwide movement to make rights effective: A general report,’ in M Cappelletti and B Garth (eds.) *Access to Justice*, Vol. 1 (Milan: Dott A. Giuffrè Editore) (1978) 6.

⁸¹ Eberechi ‘Access to Justice for Victims of Sexual Violence in Refugee Camps’ (n 79)15; Bedner & Vel ‘An analytical framework for empirical research on access to justice’(n 80) 4 – 9.

⁸² Eberechi ‘Access to Justice for Victims of Sexual Violence in Refugee Camps (n-79) 16; Bedner & Vel ‘An analytical framework for empirical research on access to justice’ (n 80) 4 – 9.

⁸³ Universal Declaration of Human Rights (n 46).

⁸⁴ *ibid.*

⁸⁵ *ibid.*

⁸⁶ *ibid.*

⁸⁷ *ibid.*

⁸⁸ *ibid.*

and punish offenders according to local legislation, and grant women access to justice machinery under domestic laws.⁸⁹

Specifically providing for access to justice for refugees is Article 16 of the 1951 UN Refugee Convention, which reads:

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 *caution judicatum solvi*.
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.⁹⁰

The above provision implies that refugees who require court facilities to address any violations against them must visit the domestic courts of host states. Article 16 further provides that states should give refugees access to court like such access enjoyed by its citizens. By implication, if women who are citizens of a contracting state do not enjoy such access, then refugee women will not also enjoy such facilities. Article 16 also adds that refugees should receive legal aid and exemption from paying caution fees. This provision further discloses that the domestic court of a host state is the jurisdiction for addressing all human rights violations against refugees. Access to courts is 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.’⁹¹

⁸⁹ UN General Assembly, Declaration on the Elimination of Violence against Women Art 3(d), 4(c) (d); Convention on the Elimination of All Forms of Discrimination against Women Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 entry into force 3 September 1981.

⁹⁰ Convention relating to the Status of a Refugee (n 41).

⁹¹ *Mandela v Minister of Prisons* 1983 1 SA 938 (A) 957; Eberechi OE ‘A Comparative Analysis of the Application of the 1951 Refugee Convention to Victims of Sexual Violence in South Africa, Tanzania and Uganda’ PER / PELJ 2020(23) 7.

However, Article 2 (1) (g) of the Vienna Convention on the Law of Treaties provides that for a treaty to bind a state that State must consent to the convention.⁹² Consenting for a state means the ratification, acceptance, approval or accession, signature and the deposit of the instrument.⁹³ South Africa consented to the 1951 Refugee Convention and the Protocol on 12 January 1996.⁹⁴

Moreover, section 7 of the African Charter provides that all individuals should have the opportunity to state their case before a competent court and appeal against the decisions of a tribunal if dissatisfied.⁹⁵ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa gives women equal protection and benefits before the law and advises states to grant women access to courts, including legal advice and legal aid when necessary, provide them with legal information and ensure that law enforcement agents are well abreast and sensitive to their needs.⁹⁶ Since, refugee women suffer more violence during their escape in transit, and host states are susceptible to various forms of violence.

In implementing the 1951 Refugee Convention in their local courts, South Africa took the monist approach per section 232 of the Constitution of South Africa, which declares customary International Law as law in the Republic except it contravenes the provision of the Constitution and the Act of Parliament.⁹⁷ This provision implies that Customary International law forms part of their internal law without domestication. South Africa is also dualist in enforcing international law as per section 231, which provides for the domestication or approval of any international agreements.⁹⁸ According to the dualist approach, South Africa enacted the Refugees Amendment

⁹² United Nations, Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, p. 331, 23 May 1969.

⁹³ *ibid* art 11-12.

⁹⁴ Convention relating to the Status of Refugees (n 45); United Nations High Commissioner for Refugees, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol; Eberechi 'A Comparative Analysis of the Application of the 1951 Refugee Convention to Victims of Sexual Violence in South Africa, Tanzania and Uganda' (n 91) 4.

⁹⁵ African Charter on Human and Peoples' Rights (n 51).

⁹⁶ *ibid* art 4.

⁹⁷ Constitution of the Republic of South Africa; Eberechi OE 'A Comparative Analysis of the Application of the 1951 Refugee Convention to Victims of Sexual Violence in South Africa, Tanzania and Uganda' (n 91) 4.

⁹⁸ Eberechi 'Access to Justice for Victims of Sexual Violence in Refugee Camps' (n-79) 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 G and Ferreira-Snyman A 'The Incorporation of Public International Law into Municipal Law and Regional Law against the Background of the Dichotomy between Monism and Dualism' (2014) PELJ 1477; *Glenister v President of the Republic of South Africa* 2011 3 SA

Act 2017.⁹⁹

Access to justice in South Africa can be gleaned from the South African Constitution Bill of Rights, which provides for the enjoyment of fundamental rights by all residents that could give rise to an action in court.¹⁰⁰ Section 9(1) provides that everybody is entitled to ‘equality and equal protection before the law.’¹⁰¹ Section 34, in turn, affirms that every person is authorised to resolve their dispute by applying the law, determined in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.¹⁰² The Constitution provides, furthermore, that anyone who suffers a violation of their constitutional rights may seek redress at a court of competent jurisdiction.¹⁰³

To ascertain the implementation of Article 16 of the Refugee Convention in South Africa, Eberechi reviewed 328 decided court cases of sexual violence in South Africa between 2013-2017.¹⁰⁴ The study revealed that out of 328 cases of sexual offence prosecuted, 326 victims concerned citizens; one victim was an American citizen with Mozambican convicted of trafficking young girls for sexual misuse.¹⁰⁵

4. BEST PRACTICES FROM ACROSS THE CONTINENT ON ARTICLE 16 OF THE 1951 REFUGEE CONVENTION REGARDING WOMEN AND GIRLS

The UNHCR and the Ugandan government launched a Mobile court for refugee camps. To facilitate access to justice for refugee women.¹⁰⁶ UNCHR built a courthouse in Dadaab Refugee

347 (CC) para 88; Eberechi ‘A Comparative Analysis of the Application of the 1951 Refugee Convention to Victims of Sexual Violence in South Africa, Tanzania and Uganda’ (n 91) 4.

⁹⁹ Refugees Amendment Act, No. 11 of 2017.

¹⁰⁰ Constitution of the Republic of South Africa, 1996; Eberechi ‘A Comparative Analysis of the Application of the 1951 Refugee Convention to Victims of Sexual Violence in South Africa, Tanzania and Uganda’ (n 91) 7.

¹⁰¹ *ibid.*

¹⁰² *ibid.*

¹⁰³ *ibid.*

¹⁰⁴ Eberechi ‘A Comparative Analysis of the Application of the 1951 Refugee Convention to Victims of Sexual Violence in South Africa, Tanzania and Uganda’ (n 91) 17; Eberechi ‘Access to Justice for Victims of Sexual Violence in Refugee Camps’ (n-79) 222-225.

¹⁰⁵ Eberechi OE ‘A Comparative Analysis of the Application of the 1951 Refugee Convention to Victims of Sexual Violence in South Africa, Tanzania and Uganda’ (n 91) 17.

¹⁰⁶ UN High Commissioner for Refugees (UNHCR) ‘Mobile courts offer hope for Somali refugee in her fight for justice’ (29 October 2013) <<https://www.refworld.org/docid/527b8b1a4.html>> accessed 20 November 2023.

Camp in Kenya, sponsored by the European Union to facilitate refugee access to justice.¹⁰⁷ Before this development, a Mobile Court with the status of a Magistrate Court had been visiting the refugee camps to resolve disputes one week every month in Kenya.¹⁰⁸ The mobile recorded five rape convictions between 1997 and 1999 in Dadaab.¹⁰⁹

Also, the Refugee Consortium of Kenya (RCK) provides legal and psychological support to displaced people in Kenya.¹¹⁰ One of their aims is to provide legal services to increase access to justice for displaced people and their host communities.¹¹¹ They offered legal aid to a total of 4,342 persons who are refugees, asylum seekers and host communities.¹¹² Refugee Consortium of Kenya gave 2,679 persons legal information on sexual and gender-based violence and areas of need.¹¹³ The 2022 report also revealed that the Refugee consortium received reports of 266 SGBV cases and assisted 102 victims at various police stations.¹¹⁴ The cases ranged from defilement, rape, attempted defilement, sodomy and attempted rape, gang rape, sodomy, etc.¹¹⁵ Out of the cases with legal ‘representation in courts and police stations’, 79% are ongoing at the time of the report, while they convicted 21% with punishment ranging from 5 years to life imprisonment.¹¹⁶

They also had physical and psychological counselling with the victims as well as telephonically as required.¹¹⁷ The RCK also counselled 556 victims who reported SGBV and gave them pre-trial and post-trial legal advice as part of psychotherapy in preparation for them to testify in court and their restoration into society.¹¹⁸ Victims receive psychosocial support

¹⁰⁷ Bernard Rono “*Refugees in Dadaab welcome opening of new courthouse “Now we will not have to wait for months to access justice.”* (8 November 2017) <<https://www.unhcr.org/ke/12714-refugee-dadaab-welcome-opening-new-courthouse.html>> accessed 20 November 2023.

¹⁰⁸ Ilse Griek, ‘Traditional Systems of Justice in Refugee Camps: The Need for Alternatives’ Refugee Reports Summer/Autumn 2006 Volume 27, Number 2, 2 <<https://reliefweb.int/sites/reliefweb.int/files/resources/A596660BB40EE30C8525727D007757F5-uscri-refugeereports-sum2006.pdf>> accessed 2 August 2020.

¹⁰⁹ *ibid.*

¹¹⁰ Refugee Consortium of Kenya ‘Annual Report 2022’ <<https://www.rckkenya.org/rck-annual-report-2022/>> accessed 15 October 2023.

¹¹¹ *ibid.* 8.

¹¹² *Ibid.* 9.

¹¹³ *ibid.* 9.

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ *ibid.*

¹¹⁸ *ibid.*

throughout the medical, police and judicial processes. Consequently, the SGBV sufferers could give evidence in court without fear of revictimization.¹¹⁹ RCK also provided translators at the police stations and the courts to break language barriers and prevent case postponements in courts.¹²⁰ In cases involving minors, RCK seeks permission for the victim's mothers and social workers to act as liaisons within the parameters of the Victims Protection Act. Article 50 (7) of the Constitution of Kenya allows the court to permit intermediaries to support a complainant for the benefit of justice,¹²¹ reinforcing judicial results of court cases.¹²² RCK also collaborate with gender-based recovery centres and Garissa County Gender Technical Group to facilitate access to justice for the SGBV survivors.¹²³

Likewise, the *Kituo Cha Sheria*, a non-governmental organisation in Kenya, supports forced migrants to attend to legal and policy demands of 'refugees, asylum seekers and stateless persons residing in urban areas in Kenya.'¹²⁴ One of their tactical intentions is to spread legal assistance via public outreaches to places outside Nairobi. Through volunteer networks and branch offices, entry points on a priority basis, Mombasa, Kakuma, Dadaab Garissa, and other parts of the country.¹²⁵

For forced migrants, their report shows that from January to December 2021, the Forced Migration Programme provided '910 refugees and asylum seekers with legal information, steered '145 Legal Aid Clinics in Kangemi, Githurai, Eastleigh and Kabiria,' trained '85 government bureaucrats on refugee law in partnership 'with the International Rescue Committee'.¹²⁶ On SGBV, they organised capacity building on the procedure for reporting cases, awareness and sensitisation, Criminal Law and Procedures, principles governing Criminal Law, amongst other issues of concern.¹²⁷ On 28 May 2022, a three-year-old refugee girl from South

¹¹⁹ *ibid.*

¹²⁰ *ibid.*

¹²¹ Victim Protection Act, 2014; The Constitution of Kenya [Kenya], 27 August 2010,

¹²² Refugee Consortium of Kenya Annual Report 2022' (n 110) 9.

¹²³ Refugee Consortium of Kenya Annual Report 2022' (n 110) 12.

¹²⁴ Kituo Cha Sheria 'Forced Migration Programme objectives' <<https://kituochasheria.or.ke/forced-migration-fmp-programme/>> accessed 16 October 2023.

¹²⁵ *ibid.*

¹²⁶ *ibid* 14,15, 30.

¹²⁷ *ibid.*

Sudan received her long-awaited justice. Her uncle received life imprisonment for sexually abusing her while under his care.¹²⁸

It was reported in Tanzania that the ‘Public Prosecutor investigated, prosecuted’ and ensured that the perpetrators of Gender-based violence and sexual violence against refugees were held accountable and international non-governmental organisations gave help to the legal teams on request by the victims.¹²⁹

Burkina Faso has universal control methods for accelerating the adoption of joint GBV inhibition and reactive actions by all interested parties.¹³⁰ This method promoted the reporting of GBV occurrences.¹³¹ They also provide legal, judicial, emotional, and therapeutic facilities to women and girls who are survivors of violence. Mobile legal clinics also move around communities to inform them about their rights and where to receive help when needed.¹³²

The anti-GBV organisations and UN agencies collaborate within a GBV sub-cluster in Mali.¹³³ Among other measures, they established a ‘One Stop Centre’ on 18 April 2018 to facilitate access to legal, medical, and other connected amenities for GBV victims, encouraging survivors to lodge complaints and locate haven when violated.¹³⁴ Mali enacted legislation to hold perpetrators of GBV accountable and trained legal personnel to disabuse their minds about preconceptions and biases founded on gender and social norms against GBV victims.¹³⁵ They also extended the training to medical personnel and law enforcement agencies on recognising GBV and reporting incidences to appropriate offices.¹³⁶

¹²⁸ UN Women ‘Sexual violence convictions a reality for Kakuma’s refugee community’ 18 June 2022 <https://africa.unwomen.org/en/stories/news/2022/06/sexual-violence-convictions-a-reality-for-kakumas-refugee-community> accessed 17 November 2023.

¹²⁹ US Department of States, Tanzania 2021 Human Rights Report 25 https://www.state.gov/wp-content/uploads/2022/02/313615_TANZANIA-2021-HUMAN-RIGHTS-REPORT.pdf accessed 17 October 2023.

¹³⁰ Ndèye Amy Ndiaye ‘Gender-Based Violence in West Africa: The Cases of Senegal, Mali, Burkina Faso and Niger’ Friedrich-Ebert-Stiftung 2021 53 <<https://library.fes.de/pdf-files/bueros/fes-pscc/18242.pdf>> accessed 17 November 2023.

¹³¹ *ibid.*

¹³² *ibid.*

¹³³ *ibid.*

¹³⁴ *ibid.*

¹³⁵ *ibid* 53-54.

¹³⁶ *ibid* 54.

Similarly, Niger has a vibrant conference structure for all stakeholders involved in the struggle against GBV in Niger.¹³⁷ There is also ‘*Maisons de la Femme*’, a women’s centre where they receive women and girls who are victims of violence and give them all-inclusive protection.¹³⁸ Mali has also successfully established and executed ‘Islam, Gender and Human Rights’, which empowered Imams to discuss ‘respect for women’s rights, combating child marriage, access to land and promotion of reproductive health’ and consequences of GBV.¹³⁹ Amongst other mechanisms for the compacting the Scourge of GBV.¹⁴⁰

Also, the Association of Senegalese Lawyers established legal aid clinics in Senegal to assist the unprivileged, supported by Italian cooperation, the Open Society Initiative for West Africa (OSIWA) and UN Women.¹⁴¹

South African Police Service (SAPS) Family Violence, Child Protection and Sexual Offences Units (FCS) combat sexual offences against children, person-directed crimes in the family, illicit removal of children under the age of 12 and crime facilitated through the electronic media.¹⁴²

Thuthuzela Care Centres (TTC) in South Africa are one-stop facilities established as a critical part of South Africa’s anti-rape strategy, aiming to reduce secondary victimisation, improve conviction rates and reduce the cycle time for the settlement of cases.¹⁴³ This initiative is managed by the National Prosecution Authority’s Sexual Offences and Community Affairs Unit (SOCA) in collaboration with different departments and contributors as an answer to the crucial necessity for a cohesive stratagem for inhibition, retort and care for rape victims.¹⁴⁴ The NPA situated Thuthuzela Care Centres in public hospitals near communities where the incidence

¹³⁷ *ibid.*

¹³⁸ *Ibid.*

¹³⁹ *ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *ibid* 54 -55.

¹⁴² South African Police Service (SAPS) ‘Domestic violence: Find your voice in the days of activism for no violence against women and children’ 2014 South African Police Service <https://www.saps.gov.za/resourcecentre/women_children/domestic_violence_find_your_voice.php#:~:text=SAPS%20Family%20Violence%2C%20Child%20Protection,facilitated%20through%20the%20electronic%20media> accessed 20 November 2023.

¹⁴³ National Prosecution Authority of South Africa(NPA) ‘Thuthuzela Care Centers Turning Victims to Survivors’ 1 <https://www.npa.gov.za/sites/default/files/resources/public_awareness/TCC_brochure_august_2009.pdf> accessed 20 November 2023.

¹⁴⁴ *ibid* 2.

of rape is exceptionally high. The TTC is connected to sexual offences courts, with expert prosecutors, social workers, magistrates, NGOs and police, and located close to the centres.¹⁴⁵

The Packages offered at the Thuthuzela Care Centres (TCCs) include:

- Welcome and comfort from a site co-coordinator or nurse.
- An explanation of how the medical examination will be conducted and what clothing might be taken for evidence.
- A consent form to sign that allows the doctor to conduct the medical examination.
- A nurse in the examination room.
- After the medical examination, there are bath or shower facilities for the victims to use.
- An investigation officer will interview the survivor and take his/her statement.
- A social worker or nurse will offer counselling.
- A nurse arranges for follow-up visits, treatment and medication for Sexually Transmitted Infections (STIs), HIV and AIDS.
- A referral letter or appointment will be made for long-term counselling.
- The victim (survivor) is offered transportation home by an ambulance or the investigating officer.
- Arrangements for the survivor to go to a place of safety, if necessary.
- Consultations with a specialist prosecutor before the case go to court.
- Court preparation by a victim assistant officer.
- An explanation of the outcome and update of the trial process by a case manager.¹⁴⁶

5. CONCLUSION AND RECOMMENDATIONS

Although women refugees who suffer sexual violence are reported to lack access to justice. However, the above analysis reveals that some African countries that host refugees, in various ways, facilitate access to justice for women who suffer Sexual and Gender-based violence and extend the same treatment to refugee women even though is inadequate.

¹⁴⁵ *ibid.*

¹⁴⁶ *Ibid* 7.

The researcher recommends that South Africa should do more through the creation of an enabling environment that will extend the same services for addressing sexual violence for their citizens to refugee women per Article 16 of the UN refugee convention.