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RESEARCH ARTICLE

Balancing Retributive and Restorative Justice Processes at the National Level: Addressing Violence Against Refugees and Asylum-seekers in Uganda

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Abstract
This interdisciplinary qualitative research on Uganda combines an empirical approach with an analysis of theoretical studies. It argues that the retributive-oriented state justice system should take a more hybrid approach by absorbing the restorative method of traditional justice systems arbitrated by community leaders to improve the way sexual and gender-based violence (SGBV) cases of refugees and asylum-seekers are addressed. The goal is to examine the interlinkages of restorative and retributive justice and why both systems should be better integrated to enhance ways of addressing SGBV. It is argued that there will be a positive impact on people in Uganda, including refugees who have suffered SGBV, if such an integration of both systems occurs. Drawing from interviews, it uses a theoretical framework of direct, structural and cultural violence within the continuum of violence. In this context, the study argues for a hybrid approach to depatriarchalize domestic justice systems, whether retributive or restorative justice, to contribute to better and more victim-friendly systems that consider the views and hopes of SGBV survivors.

Keywords: Uganda; retributive justice; restorative justice; continuum of violence; sexual and gender-based violence (SGBV); refugees; asylum-seekers

Introduction

Ugandan nationals, refugees and asylum-seekers share everyday struggles and fears, including the fear of becoming victims or survivors of sexual and gender-based violence (SGBV).[1] The prevalence of SGBV is extremely high worldwide[2] and exists across time-space-culture. Uganda is no exception.[3] In this regard, the Uganda dataset created as part of a more comprehensive study reveals

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1 JN Kwiringirat al "Experiences of gender-based violence among refugee populations in Uganda: Evidence from four refugee camps" (2018) 34/1 *Eastern Africa Social Science Research Review* 291.

2 J Sarkin "A methodology to ensure that states adequately apply due diligence standards and processes to significantly impact levels of violence against women around the world" (2018) 40/1 *Human Rights Quarterly* 1.

3 DF Morof et al "A cross-sectional survey on gender-based violence and mental health among female urban refugees and asylum seekers in Kampala, Uganda" (2014) 127/2 *International Journal of Gynecology & Obstetrics* 138.

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that SGBV has become an "expectable" part of women's lived experience in the country (key informant UG#1). This type of endemic violence has existed for a long time in Uganda.[4]

Conceptually, the term continuum of violence emphasizes how violence, notably different forms of SGBV, is present in various phases of women's lives.[5] Most people, with a particular emphasis on women due to patriarchal asymmetrical power dynamics, experience multiple forms of SGBV throughout their lifetime. Naturally, this includes different "scenarios", such as SGBV during peaceful times, conflict or humanitarian crises, ie, the refugee cycle.[6]

What is critical, though, as stressed by the concept of a continuum of violence, is that violence is not static, and systems of oppression are intertwined and reinforce each other with different forms of violence (ie, direct, structural and cultural violence).[7] Ferris and Cockburn have addressed the issue of a continuum of violence in the context of forced migration.[8] Further, Krause applies the term "continuum of violence" to different phases of the refugee cycle, establishing the connection between them while simultaneously challenging the notion that violence during conflict, displacement and encampment is static and separate.[9]

In this context, this paper focuses on a continuum of violence stemming from the matrix of domination as theorized by Collins.[10] This is because patriarchy plays a crucial role in SGBV, particularly when considering intersectionality.[11] Direct, structural and cultural violence[12] illustrates how different types of violence are intertwined and present across various levels of society;[13] the members of that society simultaneously reproduce its legal framework, its administration of justice and its economy. Moreover, direct, structural and cultural violence reinforce each other along multiple and intersecting systems of oppression, such as patriarchy, racism, capitalism, classism, Islamophobia and homophobia, among others.

Drawing from the fieldwork in Uganda, this interdisciplinary qualitative research article combines an empirical approach with an analysis of the previous theoretical studies in the literature. This is done as empirical legal studies are few and far between. As Ghezelbash and Dorostkar have noted concerning work regarding refugees, there is a need for more of these studies to be empirical.[14] They argue that:

> "Grounded, empirical research identifying the policy decision-making and law-making structure in specific jurisdictions and the policy framings which fit within existing institutional cultures would create a valuable evidence base for effective law and policy reform advocacy. There is also scope for triangulating qualitative data from interviews with quantitative data on the policy-making process and outcomes."[15]

4 P Ocheme, G Shajobi-Ibikunle and N Zuwena "A critical overview of gender-based violence in Uganda" (2020) 8/1 *American Journal of Humanities and Social Sciences* 1.

5 L Kelly *Surviving Sexual Violence* (1988, Polity Press).

6 J Kasozi "The refugee crisis and the situation in Sub-Saharan Africa" (ÖGFE Policy Brief 16, 2017).

7 J Galtung and D Fischer "Violence: Direct, structural and cultural" in J Galtung and D Fischer (eds) *Springer Briefs on Pioneers in Science and Practice* (2013, Springer) 35.

8 EG Ferris *Refugee Women and Violence* (1990, World Council of Churches); C Cockburn "The *continuum* of violence: A gender perspective on violence and peace" in W Giles and J Hyndman (eds) *Sites of Violence: Gender and Conflict Zones* (2004, University of California Press) 24.

9 U Krause *Difficult Life in a Refugee Camp: Gender, Violence, and Coping in Uganda* (2021, Cambridge University Press).

10 P Collins *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (1990, Unwin Hyman).

11 JJ Sarkin and T Morais "The importance of adopting an intersectionality approach to refugee status determination procedures: lessons from Greece, Israel and Uganda" (2022) 18/3 *International Journal of Migration, Health, and Social Care* 193.

12 Galtung and Fischer "Violence", above at note 7.

13 Ferris *Refugee Women*, above at note 8; Cockburn "The *continuum* of violence", above at note 8. See also U Krause, "A *continuum* of violence? Linking sexual and gender-based violence during conflict, flight, and encampment" (2015) 34/4 *Refugee Survey Quarterly* 1; Krause *Difficult Life*, above at note 9.

14 D Ghezelbash and K Dorostkar "Understanding the politics of refugee law and policy making: Interdisciplinary and empirical approaches" (2023) *Journal of Refugee Studies* fead039.

15 Ibid.

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In that context, this article argues that domestic legal systems should adopt a hybrid approach to retributive and restorative justice by better absorbing customary law processes into their legal systems. This alternative approach is suggested because now, these two different processes are treated separately. Also, customary law processes are treated as second-class to the ordinary criminal justice system in various countries. It is argued, therefore, that traditional justice systems, arbitrated by community leaders, should be absorbed into retributive justice to better address cases of violence, including SGBV. The literature has largely overlooked the interlinkages between empirical socio-legal studies and theoretical legal studies, particularly the gendered dimension of the law concerning these matters.[16] In fact, there is a general scarcity of gendered socio-legal empirical studies interconnected with an empirical law analysis. Gender socio-legal scholars have rarely addressed the notion of promoting the integration of restorative justice systems into the retributive justice systems concerning SGBV cases.[17] This is an important issue, as integrating the legal system into one composite system, rather than having separate parts, would provide numerous benefits. For example, it should increase the legitimacy of the courts, which in turn should have various positive effects.

Therefore, the goal of this paper is to bring together the empirical research conducted for this study and the theoretical studies that have been conducted previously to illustrate the importance of integrating restorative justice mechanisms into retributive justice systems. In this way, there can be an enhancement in how SGBV can be addressed while embarking on processes to depatriarchalize both legal systems. Focusing on SGBV, which targets refugees and asylum-seekers, integrating the various justice systems would have a positive impact on refugees who have suffered SGBV, replacing the present dual approach, based on the alternative nature between both systems, with a complementary approach which integrates both systems into one.

In this context, restorative justice is to be understood as "encounter, reparative, and transformation" processes in which those on different sides of an offence cooperatively determine how to deal with it.[18] Thus, Wenzel et al define restorative justice as a "dialogical process geared toward making offenders accept accountability for the harm they caused (as well as repair it)".[19] Retributive justice can be understood as the state justice system based on a punitive response, which culminates with various sanctions, including incarceration and even, in some places, the death penalty.[20]

As far as terminology is concerned, this article uses both the terms survivors and victims. It does this as it can be argued that survivors have begun / gone through the process of healing (in a restorative sense) and choose to identify as such. Victims choose to identify and want to be treated as such to achieve criminal justice (in a retributive sense). Thus, this distinction helps distinguish between the restorative and retributive outcomes. For example, when speaking about customary / restorative justice processes, the goal is to foster positive "survivorhood"; when discussing the statutory / retributive processes, the goal is to achieve criminal justice for victims. The hybrid approach, therefore, attempts to marry the two to find a holistic solution.

Drawing from Uganda's two-part legal system – the traditional legal system and the customary law process – this article argues for a hybrid approach to both systems. This is because these two systems should complement each other rather than simply as alternatives. Thus, this paper aims to foster a more hybrid approach by absorbing restorative methods of traditional justice systems, arbitrated by community leaders, into the ordinary legal system. This should improve the legal

16 Regarding the limited numbers of gendered socio-legal empirical studies interconnected with empirical analysis of the law see R Hunter "Gendered 'socio' of socio-legal studies" in D Feenan (ed) *Exploring the "Socio" of Socio-Legal Studies* (2013, Palgrave Macmillan Socio-Legal Studies) 205. See also Ghezelbash and Dorostkar, ibid.

17 Ibid.

18 D Van Ness and K Strong *Restorative Justice: An Introduction to Restorative Justice* (2015, Anderson Publishing) at 43–44.

19 M Wenzel et al "Retributive and restorative justice" (2008) 32/5 *Law and Human Behavior* 375 at 377.

20 See "Retributive justice" (Stanford Encyclopedia of Philosophy), available at: <https://plato.stanford.edu/entries/justice-retributive/> (last accessed 31 January 2024).

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responses given to SGBV cases while celebrating the uniqueness of customary laws and considering that both justice systems entail and display their share of patriarchal features[21] and that some of the said features are the very reason for a high level of under-reporting of SGBV cases. This paper, therefore, advocates for a hybrid approach. One benefit might be the depatriarchalization of the justice system, whether retributive or restorative justice, to provide hope for adequate justice for SGBV survivors.

The article is structured firstly by having a methodology section, a section on the prevalence of SGBV in Uganda, and then on the frequency of SGBV among refugees and asylum-seekers. The article delves into SGBV underreporting and the problems that cause it. Another issue that was debated was what the participants in the study believed should be done to deal with SGBV in the country. The paper examines the two legal regimes operating in Uganda: the formal retributive justice system and the customary or restorative justice system. It does this to indicate the roles of each and their problems in dealing with SGBV. The article then examines the benefits of a hybrid approach combining both systems to deal with SGBV and the necessity of dealing with issues of patriarchy within the law and legal processes.

Methodology

This analysis is based on a broader study that focuses on the issue of SGBV against refugee and asylum-seeking women in three countries: Greece, Israel and Uganda. The study involved 58 participants and key informants across all three datasets. This article focuses on the dataset from Uganda, examining emerging topics such as practical approaches to addressing SGBV cases and the role of customary law and retributive justice.

The Uganda dataset consists of 15 conversational interviews conducted in September 2018.[22] 11 interviews were conducted with refugee and asylum-seeking women in Kampala, Uganda, while four interviews were conducted with key informants in January 2019. Two key informants were interviewed via telephone, while the other two were interviewed in the field, one in Kampala and the other in Pader, by partners in the field. Participants represented various nationalities, including Somali, Ethiopian, Eritrean, Congolese and South Sudanese. Three of the 11 women interviewed had previously resided in settlements (Nakivale in Uganda and Mai Ayni in Ethiopia), while eight were urban refugees in Kampala and Mengo. Additionally, one asylum-seeker had previously been an urban refugee in Port Sudan. The key informants included two humanitarian workers and two UN High Commissioner for Refugees (UNHCR) officers, all Ugandan.

Before conducting the fieldwork, the study protocol and interview schedule received ethical approval from the Portuguese Data Protection Authority, the Institutional Review Board of Nova University, Gulu University and the Uganda National Commission for Science and Technology. Before each interview, participants were provided with detailed information about the study's nature, purpose, goals, topics under discussion and the conversational interview protocol. Each participant expressed their consent to participate. Once the data collection phase was completed, the primary data collected from the fieldwork was anonymized[23] and subjected to a multimodal analysis.[24] The interviews were analysed using a triangulation of thematic, content and feminist critical discourse analysis.[25]

21 T González and AJ Buth "Restorative justice at the crossroads: Politics, power, and language" (2019) 22/3 *Contemporary Justice Review* 242.

22 On attitudes of refugees in Uganda more broadly, see SR Meyer et al "Protection and well-being of adolescent refugees in the context of a humanitarian crisis: Perceptions from South Sudanese refugees in Uganda" (2019) 221 *Social Science & Medicine* 79.

23 D Remenyi *Field Methods for Academic Research: Interviews, focus group & questionnaires* (2013, Ridgeway Press).

24 M Lazar "Feminist critical discourse analysis: Articulating a feminist discourse praxis" (2007) 4/2 *Critical Discourse Studies* 141.

25 Remenyi *Field Methods*, above at note 23.

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Prevalence of sexual and gender-based violence in Uganda

Patterns of SGBV in Uganda[26] are reflected in the Uganda National Sexual and Gender-Based Violence database, which emphasizes the widespread prevalence of this particular form of violence in the country.[27] This database annually records SGBV cases reported or identified by authorities or stakeholders.[28] It showcases the widespread prevalence of sexual violence, among other types of SGBV, throughout the entire Uganda territory, targeting not only refugees and asylum-seekers but also migrants and nationals.[29] In early October 2021, this national database registered the following cases targeting women: 1,093 cases of rape; 3,199 cases of sexual assault; 12,200 cases of physical assault; 831 cases of child marriage; 1,113 cases of forced marriage; 94 cases of female genital mutilation; 18,944 cases of denial of resources, opportunities and services; 11,663 cases of psychological abuse and 3,031 cases of defilement.[30] According to the database, in late 2021, the Ugandan districts with the highest prevalence of SGBV cases were Gulu (6,497) and Wakiso (4,209).[31] Information on the high prevalence of SGBV is also reinforced by the UN Women Global Database on Violence Against Women, which indicates that 50 per cent of Ugandans have survived a lifetime of physical violence and / or sexual violence.[32] It also notes that more than 30 per cent of Ugandans have experienced physical violence and / or sexual violence in the previous 12 months, while 40 per cent of Ugandan girls were forced into child marriage.[33] Considering that incidents of SGBV are known to be vastly under-reported, the number might be significantly higher. For these reasons, along with an attempted equality policy making, Uganda was ranked 131st in the gender inequality[34] index rank in 2021[35] and 61st in the global gender gap index rank in 2022.[36]

Examples of SGBV during the conflicts that took place in Uganda[37] include the cases of women and girls abducted by the Lord's Resistance Army (LRA)[38] and who "returned with children conceived during their captivity".[39] These SGBV survivors continue to suffer, not only because of the original trauma but also because of "the stigma attached to their status as 'former rebels'".[40]

26 MC Okello and L Hovil "Confronting the reality of gender-based violence in Northern Uganda" (2007) 1/3 *International Journal of Transitional Justice* 433.

27 "National Gender-Based Violence Database" (Uganda Ministry of Gender Labour and Social Development), available at: <https://ngbvd.mglsd.go.ug/> (last accessed 1 December 2024).

28 See also "Linking, aligning, and convening: Gender-based violence and violence against children prevention and response services in Uganda's refugee-hosting districts" (2020, World Bank) available at: <https://openknowledge.worldbank.org/server/api/core/bitstreams/ef9ac51d-7ae4-5a5c-8a9e-05465cbba350/content> (last accessed 25 May 2023).

29 See also RN Ebere and D Mwesigwa "The effectiveness of social inclusion of refugees in Kiryandongo refugee settlement community of midwestern Uganda" (2021) 2/2 *Asian Journal of Sustainable Business* 76.

30 "National Gender-Based Violence Database", above at note 27.

31 Ibid.

32 "Global Database on Violence against Women: Uganda" (United Nations Women), available at: <https://data.unwomen.org/global-database-on-violence-against-women/country-profile/Uganda/country-snapshot> (last accessed 1 December 2024).

33 Ibid.

34 See generally S Klasen "From 'Me Too' to Boko Haram: A survey of levels and trends of gender inequality in the world" (2020) 128 *World Development* 104862.

35 "Gender Inequality Index" (2022, UNDP Human Development Reports), available at: <https://hdr.undp.org/data-center/thematic-composite-indices/gender-inequality-index - /indicies/GII> (last accessed 25 May 2023).

36 *Global Gender Gap Report 2022* (July 2022, World Economic Forum), available at: <https://www..weforum.org/docs/WEF_GGGR_2022.pdf> (last accessed 25 May 2023).

37 W Lajul "Justice and post LRA war in Northern Uganda: ICC versus Acholi traditional justice system" (2017) 3/2 *IAFOR Journal of Ethics, Religion & Philosophy* 21.

38 Ibid. The war in Northern Uganda started in 1986.

39 Okello and Hovil "Confronting the reality", above at note 26 at 441.

40 Id at 442.

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Notably, during the LRA conflict,[41] sexual violence was used as a weapon of war.[42] That legacy still exists, despite the observation that the "[g]uns have gone silent in Northern Uganda after the LRA war … [but] clouds of injustice are still thick in the air".[43] As reports of sexual violence have "gained global attention … due to reports of widespread rape in conflict and post-conflict zones",[44] the international community has become aware of the extension of the sexual violence perpetrated during the conflict. Despite these problems, access to services to deal with different forms of SGBV[45] remains limited.[46]

The widespread prevalence of SGBV throughout Uganda has dramatically impacted specific population segments, such as refugees and asylum-seekers, who endure multiple and intersecting vulnerabilities. This is illustrated in the following section.

Sexual and gender-based violence levels against refugees and asylum-seeking women

Besides the sexual violence that is related to the conflicts in Uganda,[47] the risk of sexual violence (among other types of SGBV) remains high. This is partly because of the rigid national patriarchal social structure that is exacerbated by the existence of another durable layer of patriarchal arrangements found among the refugee and asylum-seeking communities in the country.[48] The SGBV levels among refugees and asylum-seekers result not only from the complex power dynamics (formal and informal) within the different refugee communities and Ugandan society but are also influenced by the layout of the camps and their internal power structures. Levels of SGBV are also affected by power structures outside the refugee camps and internal power dynamics (formal and informal) within refugee and asylum-seeker communities.[49]

A 2014 study[50] shows the high prevalence of SGBV among refugee and asylum-seeking women, especially the pervasiveness of sexual violence. That study indicated that 84 out of 117 participants reported sexual violence, of which 48.8 per cent had experienced sexual offences, while 58.3 per cent had experienced attempted sexual offences.[51] These findings from Morof et al's study (63.3 per cent prevalence of sexual violence among women aged 15–49 years) are like statistics from Liberia on the prevalence of SGBV in Lofa County during the 1999–2003 conflict. There, 60 per cent of women

41 See further J Sarkin "The interrelationship and interconnectness of transitional justice and the rule of law in Uganda: Pursuing justice, truth, guarantees of non-repetition, reconciliation and reparations for past crimes and human rights violations" (2015) 7 *Hague Journal on the Rule of Law* 111.

42 J Mootz, S Stabb and D Mollen "Gender-based violence and armed conflict: A community-informed socioecological conceptual model from Northeastern Uganda" (2017) 41/3 *Psychology of Women Quarterly* 368; L Smith-Khan et al "'Up to I am suffering': Justice, sexual, violence and disability amongst refugees in Uganda" (2015) 1/4 *International Journal of Migration and Border Studies* 348; C Baguma "'When the traditional justice system is the best suited approach to conflict management: The Acholi Mato Oput, Joseph Kony, and the Lord's Resistance Army (LRA) in Uganda" (2021) 7/1 *Journal of Global Initiatives: Policy, Pedagogy, Perspective* 31.

43 Lajul "Justice", above at note 37 at 21.

44 S Yohani and P Okeke-Ihejirika "Pathways to help-seeking and mental health service provision for African female survivors of conflict-related sexualized gender-based violence" (2018) 41/3-4 *Women & Therapy* 380 at 382.

45 RS Kalyango "Social work with refugees and migrants in Uganda" in R Roßkopf and K Heilmann (eds) *International Social Work and Forced Migration: Developments in African, Arab and European Countries* (2021, Verlag Barbara Budrich) 167.

46 E Shoemaker et al "Identity at the margins: Examining refugee experiences with digital identity systems in Lebanon, Jordan, and Uganda" (Proceedings of the 2nd ACM SIGCAS Conference on Computing and Sustainable Societies. 2019) 206–17.

47 J Sarkin "Why establishing a credible and legitimate transitional justice model in conjunction with democratic reforms is necessary for long-term peace and stability in Uganda" (2016) 31/2 *Southern African Public Law* 1.

48 P P'Odong and B Can "Combating marital rape: The law and the criminal justice system in Uganda" in A Budoo-Scholtz and EC Lubaale (eds) *Violence Against Women and Criminal Justice in Africa* (2022, Springer) 109.

49 Okello and Hovil "Confronting the reality", above at note 26; Krause *Difficult Life*, above at note 9.

50 Morof et al "A cross-sectional survey", above at note 3.

51 Ibid.

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aged 15–49 years reported sexual violence during conflict.[52] However, the figures differ from those of the Democratic Republic of Congo, which were much lower, probably due to significant under-reporting. There, 16 per cent of women aged 18–49 years reported sexual violence.[53]

Various steps must be followed to deal with SGBV; there is a need for high levels of protection, especially during the refugee cycle, since vulnerable people face multiple and intersecting forms of discrimination.[54] This aggravates the risk of refugees and asylum-seekers experiencing abuses of power and sexual violence, among other types of SGBV. There are multiple reports of SGBV throughout the refugee cycle, and findings highlight pre-migration and post-migration reports of SGBV. For example, Yohani et al[55] and Smith-Khan indicate the prevalence of sexual violence among refugees "before arriving in the country [Uganda], during the conflict, or while fleeing".[56] Thus, there are multiple reports of men and women who survived and who have witnessed sexual violence[57] during conflict, flight, encampment and displacement in what can be called a "continuum of violence".[58]

The Uganda dataset reinforces the various academic studies, emphasizing that SGBV against refugees and asylum-seekers is related to organizational, spatial, cultural and social structures and (formal and informal) power dynamics within the local cities and the refugee camps.[59] The fieldwork in Uganda revealed a high rate of SGBV among refugee and asylum-seeking women, both inside and outside the refugee camps.[60] Different types of SGBV were reported inside and outside the refugee camps during the interviews. These included rape (29 per cent), sexual harassment (21 per cent), transactional sex (14 per cent), economic violence (11 per cent), physical violence (11 per cent), forced marriage (7 per cent), kidnap (4 per cent) and gang rape (3 per cent).[61] Cases of forced marriage that were reported during the interviews represented a second layer of complex intersecting violence, considering these cases were a response to other types of SGBV cases (inside the camps) in which SGBV victims were forced to marry their perpetrators. One interviewee noted that: "if someone is violated, they may end up marrying the perpetrator" (key informant UG#1). Similarly, key informant UG#2 stressed that "there are also power dynamics inside the camp and among refugees, where refugee men also abuse and take advantage of women and girls (sexual abuse) to marry them afterward" (key informant UG#2).

Other testimonies mentioned sexual violence cases that individuals had to endure to access a range of services[62] or while looking for a job:

52 Ibid.

53 Ibid.

54 See generally K McQuaid "There is violence across, in all arenas: listening to stories of violence amongst sexual minority refugees in Uganda" (2020) 24/4 *The International Journal of Human Rights* 313.

55 Yohani and Okeke-Ihejirika "Pathways", above at note 44.

56 Smith-Khan et al "Up to I am Suffering", above at note 42 at 353.

57 M Nagai et al "Violence against refugees, non-refugees and host populations in Southern Sudan and Norhern Uganda" (2008) 3/3 *Global Public Health* 249.

58 Krause "A *continuum* of violence?", above at note 13; Krause *Difficult Life*, above at note 9.

59 Ibid.

60 T Morais "Rethinking dealing with sexual and gender-based violence in countries of asylum: Intersectional impact of vulnerability to the state in Greece, Uganda, and Israel from a matrix of domination standpoint" (Unpublished PhD dissertation, Nova University of Lisbon, 2022). See also J Sarkin and T Morais "Why states need to view their responsibility to protect (R2P) refugees and asylum-seeking women through the lens of intersectionality, vulnerability, and matrix of domination to address sexual and gender-based violence" (2022) 33/6 *European Human Rights Law Review* 554. See also Sarkin and Morais "The importance of adopting an intersectionality approach", above at note 11.

61 See on rape, C Kabaseke "Justice for rape victims in Uganda: Definitional crises and errors of justice in prosecuting rape cases" in M Addaney (ed) *Women and Minority Rights Law in Africa: Reimagining Equality and Addressing Discrimination* (2019, Eleven Publishing International) 69.

62 S Nakueira "Unpacking vulnerability: An ethnographic account of the challenges of implementing resettlement programmes in a refugee camp in Uganda" in M-C Foblets and L Leboeuf (eds) *Humanitarian Admission to Europe* (2020, Nomos Verlagsgesellschaft mbH & Co KG) 239.

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> "[W]hen looking for a job … some refugee women are manipulated, and some of them are given jobs for sex. After having sex, they may be given jobs. Sexual exploitation … happens in both ways: manipulating someone who is looking for employment, and there have been cases of employees who work in the refugee camps who oversee refugees and take advantage of them sexually. And individuals in power who take advantage of vulnerable individuals, for instance, girls and women" (key informant UG#1).

Many SGBV cases occurred outside refugee camps.[63] It was reported that sexual harassment, various forms of rape, abductions, multiple types of physical violence and other forms of violence occurred. Such high rates and the "naturalization" of SGBV explain why over half of the Sudanese participants in Nagai et al's study acknowledged that Sudanese refugees and asylum-seekers were "extremely worried" about being forced to have sex[64] with other refugees, asylum seekers and humanitarian workers, including international aid workers. As such, SGBV has become an expected "part" of the flight.

Along with the high prevalence and diverse forms of SGBV targeting refugee and asylum-seeking women in Uganda, participants shared that there were high levels of under-reporting of SGBV cases. This can be seen in the fact that 16 per cent of participants declared that they would not report their cases. In comparison, 39 per cent asserted that they would turn to traditional justice and 11 per cent stated they would prefer tribal meetings, while 6 per cent would report to their family. In total, 72 per cent would not report to authorities or would prefer an alternative to retributive justice. One of the key informants compared the level of under-reporting in the cities and the camps, stressing that:

> "The rate of SGBV cases reported in the camps are higher than the individuals in the city … camp statistics show that … Nevertheless, when we speak with individuals in urban settings, we notice the rate is higher in the city, but individuals fear talking or going to the police. When we talk to them personally, we notice that they face more SGBV than the individuals in the camp. However, SGBV statistics are higher in the camp, because individuals feel more at ease to report than those living in the city. Some of the latter, are independent and have a business, like any Ugandan, so they keep quiet; they do not open up and keep it for themselves" (key informant UG#2).

The participants also shared their views regarding the best way to address SGBV cases while in the country of asylum, especially regarding their crucial understanding of the role that customary law processes could play, as discussed in the following section.

Under-reporting of sexual and gender-based violence and its causes

SGBV is under-reported everywhere, regardless of the circumstances in a particular place. Many studies have reported worrying levels of SGBV under-reporting.[65]

In Uganda, many cases of SGBV are reported.[66] There is, nevertheless, a high level of under-reporting.[67] This is largely due to the judicial system's backlog of cases and deficiency of judicial

63 HJ Liebling, HR Barrett and L Artz "Sexual and gender-based violence and torture experiences of Sudanese refugees in Northern Uganda: Health and justice responses" (2020) 16(4) *International Journal of Migration, Health and Social Care* 389.

64 Nagai et al "Violence against refugees", above at note 57 at 260.

65 Okello and Hovil "Confronting the reality", above at note 26; Krause *Difficult Life*, above at note 9.

66 "National Gender-Based Violence Database", above at note 27.

67 M Nabukeera "Prevention and response to gender-based violence (GBV) during Novel Covid-19 lock-down in Uganda" (2021) 23/2 *The Journal of Adult Protection* 116.

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officers.[68] In 2018, about 10,000 SGBV cases were unresolved.[69] Some cases take a decade to be finalized. To assist in moving cases forward, the UN Population Fund has funded 13 pilot special courts to deal with such cases and reduce the number of cases pending.[70] As a result, 2,000 of these cases were decided in 2018. However, perpetrators plead guilty in agreements for lesser charges or reduced prison sentences. Nonetheless, research indicates that ordinary courts usually hand down lenient sentences anyway.[71] Although the conviction rate has increased recently, the number of prosecutions has not.[72] All these issues impact reporting levels, as women distrust the legal system because it does not give them confidence that reporting such cases will lead to adequate outcomes.

However, there are other barriers to reporting, such as women's socialization.[73] Thus, SGBV cases are chronically under-reported, not only because of patriarchal features within the host community and the hosted community but also due to patriarchal features of retributive justice, which leads to low rates of conviction of perpetrators. This is reinforced by group pressure not to report any SGBV within the same community. For instance, key informant UG#2 stressed that women who survived SGBV prefer not to report, as:

> "These women who go through this rape, sexual violence, sexual mistreatment, they have this fear. They have this fear inside them. They fear going to public places to talk about their problems. They do not want to tell this to the police publicly … they fear that individuals will know they will not get married and will be looked down on in society. They feel that society would mistreat, look badly at them and ostracise them" (key informant UG#2).

A range of other problems were mentioned. Participant UG#7 stressed the fragility of the judiciary system, as well as the lack of security provided to SGBV survivors, including refugees and asylum-seeking women, noting that: "people follow us to Uganda. No court, no police, no nothing. No one can help us and protect us". As a result, many SGBV survivors tend to seek justice in their traditional justice systems instead of reporting to the authorities or the non-governmental organization (NGO) focal point. Sometimes, such decisions, including remaining silent, may be made to avoid further discrimination by the host community. One participant noted: "I will not go to the police because I am scared to go there. I do not want to be seen as a troublemaker" (participant UG#1). In this regard, the Ocen study also found that "[i]n the case of Madi women, participants in seminars have said that, although rape happens in their society, women have been 'socialized' not to make allegations of rape against Madi men".[74] Similarly, one of the participants from the Uganda dataset stressed that "[t]here is a saying within the Eritrean community, if you are raped you have to be quiet … We cannot force someone to speak if they are afraid" (participant UG#3).

Thus, refugee and asylum-seeking women participants expressed a preference not to report SGBV cases to avoid further discrimination towards their hosted communities. There is also a lack of confidence in available legal remedies, and, as stressed by key informant UG#1, it is rare

68 E Lirri "Uganda sets up special courts to hear sexual violence cases" (24 November 2018, The East African), available at: <https://theeastafrican.co.ke/tea/news/east-africa/uganda-sets-up-special-courts-to-hear-sexual-violence-cases-1407298> (last accessed 25 May 2023).

69 Ibid.

70 Ibid.

71 Ocheme, Shajobi-Ibikunle and Zuwena "A critical overview", above at note 4.

72 "Special SGBV court session conviction rate increases to 70%" (25 April 2023, The Judiciary, Republic of Uganda), available at: <http://judiciary.go.ug/data/news/1272/814/Special SGBV Court Session Conviction Rate Increases to 70%25.html> (last accessed 20 May 2023).

73 C Gilligan *In a Different Voice: Psychological Theory and Women's Development* (1982, Harvard University Press).

74 J Ocen "Can traditional rituals bring justice to Northern Uganda?" (16 October 2007, Institute for War & Peace Reporting), available at: <https://iwpr.net/global-voices/can-traditional-rituals-bring-justice-northern-uganda> (last accessed 25 May 2023).

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for women to report sexual violence, even to NGOs or block leaders, "although we know it happens" (key informant UG#1). These findings confirm the Nagai et al study, which found evidence of high levels of underreporting despite the prevalence of sexual abuse or exploitation.[75] Most participants in the Nagai study chose not to seek help, especially the men who participated.[76]

The interviews in Uganda also revealed that underreporting is grounded on difficulties in accessing justice, amplified by a feeling of impunity. Key informant UG#2 stated that: "there is a low percentage of perpetrators who go to court" (key informant UG#2). This was also stressed by key informant UG#3, who highlighted that most cases that go to trial occur inside the camps. According to the same key informant, this is probably due to the NGOs in the camps providing legal representation and following-up in these cases. Participant UG#7 stressed that there is a lack of response given to the SGBV survivors due to police lack of action and the ineffectiveness of the entire judicial system, which is, per se, a barrier against reporting. The participant stressed that: "[t]hey [the police] give you a letter [to individuals] to go to UNHCR not to court. There are also issues of kidnapping individuals … How can you go to court? The perpetrators may follow you! There are security issues. They [the police] give you a letter to access medicines and resettlement, and that is it".

Thus, participant UG#7 underscored that the services provided to people who have suffered a crime are insufficient and do not ensure the safety of the victim from the time they decide to report the matter.[77] Other studies have reinforced this.[78] Thus, Smith-Khan et al have pointed out that "sexual violence has been identified there as a serious problem among refugees … [and a]ccess to justice … is limited".[79] Thus, it is clear that victim support is lacking or, at least, insufficient.

Thus, the Uganda dataset reveals that most SGBV survivors preferred not to report incidents. Despite the "report mechanisms in different places and referral pathways" (key informant UG #1), there are barriers to reporting that induce refugee and asylum-seeking women not to do so.[80] Many survivors avoid the retributive justice system and prefer using customary law. For example, participant UG#1 suggested a collective active agency, using tribe meetings among Somalis to address SGBV and privileging community-based responses to address SGBV cases. Many refugee and asylum-seeking women exercise their agency to consider and privilege the interests of the whole community over their own welfare and rights.[81]

Thus, the Uganda dataset provides evidence of the difficulty of gaining access to justice in the retributive criminal justice system. The effect of this message is apparent: it was not worth reporting SGBV incidents because of impunity, stigma, possible retaliation, humiliation, revictimization (secondary victimization), further discrimination against the hosted community and the lack of access to the courts[82] because of the remote locations of refugee camps.[83]

75 Nagai et al "Violence against refugees", above at note 57.

76 Ibid.

77 See also H Mwenyango "The place of social work in improving access to health services among refugees: A case study of Nakivale settlement, Uganda" (2022) 65/5 *International Social Work* 883.

78 See M Lanfranchi and AM Akinsulure-Smith "The role of mental health counselors in international human rights: Reflections on counseling services with urban refugees at the Refugee Law Project in Kampala, Uganda" (2018) 40 *International Journal for the Advancement of Counselling* 365.

79 Smith-Khan et al "Up to I am Suffering", above at note 42 at 351.

80 See generally J Oloka-Onyango "Exploring the multiple paradoxes and challenges of Uganda's refugee law, policies and practice" (2022) 9 *Transnational Human Rights Review* 1.

81 J Sarkin and T Morais "A cost–benefit assessment of refugee and asylum-seeking women reporting sexual and gender-based violence in Uganda: Assessing women's resilience as a means to protect their ethnoreligious group" (2023) 38/1 *Southern African Public Law Journal* 1; Sarkin and Morais "The importance of adopting an intersectionality approach", above at note 11; Sarkin and Morais "Why states", above at note 60; Morais "Rethinking". above at note 60.

82 See further in the Ugandan context, Sarkin "The interrelationship and interconnectness of transitional justice", above at note 41.

83 C Newman et al "Uganda's response to sexual harassment in the public health sector: From 'dying silently' to gender-transformational HRH policy" (2021) 19/1 *Human Resources for Health* 59.

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To overcome such barriers to reporting and to change the discourse that it is too difficult to access justice, the Ugandan government has implemented a pilot programme that provides a "mobile court within the settlement".[84] Although these mobile courts do promote access to justice, community leaders still provide community-based mechanisms, known as traditional justice, as an alternative mechanism to solving the "dispute", a form of restorative justice. These community-based mechanisms provide a pathway to overcoming the fear of villainization of the community while providing a faster way to seek justice and a more straightforward mechanism for providing evidence of incidents of SGBV.[85]

Thus, most of the participants in the Ugandan dataset mentioned their preference for the traditional justice system (39 per cent). They preferred the traditional (customary) justice systems over retributive justice, favouring community-based mechanisms over state-based processes (participants UG#1, UG#2, UG#3, UG#6, UG#5 and UG#9). This has held concerning cases of intra-community violence. For example, participant UG#1 suggested that to address SGBV, "it is good to have tribe meetings, to sit down and talk about issues". An issue connected to this is ownership of the process. That may be important, as there could be some benefit for communities who feel they "own" the traditional justice process rather than being passive recipients of justice by state-based interventions.

On reporting, a few participants did, however, consider the possibility of reporting incidents to the police "if the perpetrator is from another nationality" (participants UG#1, UG#5 and UG#10). Some participants preferred going to court since it would be "good to go to court, so the person pays for his deeds" (participant UG#11). Likewise, participant UG#12 highlighted that she would go to the police to report because "I cannot help individuals, but police can. Sometimes individuals fight and sometimes are together" (participant UG#12). Four participants preferred to go first to the police. If the police could not help them, they would go to the community to ask for a community-based response through the traditional justice system (participants UG#2, UG#5, UG#9 and UG#10). Thus, these interviews show the participants' calculus while assessing the cost-benefit of reporting SGBV to the authorities.[86] Despite such dilemmas between reporting or not reporting and seeking justice in community-based responses or mobile court, there are mechanisms in the refugee camps to keep SGBV survivors safe in cases of "serious threats from the side of the perpetrator" (key informant UG#3). Despite these mechanisms, one participant stressed how hopeless individuals feel and the tremendous amount of suffering those individuals endure daily while waiting for the institution's response to their asylum claim (participant UG#7).

As a result of what they were experiencing, participants noted that the best option to avoid such problems would be the development of prevention programmes, including a "community-based protection network and initiatives, creating safe spaces for women, raising awareness, and in collaboration with partners to repair standard operating procedures (SOP) on SGBV prevention" (key informant UG#3).

Some also sought "psychosocial [care] and safe places for resettlements … engage men in more productive activities … involve local leaders, religious leaders, and cultural institutions in the coordination platform … and strengthen the judiciary system" (key informant UG#4).

Some, however, suggested a collective passive response, which included not reporting SGBV incidents to avoid further intra-community violence: "[t]here are cases within the Somali community, for instance, a gang rape case, it should be handled inside the community; otherwise, it will add more fights between and against Somalis" (participant UG#2).

Nevertheless, the preference is for a community-based approach despite the problems for women seeking to navigate those processes. One problem is that women have a minimal role in ritual

84 Smith-Khan et al "Up to I am Suffering", above at note 42 at 361.

85 Ibid. See also Krause "A *continuum* of violence?", above at note 13; Krause *Difficult Life*, above at note 9.

86 J Sarkin and T Morais "A cost–benefit assessment", above at note 81.

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ceremonies, such as the *mato oput* within the Acholi community.[87] This is because most ritual ceremonies of African customary laws are patriarchal, which renders women largely invisible in the decision-making process of traditional justice.[88] Dancer mentions that "gendered power relations are embedded within customary law and local legal structure".[89] This excludes women "from making a meaningful contribution towards justice and reconciliation".[90] While some progress has generally been made as far as women's rights are concerned, some community leaders struggle against the "modern expansion of women's rights [which] 'threatened and prevented them from carrying out their "traditional roles,"' which included disciplining women through beatings".[91] Although not all community leaders share this view, such a statement raises questions about how protected women SGBV survivors are within traditional justice.

Sexual and gender-based violence and the formal criminal justice system

In Uganda, SGBV incidents are met with different challenges, depending on whether the victim files a formal complaint with the legal system or turns to the traditional justice process. Unfortunately, when it comes to the protection of women against SGBV, retributive justice (or the formal criminal justice system) is not of much assistance either. In 2011, in sexual violence cases, Uganda convicted less than 5 per cent of people reported to have committed such crimes.[92] This is despite the high prevalence of SGBV throughout the country, with an emphasis on femicide, rape and sexual assault.[93] These low rates of conviction send out a discouraging message to SGBV survivors that it is not worth reporting cases to authorities. Notably, along with the severe incidents of SGBV, there is a lack of access to the courts, especially in the North. This has resulted in the implementation of the mobile justice system[94] to provide access to justice for populations in remote areas. This illustrates the root cause of a general feeling of hopelessness due to the apparent impunity of perpetrators of sexual crimes. Adding to the difficulty of individuals in remote areas and camps having access to justice, a significant percentage of SGBV cases do not result in a conviction, as noted above. Thus, the lack of access to justice represents a significant obstacle. Nonetheless, the difficulty of access to justice is not the only issue that SGBV survivors face. The law and its political and social message leave survivors in a challenging situation when seeking to report SGBV. One such example is the bill that prohibits "carnal knowledge", intending to prohibit same-sex relationships,[95] which acts as a barrier to people reporting same-sex rape since it might be perceived as a homosexual relationship instead of being a violent abuse. Thus, this bill acts as a barrier to the reporting of same-sex abuse.[96] Consequently, the Anti-Homosexuality Act, signed into law in May 2023, is deeply problematic. The coexistence within the Ugandan legal framework of laws that protect SGBV survivors,

87 EK Baines "The haunting of Alice: Local approaches to justice and reconciliation in Northern Uganda" (2007) 1/1 *The International Journal of Transitional Justice* 91. See also MO Ensor "Drinking the bitter roots: Gendered youth, transitional justice, and reconciliation across the South Sudan-Uganda border" (2013) 3/2 *African Conflict and Peacebuilding Review* 171.

88 EC Lubaale "Legal pluralism as a lens through which to understand the role and place of TJMS in international criminal justice" (2020) 52/2 *The Journal of Legal Pluralism and Unofficial Law* 180.

89 H Dancer "Power and rights in the community: Paralegals as leaders in women's legal empowerment in Tanzania" (2018) 26/1 *Feminist Legal Studies* 47.

90 Ocen "Can traditional rituals bring justice", above at note 74.

91 Ibid.

92 "Universal Periodic Review – Uganda: First cycle" (2011, UN), available at: <https://www.ohchr.org/en/hr-bodies/upr/ug-index> (last accessed 1 December 2024).

93 Ibid. See also *Annual Report 2017/2018* (2018, Amnesty International), available at: <https://www.amnesty.org/en/latest/research/2018/02/annual-report-201718/> (last accessed 25 May 2023).

94 "Universal Periodic Review – Uganda: Second cycle" (2016, UN), available at: <https://www.ohchr.org/en/hr-bodies/upr/ug-index> (last accessed 1 December 2024)

95 *World Report Annual Report* (2019, Human Rights Watch) at 604.

96 "Universal Periodic Review – Uganda: Second cycle", above at note 94.

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and those that criminalize same-sex relationships, send out contradictory messages resulting in the legal framework's inability to protect SGBV survivors of same-sex rape while perpetuating the types of discourses that are root causes for SGBV.[97]

As a result, and despite legal measures to address SGBV and domestic violence, the issue of the implementation and interpretation methods of these legislative obligations remains an obstacle for SGBV survivors seeking justice through the courts. Despite the adoption of many laws to deal with these issues, a significant gap exists between the law and the practice.[98] As a result, there remains a high prevalence of SGBV throughout the country.[99] This is despite the Domestic Violence Act of 2010, the Prohibition of Female Genital Mutilation of 2010, the Prevention of Trafficking in Persons Act of 2009, the Children Act of 1997 and the International Criminal Court Act of 2010, among others.[100] The Uganda Constitution also honours ethnoreligious diversity in article 129. This article explicitly mentions Islamic courts, emphasizing that ecclesiastical laws (both the majority Christian and Islamic) are "keeping effect in Ugandan legislation".[101] Such ethnoreligious diversity also has an impact on the way SGBV is addressed in Uganda.

Most of the participants in the Uganda dataset mentioned their preference for traditional justice systems, particularly in cases of intra-community violence (around 39 per cent of the participants). Despite this significant preference among many participants, there are major challenges for SGBV survivors who turn to traditional justice systems. Unfortunately, retributive justice (the formal criminal justice system) leaves much to be desired when dispensing justice.[102] This is because the Ugandan judiciary system faces "a huge backlog of cases and shortage of judges".[103] This has led to the setting up of "special court sessions to expeditiously hear and dispose of court cases related to sexual and gender-based violence".[104]

This is a controversial aspect of the plea-bargaining process because a defendant may get a reduced charge or punishment. For instance, in 2016, Stephen Kato, who faced a death sentence, was handed a ten-year prison sentence for raping a 60-year-old woman in the country due to a plea-bargaining agreement.[105] These cases emphasize the state's priority for expedience to the detriment of providing protection to SGBV survivors. This raises questions about the state's responsibility to protect the population.[106] However, these are the cases that do reach the courtroom. It is, therefore, essential to ask about those who remain invisible and the silencing of refugee and asylum-seeking communities.

Sexual and gender-based violence and the traditional or customary justice system in Uganda

In Uganda, a significant percentage of SGBV cases are settled through traditional justice systems. This is because the Ugandan legal system acknowledges and includes African customary law

97 F Bustreo and F Knaul "COVID-19 gender-based violence policy tracker policy briefing paper: Uganda" (September 2020), German Institute for Global and Area Studies <https://pure.giga-hamburg.de/ws/files/28564393/Uganda_Working_paper_2.pdf> (last accessed 1 December 2024). See also Sarkin and Morais "Why states", above at note 60; Morais "Rethinking", above at note 60.

98 M Andrews "Overcoming the limits of institutional reform in Uganda" (2018) 36/S1 *Development Policy Review* 159.

99 Afrobarometer "Majority of Ugandans see domestic violence as a private – not criminal – matter" (23 January 2023) *Afrobarometer* AD593 <https://www.afrobarometer.org/wp-content/uploads/2023/01/AD593-Majority-of-Ugandans-see-domestic-violence-as-a-private-matter-Afrobarometer-17jan23.pdf> (last accessed 1 December 2024).

100 M Andrews "Overcoming the limits of institutional reform in Uganda" (2018) 36/1 *Development Policy Review* 159.

101 Ibid.

102 N White "Open the doors: Towards complete freedom of movement for human rights defenders in exile in Uganda" (2020) *Journal of Human Rights Practice* 1104.

103 Lirri "Uganda", above at note 68.

104 Ibid.

105 D Kiyonga "Uganda: Plea bargain innovation helps clear 1,500 cases" (3 October 2016, All Africa), available at: <https://allafrica.com/stories/201610030348.html> (last accessed 25 May 2023).

106 Sarkin and Morais "The importance of adopting an intersectionality approach", above at note 11; Sarkin and Morais "Why states", above at note 60; Morais "Rethinking", above at note at 60.

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alongside the formal retributive justice system. However, the legal system does not function as a dual system; instead, having two disparate parts, with the formal system being dominant. while section 14 of the Judicature Act permits the use of customs and doctrines of equity, article 2 of the Uganda Constitution clarifies that formal law supersedes customary law. Customary law is defined in the Local Council Courts Act of 2006 as "the rules of conduct established by custom and long usage having the force of law and not forming part of the common law nor formally enacted in any legislation".[107]

Thus, the two systems operate side by side. African customary law is constituted by specific models of justice that "predate the British colonial rule and Ugandan independence".[108] These ancestral customary laws have governed the continent south of the Sahara for centuries. They have been "a social system of law centred in each community with communal methods for dispute resolution".[109] They are the "binding nature of law in these societies [which] comes from the pressure of the group, and not wanting to act against the group for fear of shame and banishment".[110]

Contrary to retributive justice, centred on punishment and retribution, African customary law is centred on healing the entire community.[111] It emphasizes forgiveness and rebuilding or restoring community balance and harmony. Despite the crucial and ancestral nature of these customary laws, the formal legal system based on common law still has priority over customary law. The latter is only "effective when it does not conflict with statutory law".[112]

While it could be argued that the legal system regards customary law as inferior to the formal legal system, a dualist or hybrid system operates in Uganda. This system combines retributive justice (common law system) and restorative justice (traditional justice system). Thus, this enhances the country's complexity and diversity in the law.

However, these processes depend on the intervention of community leaders (African customary law), who tend to be men that reinforce patriarchal views on women's social roles instead of promoting a solution for the conflict according to women's own views.[113] This is an issue that needs to be addressed.

A hybrid approach to retributive justice and customary law: Breaking the continuum of direct, structural and cultural violence

Fieldwork that led to this article illustrated that SGBV survivors prefer to avoid reporting to authorities and/or turn to restorative justice (customary law, ie, traditional justice systems arbitrated by community leaders) to seek justice for their cases. There was evidence of SGBV survivors turning to community leaders to tackle SGBV cases, including refugee and asylum-seeking women. Considering that, and despite the strong patriarchal features of customary law that disregard women's interests, well-being and human rights, some participants reported that SGBV survivors prefer to reach out to a community leader to seek justice for their SGBV cases.

For those reasons, this paper advocates for a hybrid approach using restorative and retributive justice processes in a complementary fashion instead of an alternative approach to improve the

107 Local Council Courts Act of 2006, available at: <https://mlhud.go.ug/wp-content/uploads/2019/03/Local-Council-Courts-Act-2006.pdf> (last accessed 5 December 2024).

108 Ocen "Can traditional rituals bring justice", above at note 74.

109 D Zartner "The culture of law: Understanding the influence of legal tradition on transitional justice in post-conflict societies" (2012) 22/2 *Indiana International & Comparative Law Review* 297 at 307.

110 Ibid.

111 A Aiyedun and A Ordor "Integrating the traditional with the contemporary in dispute resolution in Africa" (2016) 20 *Law, Democracy & Development* 154.

112 "The Republic of Uganda" (22 May 2019, LawTeacher), available at: <https://www.lawteacher.net/free-law-essays/common-law/the-republic-of-uganda.php> (last accessed 1 December 2024).

113 "Universal Periodic Review – Uganda: First cycle", above at note 92.

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response to SGBV cases. This would entail incorporating traditional justice system mechanisms, led by community leaders, into the retributive justice system, better ensuring that SGBV survivors' fundamental human rights are respected and protected. One option would be to include alternative dispute resolution mechanisms within the retributive justice process.

The reasoning behind such a solution is that customary law is already being applied to SGBV cases. However, customary law must be included in the retributive system while guaranteeing SGBV survivors their fundamental human rights and legal guarantees.

The goal should be the interlinkage of restorative and retributive justice to ensure that both can be integrated, not as an alternative system, but as a complementary one. This should also assist in depatriarchalizing both legal systems. Furthermore, such a hybrid approach between retributive and restorative justice would also celebrate the uniqueness of customary laws and processes.

This dual or hybrid approach stems from the nature of the Ugandan legal system, which combines retributive justice (common law system) and restorative justice (traditional justice system). Combining the different legal approaches would not be new. Already, the formal legal system has vestiges of restorative justice in Uganda. This is because the parties, in some instances, can agree to enter a reconciliation process.[114] This is provided by the courts in the Constitution[115] and the Domestic Violence Act.[116] While reconciliation has been used broadly to deal with conflict and human rights violations in Uganda, some envisage implicitly combining the formal legal processes and parts of the customary legal traditions to achieve reconciliation.[117] However, this approach has been criticized by some, such as Human Rights Watch, as supporting "a social structure that stresses women's subjugation in marriage and effectively silences battered wives".[118] Thus, adopting a restorative approach can be dangerous, and it needs to be guarded against. However, an approach that combines and uses both systems could be helpful and give victims choices while possibly finding better solutions. It could better ensure that traditional justice systems effectively comply with fundamental human rights foreseen in the Uganda Constitution (articles 2 and 32) and international law that Uganda needs to comply with.

However, combining the two systems more formally would bring significant benefits. It would enhance the country's complexity and diversity and bring together the various historical strands of its legal system.[119] Crucially, the Uganda Constitution honours and incorporates ethnoreligious diversity in article 129. It includes, for example, Islamic courts, emphasizing that ecclesiastical laws (Christian – the majority – and Islamic) are "keeping effect in Ugandan legislation".[120] The Uganda Constitution also emphasizes protecting "cultural and customary values consistent with fundamental rights and freedoms, human dignity, democracy, and the Constitution", which should be "developed and incorporated in aspects of Uganda life".[121] Interestingly, the Uganda Constitution reinforces this point in articles 2 and 32. Article 2 distinctly establishes that the Constitution prevails over any law or custom that proves inconsistent with the Uganda Constitution, and such law or custom will be declared void. Article 32 strengthens the constitutional consistency principle by outlawing any "laws, cultures, customs, and traditions that are against the dignity, welfare, or interest of women or any other marginalised group". These constitutional principles are fundamental, on

114 A Polavarapu "Global carceral feminism and domestic violence: What the west can learn from reconciliation in Uganda" (2019) 42 *Harvard Journal of Law and Gender* 123.

115 Art 126(2)(d).

116 Sec 6(5)(g) of the Act.

117 Polavarapu "Global carceral feminism", above at note 114.

118 "Just die quietly: Domestic violence and women's vulnerability to HIV in Uganda" (2003, Human Rights Watch).

119 Ibid. See also B Kabumba "The application of international law in Uganda judicial system: A critical enquiry" in M Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010, Pretoria Univesity Law Press) 83–108.

120 "The Republic of Uganda", above at note 112.

121 Art XXIV of the Uganda Constitution.

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the one hand, to acknowledge and honour African customary law and, on the other hand, to acknowledge and honour Uganda's commitment to human rights.

In this regard, customary law is unquestionably a significant part of Uganda's legal system of justice. Most notably, in well-known international cases, such as the ones involving the LRA, the Acholi Elders and religious leaders demanded an alternative justice system to ensure the forgiveness, apology, compensation and reconciliation of former LRA combatants.[122] The demand by the Acholi Elders and religious leaders for an alternative justice system was based on the recognition that most combatants of the LRA were also victims of abduction.[123] While the government of Uganda and the LRA conducted the Juba Peace Talks between 2006 and 2008, the LRA did not sign the Final Peace Agreement. However, the LRA has not attacked Uganda since 2006.[124]

Interestingly, traditional justice systems include rituals to restore the balance within the community through forgiveness, apology and reconciliation. These rituals include *cula kwor* (Acholi and Langi communities practice for homicides); *kayo cuk* (Langi community practice); *mato oput* (Acholi community practice);[125] *ailuc* (Madi community practice) and *tonu ci koka* (another practice to reconcile parties formerly in conflict by the Madi community).

Therefore, considering the relevance and frequency of customary law in Ugandan daily life, especially for refugees, ensuring that the dual nature and hybrid approach to retributive justice and restorative justice in Uganda is given more prominence is vital. Understanding that 39 per cent of the participants in the Ugandan dataset revealed their preference for traditional justice systems, the Uganda legal system must support and sustain customary law if it respects not only the Constitution but the "dignity, welfare, or interest of women or any other marginalised group".[126]

As a result, and although both legal systems, the customary law (traditional justice system) and the formal law (retributive justice system), have been problematic for SGBV survivors because of their patriarchal features, it is crucial to safeguard Uganda's dual legal system and improve the commitment to human rights protection. It is not only customary law that demonstrates profoundly patriarchal features that reinforce women's invisibility and disregard women's interests, rights and well-being. The ordinary justice system has also been ineffective in punishing SGBV perpetrators despite the adoption of a plea-bargaining system that has also not adequately provided justice to SGBV survivors.

Thus, while acknowledging the struggles and limitations of both the retributive and restorative systems, it is important to include and acknowledge that customary law approaches should be applied to SGBV cases as long as they can guarantee SGBV survivors their fundamental human rights and provide legal guarantees.[127] Such a hybrid approach between retributive and restorative justice would catalyse the depatriarchalization of the justice system (ie, retributive justice and restorative justice) while celebrating the uniqueness and value of customary laws. There is enormous room for improvement in how the dual legal system in Uganda could better integrate restorative justice system mechanisms into the retributive justice system. This would entail acknowledging the uniqueness of African tradition embedded in the African customary law and fostering its independence from laws created during colonial times. This was demonstrated by the fieldwork for this study and reinforced by other studies developed by gender socio-legal scholars

122 Lajul "Justice", above at note 37; Baguma "When the traditional justice", above at note 42.

123 Baguma, id at 42.

124 Id at 34.

125 H Among "The application of traditional justice mechanisms to the atrocities committed by child soldiers in Uganda: A practical restorative justice approach" (2013) 13/2 *African Human Rights Law Journal* 441.

126 Art 32 of the Uganda Constitution.

127 T Morais *Violência Sexual e de Género Nos Campos de População Refugiada: Enquadramento e Análise Legal* (2020, OM ACM Colecção Teses); T Morais "Violência sexual e de género nos campos de população refugiada: o contributo dos sistemas de justiça tradicionais na solução dos casos concretos" (2016) 4 *Anatomia do Crime* 49.

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in neighbouring countries, such as Kenya.[128] Mwangi, a gender socio-legal studies advocate, notes that the:

> "hybrid approach to justice systems in Kakuma can offer synergy and perhaps create accountability between the unique Somali culture and formal legal framework … This non-conventional approach to justice could lead to greater results in the unusual camp setting of Kakuma preceded by high levels of trauma, inefficient courts, and lack of expertise that cannot be compared to any formal legal procedural expectations."[129]

This solution would address the concerns of refugees and asylum-seekers that see them support justice within their community (ie, a traditional justice system). This is, as noted earlier, due to the police's failure to protect refugees and SGBV survivors (participants UG#2, UG#3 and UG#5). As a result, there is a commonly held view that sexual violence is a matter that "should stay inside the community" (participants UG#1, UG#2 and UG#3). This preference for community-based response reflects how people from these communities work collaboratively in a solidarity-orientated and cooperative way. They usually seek to bring individuals together to solve problems (participants UG#2 and UG#3). Thus, instead of reporting an incident to the police, it is preferable for them to seek support within their community. Therefore, the preference is to turn to traditional justice when the perpetrator is from the survivors' community. However, if the perpetrator is from another community, participants stressed that the local authorities should tackle those cases.

Finally, depatriarchalization should occur by emphasizing the constitutional guarantees found in Uganda's dual legal system. Hopefully, this will lead to better human rights protection, including women's rights, as found in articles 2 and 32 of the Uganda Constitution.

Conclusion

The fieldwork conducted in Uganda indicated that SGBV is prevalent inside and outside refugee camps. The types of SGBV reported include rape, gang rape, kidnap and transactional sex.[130] The study's Uganda and other country datasets revealed that most participants were inclined to pursue a community-based intervention to address SGBV to ensure their group's unity and avoid discrimination and villainization. While Uganda has a customary law or traditional justice system and its usual criminal justice process, both are problematic for SGBV victims due to the patriarchal features of both systems that jeopardize women's rights.

The study's findings reveal that 39 per cent of the participants preferred to address SGBV cases in customary law processes, even though both justice systems (retributive and restorative) entail and display their share of patriarchal features. Some of those features constitute the reason for the high under-reporting of SGBV cases. However, as noted, both systems deal with SGBV, and there are benefits to using both from the SGBV survivors' standpoint, depending on whether the violence was intra or inter-community, despite the evident problems that both systems possess.

In this context, this article aimed to examine the interlinkages of restorative and retributive justice and how both can be integrated synergistically to tackle better SGBV, considering the participants' viewpoints in the study. The article advocates for a hybrid approach to criminal justice issues using both parts of the dual system. The study argues that community leaders should arbitrate the revised integrated system to address SGBV cases. This may depatriarchalize the justice system,

128 CW Mwangi *Women Refugees and Sexual Violence in Kakuma Camp, Kenya – Invisible Rights, Justice, Protracted Protection and Human Insecurity* (2012, International Institute of Social Studies).

129 Id at 23.

130 JJ Mootz et al "Transactional sex work and HIV among women in conflict-affected NorthEastern Uganda: a population-based study" (2022) 16/8 *Conflict and Health* 1.

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whether retributive or restorative justice. It should contribute to SGBV survivors' views and hopes of achieving justice. Arguably, much needs to be done to remediate these features to ensure these systems are more gender capable and sensitive to deal with SGBV cases and women's rights issues in general.

Competing interests. None

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