



**Strathmore University**

Strathmore Institute of Advanced  
Studies in International Criminal  
Justice (SIASIC)

**SIASIC CONFERENCE ON PROSECUTING SEXUAL AND GENDER BASED  
VIOLENCE IN NATIONAL AND INTERNATIONAL CONTEXTS: EXCHANGING  
EXPERIENCES AND EXPERTISE**

**HOSTED BY STRATHMORE LAW SCHOOL**

**NAIROBI, KENYA**

**4<sup>th</sup> & 5<sup>th</sup> August 2016**

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INTERNATIONAL  
NUREMBERG  
PRINCIPLES  
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Konrad  
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## **ABBREVIATIONS**

DPP – Director of Public Prosecutions

ICC – International Criminal Court

ICTR – International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for the Former Yugoslavia

IEBC – Independent Electoral and Boundaries Commission

SGBV – Sexual and Gender – Based Violence

SIASIC – Strathmore Institute of Advanced Studies in International Criminal Justice

UNPFA – United Nations Population Fund

## **1. EXECUTIVE SUMMARY**

This report is the compilation of all the issues discussed at the 2<sup>nd</sup> Annual Strathmore Institute for Advanced Studies in International Criminal Justice (SIASIC) conference, held in Strathmore University, Nairobi, Kenya, on 4th and 5th August 2016, titled *Prosecuting Sexual Violence Crimes in National and International Contexts: Exchanging Experiences and Expertise*. The overall objective of the Conference was to encourage a dialogue and the exchange of expertise between actors working at the national and international levels and between actors addressing conflict-related sexual violence and peacetime sexual violence. The intention of compiling this report is to avail the information discussed during the conference to all the stakeholders that were involved and those that were not able to attend, so as to encourage the conversation to keep going.

This report includes the pertinent strategies discussed for making available to national prosecution authorities engaged in conflict-related sexual violence cases the insights that have emerged from work being done at the international level on these issues. It also includes the challenges encountered by East African prosecution authorities in the prosecution of SGBV in conflict and peace time, as well as some of the solutions and recommendations put forward to deal with these issues. Lastly, the challenges and recommendations regarding collaboration and coordination between legal justice actors and members of the civil society in preventing and addressing SGBV have also been captured. The conference was then finalized on a high note with the launching of the book *Prosecuting conflict-related sexual violence crimes at the ICTY* edited by the chief and deputy chief prosecutors of the ICTY, and published by Oxford University press.

## **2. OPENING REMARKS**

### **a) ELIZABETH GITARI, DIRECTOR, SIASIC and DR. LUIS FRANCESCHI, DEAN, STRATHMORE LAW SCHOOL**

The Director of SIASIC and the Dean of Strathmore Law School ushered in the 2016 Annual SIASIC conference on Prosecuting Sexual and Gender-Based Violence and welcomed the audience to Strathmore Law School and to the conference.

### **b) MS. RUTH MALONGO, UNITED NATIONS POPULATION FUND**

#### *Context to the fight against Sexual and Gender Based Violence in Kenya*

1. SGBV is inclusive of forced prostitution and harmful traditional practices and it is young women that are vulnerable to this violence. They are susceptible to getting HIV, STDs and even pregnancy. Despite the law saying otherwise, SGBV is at a 21% rise according to the Demographic and Health survey of 2013.
2. This being a patriarchal society, there is stigma towards those affected. This affects and limits reporting of SGBV cases to the relevant authorities. There is also limited information for survivors to seek ways of finding support.
3. There is no middle ground on ways to seek support. There needs to be a coordinated effort by the relevant institutions including advocacy forums with policy makers. Everyone needs training to deal with the survivors of SGBV.
4. There are also low arrest and conviction rates. Survivors fear that they may not be convincing enough to the police and the prosecutors. In addition, the police themselves also become perpetrators of these sexual violations.
5. The government has passed the Sexual Violence Act, the Female Genital Mutilation Act and other responses in Kenya. There are challenges in the implementation of these legislations because of the implementation framework in place. We need to have prevention mechanisms put in place as well as socializing boys to desist from violating women and girls irrespective of their social standing. This is an activity that could be done within the communities.
6. UNPFA is committed to stopping SGBV crimes.

**c) DR. ARNE WULFF, DIRECTOR, RULE OF LAW PROGRAM, KONRAD ADENAUER STIFTUNG**

7. SGBV is wrongly connected to the misconceptions on the role of women in society. Different traditions have different perceptions to the role of women, depending on the particular community.
8. In Germany for instance, there were numerous reports of sexual assault by men of Arab descent in the beginning of the year. In the Arab world, this phenomenon is known as *taharuj jamia*. This was an indicator to the German and the European community that their perception of women is different from the perception of women in the Arab world. Germany indeed, has come a long way and changed the law so that rape victims do not have to defend themselves; lack of consent is simply sufficient. For a long time, sexual violence within marriage was not a crime. Societies take time to change their laws and views on such issues. The media has also had a role and took time to report the New Year's issues because no one wanted to point fingers to the asylum seekers as sexual violence is often seen as a taboo topic.
9. Most of the time SGBV happens in the context of the family fabric which makes it even harder to report it. To improve, we should not only encourage affected persons to report but we also have to work on the perception of the role of women. Men do not regard fellow women as equals in most societies thus taking advantage of this position of power. Most men are also not aware of their wrong doing or the fact that they are committing a crime until we teach every young man to treat every women with respect. It is in this way that the cases of prosecution of SGBV will be reduced.
10. Konrad Adenauer Stiftung supports the conference and strongly promotes the rule of law. Since 1990 the foundation has been improving and supporting democracies and this work is coordinated from Berlin in Germany.
11. The rule of law program was born due to the fact that rule of law is a necessary component of any democracy and to encourage a strong independent judiciary. The program was started by the positive results of the rule of law in Latin America and covers 49 states in Africa. The main objective for sub-Saharan Africa is to contribute to the rule of law of these states. The rule of law can only work where there is a strong, impartial judiciary that protects the



civil rights of individuals. Regarding constitutionalism, there is a difference between the text and the practice. This program identifies these issues so as to ensure there are good democratic constitutions in African states. It also supports various activities that build on constitutionalism. The rule of law program involves the legislation, judiciary and the executive.

**d) DR. SERGE BRAMMERTZ, CHIEF PROSECUTOR, INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA**

12. Sexual violence is at its highest owing to the high number of conflicts since World War II. Why are we having this session today? Why in Nairobi?
13. SIASIC had conducted a training the past week in conjunction with the ICTY, for prosecutors in Kenya, South Sudan, Rwanda, Uganda and Tanzania. It was a rewarding peer-to-peer experience that showed the impressive level of knowledge by the prosecutors in attendance.
14. It is our duty to strengthen capacity for prosecution of these crimes. The future of international criminal law is at the national level. It is the best place to see and test that justice has been done and it is for this reason that capacity building is very important.
15. I want to thank the Nuremberg academy, as well as the Swiss, German and Belgian embassies for supporting this training and conference. We were happy to invite the participants to our training to the conference. Our speakers to the conference come from different backgrounds: members of international tribunals and organisations, representatives of the five regional DPP offices, and members of civil society organisations.
16. We agree that we have a global solution or no solution at all.
17. I declare the conference open.

### **3. KEYNOTE ADDRESS BY HON. ISAAC LENAOLA, CHAIRMAN OF THE BOARD, SIASIC**

#### **(a) Legislative history of Kenya and Introduction**

18. In recent past, we have had to recognize SGBV as a serious issue. Only in 2006 did we get legislation on sexual violence. Njoki Ndung'u<sup>1</sup> and others drafted the Sexual Offences Act, 2006 (SOA) which defines and criminalizes sexual offences, and it was passed. For the first time, these crimes were defined, to include offences such as rape, defilement, incest, prostitution, sexual harassment, deliberate transmission of HIV and child pornography.
19. Why did we not appreciate the problem of female genital mutilation until 2011, when we criminalized the act? All forms of female genital mutilation are criminalized under the Female Genital Mutilation Act 2011. In the community I come from, it is however still practiced at 96 per cent. It happened in my mother's house and I have not yet recovered from the effects it had on those I love.
20. We take it as if being a cultural issue, and not an offence. Why is that so? When we know many communities still practice female genital mutilation at this very moment.
21. Therefore this conference is timely and it will help us understand why we are where we are, and why are we not doing more. Why are prosecutions not commensurate with the problem we have?
22. In my view, to prosecute sexual violence we must have the diligence, the cooperation and the will to try it from the criminal and medical sectors, but also from the legislative arm. We cannot leave the medical sector behind if we are to successfully prosecute these crimes.

#### **(b) Examples of sexual violent crimes in Kenya**

23. I will give real life examples that must touch us. A twelve year old girl was violated by an Administrative Police officer. We had an issue with the Administrative Police being part of regular police. When he violated her, he was charged with the crime. The police delayed. They asked for money for fuel to bring the accused to the police station. Another girl was violated and interrogated in a police station in the hearing of everyone. An 8 year old girl

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<sup>1</sup> Njoki Ndung'u is a Supreme Court Judge in Kenya but was a nominated Member of Parliament from 2003 – 2007 and is considered to have been the architect and mover of the Sexual Offences Bill 2006 that was signed into the Sexual Offences Act 2006.

was violated by 3 neighbors and contracted a sexual disease. The family was intimidated by the perpetrators, let to go free. Another 8 year old girl was violated and summons were not issued because the magistrate thought the testimony was not corroborated.

24. In the past years I have seen that the problem lies in the lack of clear chain of evidence from the medical services to the police. There needs to be an ease with it. Evidence is lost or tampered with and then we are not able to rely on it and have to go with oral evidence.
25. Another girl was defiled and she reported when she had a five month old child. The police said she came too late and they opted to settle the matter between the parents and the accused. DNA alone could have proved that the child was of the perpetrator, and therefore the possibility and fact of defilement could have been proved. In another case, an officer who did the DNA swab came to testify but did not come to court with any other evidence, the rape conviction was therefore not upheld.
26. There is another form than the P3 form, the MOH363 form, introduced for rape reporting purposes. It is however only used in Nairobi. Recent research showed that medical evidence is essential to confirm or disprove links between alleged perpetrator and the assault. There is a policy for the collection of evidence to build a case, but the National Guidelines on the Management of Sexual Violence are not implemented at all levels (investigation, prosecution, trial). The result is flawed evidence collection, which may lead to a weak case.

### **(c) Management of Sexual Crimes**

27. We are going for an election in Kenya. Every election period, there is an increase in sexual violence. I am now handling a case form 2007 – 2008. Everyone was teary eyed.
28. Why don't we take measures before the election time? What are we doing about it? Why don't we take action?
29. The DPP called together players in this field. Why can't there be a permanent task force to prepare ourselves? Why should we be worried by IEBC commissioners? Could we not prepare ourselves for this? Are we going into the issues themselves? Can we learn from examples outside the region?
30. If indeed sexual violence is a weapon of war, how much more seriously should we take on these crimes? If the ICC convicted Bemba for sexual violence, not as a physical perpetrator but as a commander who knew or ought to have known sexual violence were going to be

committed, why are we not doing the same? It is not enough to say, 'take Bemba to court'. We need proper evidence and investigations. In the Bemba case, there were numerous pieces of evidence and witnesses, it took 8 years for the trial to be completed.

- 31.** The judges who handle such cases, know that it is rare to find a P3 form in the file. This merely indicates how we do not take seriously these crimes or processes.
- 32.** One of the proposals from the ICTR is that the collection of evidence should come from all sources, not only victims. Also, if need be, we should have female lawyers and investigators talk to survivors (if they are comfortable) when reporting such cases. Furthermore, because the police were also perpetrators, police officers asked victims to report to the chief and not to the police.
- 33.** Kenyatta National Hospital trauma centre for sexual violence victims says it has no capacity to handle SGBV cases during peacetime. This trauma centre has no visibility. Where are our priorities?
- 34.** To grant lasting justice to the victims, we assume that justice is around a prosecution and a conviction, but we need to consider psychological care post-conviction. Some of the victims will never recover, and these aspects need to be worked on.
- 35.** In the ICTY, 78 persons were charged for sexual violence, wherein numerous testimonies of victims and witnesses were vital evidence, and special procedure for appearances in court were used. Why do we let victims encounter their attackers in court in Kenya, is this necessary to prove the case?
- 36.** Witness protection and counseling: Do we have a victims and witnesses section outside the usual victim protection? Where are our priorities in matters of admissibility of oral evidence?
- 37.** The Judiciary Training Institute has no curriculum on SGBV for judges and magistrates to appreciate these issues. When we do not, we are as good at looking at the black and white of the law. Getting training on this is very important. Where is the chain-link between all the parties? Often those who are victims are the lowest in society and face many hurdles in bringing their case forward. There must be a shift and intensification of the human, scientific and financial resources available to the Prosecution. The Ministry of Gender must be the link to bringing these matters to the fore. Why can't the Ministry demand for forensic equipment, and forensic training? They should request for all these things.

- 38.** I have met an individual from the Innocent Project in the USA, who was exonerated through DNA test. Before he was released, it was found that the man who committed the sexual offence was in fact his cellmate, who was in death row because of another offense he had committed. We should not let innocent men be convicted falsely.
- 39.** We are too laissez faire to protect our young women and girls. Where is the equipment? Why don't we have a special training program for students as well? Why do we allow apathy, greed and incompetence to deride the need to get justice for the victim? We have much to do as individuals and as a society. This conference has brought us together to discuss at a practical and realistic level how to manage these questions.
- 40.** In conclusion, I will cite the ICTR 2014 report. For the fight against impunity to succeed, it is not enough that perpetrators and political leaders be held accountable, victims require ongoing medical and socio-economic support after legal proceedings are concluded, to become fully integrated members of society. The question to you is what are you doing to end impunity along these lines?

**4. SESSION ONE: PANEL DISCUSSION ON STRATEGIES FOR PROSECUTING SEXUAL VIOLENCE AT THE INTERNATIONAL LEVEL AND LESSONS LEARNED**

41. The panel consisted of:

**Adama Dieng, UN Special Adviser on the Prevention of Genocide**

**Michelle Jarvis, Principal Legal Counsel, ICTY**

**Gregory Gordon, Associate Dean, Chinese University of Hong Kong**

**Thembile Segoele, Principal Legal Officer, African Court on Human and Peoples' Rights**

**Moderator: Adama Dieng, UN Special Adviser on the Prevention of Genocide**

**(a) Adama Dieng, UN Special Adviser on the Prevention of Genocide**

42. Thank you for the keynote address. I am glad that Hon. Lenaola put emphasis on the need to address the importance of prosecuting sexual violence, and also contextualizing his concern of preventing violence ahead of the elections in Kenya in 2017. We need to ensure that there is no space for immunity for sexual violence.
43. President Uhuru Kenyatta stated that incitement to violence will not be tolerated. This is prevention for atrocity crimes. But what President Kenyatta said is also valid for many African countries. At the end of the day, development cannot be achieved if rule of law is not being upheld, because the rule of law is the basis for democracy. Therefore we need to make sure there is no space for impunity where sexual violence is committed. It is our role to ensure all perpetrators face full extent of their criminal responsibility.
44. I think it is not a surprise that the organisers of this conference have asked the UN Special Adviser on the Prevention of Genocide to moderate this panel, and I believe it is not necessary to underline the importance of the topic to the audience. We are all aware that sexual and gender based violence is not aligned to international crimes, but that it has historically constituted a key element in their commission, therefore I will simply state the obvious: genocide, war crime, crimes against humanity can be perpetrated through acts of sexual violence (for instance in Rwanda, where between 100 thousand and 250 thousand

women were raped during the genocide in 1994, more than 40.000 in Liberia between 1989 and 2003, up to 60 000 in former Yugoslavia in early 90', and at least 200 000 in DRC since 1998. However not all acts of sexual violence are considered international crimes even if perpetrated in the context of war. For genocide for instance, the acts need to be perpetrated as part of intent to destroy an ethnic, religious, racial, or national group.

45. There are several reasons why sexual violence is used as part of war crimes, genocide and crimes against humanity:

- Change of ethnic make up
- Sheer vengeance, terror and murder
- Simple humiliation (forced intercourse and impregnation as a symbolic conquest of the woman by the rapist for instance)
- Moral destruction of communities (for instance children and women taken as prisoners for rape: Last November I went to Kurdistan and met Yazidi woman who were raped. Once freed they returned to their communities, but their parents refused to accept them. The religious leader emphasized that they cannot be victimize twice, they need to be accepted back and reintegrated into their families and community.

46. It is important for Africa to handle issues of international crimes justice. International justice starts at home. We all know the ICC should simply be called when States fail to apprise the issue of international crimes, and therefore complementarity is a key principle of the Rome Statute. I would like to invite our eminent panelists to try to find together how we can practically contribute to developing strategies for prosecuting sexual violence at national and political level, bearing the experience built at the international level.

**(b) Michelle Jarvis, Principal Legal Counsel, ICTY**

47. Thank you Adama. It is great to be here in Nairobi, and it has been a wonderful experience taking part in the training program mentioned earlier by the Prosecutor. Particularly for us working at the international level, it was great to have the opportunity to connect with prosecution counterparts in East Africa and discuss on a peer-to-peer level the experiences we have had and the lessons we hope will help with the work on this issue in the future. Indeed, we know that although we have made progress at the international level, it is just the

tip of the iceberg and we now need to think of better and more sophisticated strategies for moving forward.

48. During this session, I will try to give you an idea of some of the experiences we have had at the International Criminal Tribunal for the Former Yugoslavia (ICTY) over the last 2 decades, on prosecuting Sexual and Gender Based Violence (SGBV). I will try to highlight the most helpful aspects, for the work of our national prosecution counterparts in future. Hopefully it will give an idea of the real potential for collaboration on a global level.
49. To set the scene a little bit, the ICTY was set up by the United Nations Security Council in 1993, and has a mandate to look at the conflict in the Former Yugoslavia between 1992 and 1995. In the reporting of the conflict, the issue of mass sexual violence (SV) became a dominant feature of public perception, and it helped to stop thinking of SV as an inevitable part of conflict as it was used as a strategy of ethnic cleansing. It became clear that SV had to be addressed just as any other atrocity crime.
50. Addressing conflict related SV was a difficult operational challenge, to locate victims, convince people to testify, and also challenge our own misconceptions about this category of crimes. We were conscious that we had an opportunity to set a better accountability path for the future. Together with the ICTR, we had the opportunity to set up a framework, precedents and operational practices on SGBV.
51. Just like the ICTR, we are in a process of reflection and review, and of collecting memory of the work done by publishing a volume. There are 3 reasons why we go through this legacy project. Firstly, it is very important not to lose the expertise collected and find ways to channel the expertise developed to the national level, where the bulk of accountability process will pile up in future, to make sure that national systems can benefit from work done at the international level is crucial. Secondly, we realized that the difficulties we faced to establish accountability for SV at the international level are similar at the national level. Lastly the persistent challenge of impunity for this category of crimes shows the need to have a multi faceted approach to addressing this issue in future (for instance, out of 635 reported rape cases in New Dehli in India only one has led to conviction, in Germany one of 10 reported cases of SV lead to conviction)
52. I will look at 2 different components of our work: The first is the obvious part of our legacy, the precedents set by the ICTY (judgments, procedural issues...) useful for judicial systems



around the word. The second component I will address is the invisible part of our legacy, the operational experience. Indeed, even when equipped with the best legal procedural framework, it does not translate into better accountability, because a lot of what we do as justice officials depends on our perceptions of sexual violence crimes, on the human factor (how we categorize and describe sexual violence, how judicial officials and courts react, the priority we give to it etc. We see at every phase that SV is deprioritized, mischaracterized, and ultimately acquittals entered. This is the difficult challenge and we have tried to dig into our experience to figure out what will be helpful for others.

- 53.** An example of precedents valuable at the international level is the definition of rape. When we started our work, there was a reference to rape as a crime against humanity but there was no legal definition of the elements of rape in International Criminal Law (ICL). So the court looked at national systems, and we came across the issues of requirement of penetration, or non-consent. This raised a big question in ICL because it seemed ridiculous to ask victims whether they had consented to the sexual violence, given the contexts (they were often detained in camps in most coercive conditions, subjected to beatings, lack of food and sanitation etc). Non-consent was included as an element of the crime, but our courts have held that it is not a question of the victim's actions, there is no need to ask the victim if (s)he consented or not, but the coercive circumstances need to be shown. The coercive circumstances are enough for the court to infer that the act was committed without the consent of the victim. This very practical common sense approach to what would otherwise create a conceptual problem. We have seen national courts (particularly in the Former Yugoslavia) adopting a similar approach to defining the crime of rape.
- 54.** The second component of our work I want to raise is about the procedure on evidentiary approaches. It was a challenge experienced in the national sphere with rape cases in peacetime, particularly with stereotypes on these crimes. The ICTY created a progressive evidentiary framework for evidentiary requirements, with 3 important features. First, corroboration for rape victim testimony was not a legal requirement; just as any other category of crime, there is no heightened evidentiary requirements for sexual violence victims. Second, the prior sexual conduct of victim does not come up at all, it is prohibited to adduce evidence on this (often in national rape cases, a strategy of the defence is to put forward the prior sexual conduct of victim to try to argue that the victim is prone to consent

to sexual violence). Thirdly, the way of handling the issue of non-consent. The defence is only allowed to bring forward in the court room evidence to which the victim has consented, so that it cannot be a tactic to intimidate and humiliate victim on the stand. These are procedural developments that will have applications around the world. Another issue is the protection of the victims. We have move towards a victim centered approach to sexual violence prosecutions (we consult the victim, try not to make assumptions about what is in their best interest, and try to create the most conducive environment to allow them to tell their story and that will not add to the trauma). For instance, we have a victim and witnesses section, gave victims pseudonyms, had private sessions for victim testimony, distorted voices of victims etc. Covering the face of the victim, as well as electronic image distortion is also a possibility, so that the public is not aware of the identity of the victim.

55. As justice professionals, we need to remove our own biases towards SGBV. We tend to think of them as matters of honor and dignity, and this is why the issue of stigma comes up, because the victim is perceived within the community as having been diminished in terms of honor. As prosecutors, we had to clearly articulate in our minds that it is a violent crime just like any other crime. If we see it as a matter of honor and dignity, we tend to discount the seriousness, whereas if we see it as a violent crime in the same way, we are more likely to give it priority.
56. A lot of goodwill came up at the beginning of the creation of the ICTY but after some time, the attention on sexual violence crimes was taken away by other conflicts, and we had to work hard to make sure we didn't become complacent about this category of crimes.
57. It is also of great importance to take up the challenge of accountability collectively at the international level. Basically, we need to connect practitioners globally so that we channel our efforts and we do not keep reinventing the wheel.

**(c) Prof. Gregory Gordon, Associate Dean, Chinese University of Hong Kong**

**i. Incitement to sexual violence in armed conflict**

58. My book deals with atrocities speech law. It does not focus on incitement to genocide. Genocide is the more horrific and traumatic crime but we have to realize that the other core crimes account for more violence.

59. I am going to talk about incitement and there is a whole tool kit that prosecutors can use such as instigation and ordering.
60. Speech abetting is a new term I have come up with, it refers to speech synchronized with the atrocities which isn't necessary causal of it. I want to focus on incitement in relation to armed conflict.
61. In my book I talk about incitement to war crimes. I mention Donald Trump and I am ashamed of what he is doing in my country, the United States. Not only military officers but civilians are also caught up in incitement to war crimes and Donald trump is a perfect example.
62. In my presentation I do not talk about Rwanda but it is in my book. In the Akayesu case, the tribunal found no nexus between his speech and the violence even though he was in charge of the militia that carried out sexual violence and was the mayor of the town. I actually argue that it was war crimes.
63. I will talk about the legal landscape now, recommendations and then potential concerns that may come up. I want to give a couple of examples:
- Example 1: The rape of Nanking. Japanese soldiers perpetrated mass rape following the capture of Nanking. When speaking to their troops, the Japanese military chiefs referred to the Chinese as less than human. They were able to engage in such crimes because they did not regard the Chinese as humans. Dehumanization is one of the elements of incitement. In the ICC Bemba case Bemba was convicted under command responsibility, which is an example of omissions liability. We also have commission liability. However what is lacking is inchoate liability, which is precisely what incitement can bring. What we need is to prosecute individuals in leadership who make these cases possible. We talk about incitement to war crimes, we saw it in the rape of Nanking.
  - Example 2: In the Guatemala Genocide, in the context of civil war, the troops committed atrocities against civilians. The military officers inflamed their troops and told them that the women were pro guerrilla and that the innocents must pay for the crimes of the guilty. There are over 1000 cases of rape reported and many women were sexually enslaved. The recent conviction of former military commander Francisco Reyes in connection with the rape camp did not involve any charges of incitement.

- Example 3: Rape in DRC in Ituri; the commanders told the soldiers that they are free to take any of the girls and sleep with them. Though it was not an order or commission liability, it was certainly incitement.

These examples show how speech fuels this kind of violence

**64.** What is the current legal landscape? The Geneva 1949 conventions and The Hague conventions say that the high contracting parties will make laws for persons committing or ordering any of the grave breaches of the convention. There is no other reference to speech related crimes. This is the extent of incitement. In the ICTR and ICTY statutes there are no crimes of incitement, it is limited to general modes of liability. Even the Rome Statute does not mention any speech related crimes.

## **ii. Recommendations**

- 65.** Article 49 of the Geneva Conventions provides that the high contracting parties must have penal codes that provide for committing or inciting, ordering or abetting of the grave breaches.
- 66.** Article 25 of the Rome statute could be changed to include incitement to any of the core crimes. In the statute of the ICTR and the ICTY article 7 should be amended to include this.
- 67.** We should rely on precedent. US ARMY FM 27-10 Article 500 explicitly says that direct incitement for war crimes or war against crimes will be a crime even though that person did not get the implications at that very moment. It has never been fleshed out but it certainly can still be used to make similar laws.

## **iii. Elements of incitement**

- Direct
- Intent
- Content
- Illegitimate purpose
- Inciting text

#### **iv. Challenges of the crime of incitement**

- Free speech concerns: however, in the military, free speech is not as sacrosanct as it is in the civilian context.
- Operational concerns: would it shield officers' ability to expire troops in a conflict situation?
- Potential institutional concerns: will the militaries enforce this?
- Evidentiary concerns: will subordinates be willing to testify against their commanders?

#### **(d) Thembile Segoete, Principal Legal Officer, African Court of Human and Peoples' Rights**

- 68.** We need to change our mind-set in the way in which we view SGBV. People who perpetrate them, do this to wield power over the victims, to dehumanize and humiliate the victims. Peacekeepers are also using it to wield power while being backed by humanitarian resources. If we look at it away from an issue of sex and into power or violent crimes then it will help to lessen stigma and taboo associated with the crimes.
- 69.** Moving on to strategies of prosecutions, we cannot talk about successful prosecution without starting with successful investigations. In the beginning at the ICTR, as well as presently in national jurisdictions, investigators did what they wanted and the prosecutors found that the evidence was not sufficient to try the crimes, when they received the file. This is an issue. One of the best strategies is to employ a close cooperation between the investigators and the lawyers right at the beginning. The lawyers need to inform the investigators of what they want to prove, what they look for, and how they intend to prove it. They need to be more closely connected.
- 70.** Justice Lenaola has mentioned the importance of training. We need to train both the prosecutors and the investigators on SGBV, on the definitions of crimes, and the modes of liability. The guidelines manual of the ICTR recommends a crime-based approach as opposed to a target-based approach. For example in investigating Mr. A, because Mr. A was probably a commander, the sexual violence crimes will not come out because he only ordered and did not perpetrate the crime himself. He will then not be found guilty for any of the SGBV crimes.

71. The most important issue in the lessons learned on SGBV from the ICTR is to look for the evidence. It will not come to you. In the beginning in the Akayesu case we had no evidence that the women had been abused, because the investigator did not ask the questions. The victims will most likely not volunteer the information.
72. Another lesson learned, is to not take anything for granted especially in the identity of the perpetrators. In most instances, it was known that the soldier's from a certain camp perpetrated the crimes. When you are looking for evidence on identity, do not take it for granted that because it was in location X, it was the soldiers of camp X. In national jurisdictions, it is usually less of a problem because often the perpetrators are known. In recent years, we have seen situations where crimes were committed by persons not known to the victims, so it is important to be very thorough in establishing identity.
73. In addition to what was already mentioned on this, one of the reasons why it is important to take care of the victims, is that it affects the future of the case, or other cases. They will not come back to testify if they feel they have not been treated rightly. You can only have a limited number of witnesses. At the ICTR we recycled witnesses a lot and we had difficulties with witnesses who thought they had not been treated well. They didn't want to appear in future trials.
74. I want to throw a word of caution regarding policies about medical evidence mentioned earlier. We should be careful not to make these policies a must. In SGBV cases, medical evidence is usually corroborative evidence and if we insist on this, we will limit the cases where there is no medical evidence. The real question is what evidence is there, is medical evidence necessarily needed or can the sexual violence crimes be proven through other type of evidence (witnesses for instance)? In the ICTR for instance many women were killed after the rapes, but we managed to get the convictions even though they were not able to come forward as witnesses. While it is good to have medical evidence to corroborate other evidence, we need to be careful not make them musts, such that when we don't have them we feel we cannot take the case for successful prosecution. This could be very limiting.

## **PANEL INTERACTION WITH THE AUDIENCE**

### **Questions**

Q. What are the implications of the Malabo protocol?

Q. How do you deal with victims who were also witnesses?

Q. What of the requirement for States to consent on the cases for the African court to hear since States are reluctant to make a declaration under Article 34 (6)?

Q. What about when incitement is not public? In the ICTR we tried to make the court agree that it was still incitement even where it was not public.

Q. On access to justice for vulnerable individuals for people such as prisoners; how about prisoners who have been subjected to sexual violence? In Kenya and South Africa, inmates would report that on the first day they are assaulted. The prison wardens actually facilitate these crimes. Are there mechanisms to ensure that even inmates access justice when they are sexually abused?

Q. Michelle, you have put together lessons learnt in the ICTY. I am wondering about the issues on the chain of custody, are there any creative measures you used?

Q. The most significant thing we must look at is significance as opposed to all the rest. From your experience, you pioneered these courts, you've done a good job. What would you want a State to put in place to ensure that we have effective investigations? How do we do that?

Q. I want to represent the vulnerable. Whose role is it to take up such cases where people cannot actually take up unreported cases, which are in too large numbers?

Q. Most cases come through the medical facilities. For those that do not, how do such victims come to the justice system?

## **Answers**

### **Michelle Jarvis**

75. It is difficult to have medical evidence. It is important to make it a victim centered process.

We have to make sure that the process is empowering for the victim. For some, it is going to be a harrowing experience full of stigma. For others, they have no stigma. So we need to support both. We had the option of written evidence. We could use written statements.

Some want to speak in open court and others do not. There may be circumstantial evidence and documentary evidence.

**Prof Gregory**

76. These are great questions. I will start with public incitement. I have called for the public element for incitement. In genocide and crimes against humanity there is an idea that if the speech is held in front of masses versus in smaller groups, there is a greater impact. I think it is more effective in small groups where you can see gestures and facial movements. The ICTR has struggled in determining what public context is. In the contexts of the above crimes, it needs to be eliminated.

77. In war crimes we have more specific context. We can have military officials and the public element does not have to be proven here. For it to be direct, it must be that the person who was being spoken to grasped the importance of what they were being told. In most times, incitement is done by inchoate. It is important to show how these techniques have been developed.

**Thembile Segoete**

78. With regard to the Malabo Protocol, it depends on the kind of commitment that African states have. I will respond to the question on the African Court on Article 34 (6). A person cannot file a case directly with the court. The State must make the declaration and then the Court decides whether the case must be heard. There is nothing the civil society can do until the parent State deposits a declaration.

**Hon. Joyce Aluoch**

79. I was one of the judges of the Bemba case. The prosecutor is happy with the result. The defence, however, is not. Throughout the trial and the judgment, there was no medical evidence at all. This is the first conviction of the Court on command responsibility. There was no victim who pointed out Bemba as the direct perpetrator, it was his militia. The victims were able to talk about this. So we looked for other evidence.

80. What about the context? We have new areas for sexual violence in the homes. How do we deal with it as strategies in the national level? What are the strategies to go by? How do you go about spousal rape? One of the difficulties is that the perpetrators used condoms. The



challenge is that we have been conditioned to look for it. The policies that Hon. Lenaola talked about are meant to help to collect the evidence, to help the victims. They are not bad policies. Why do we not use the policies? We need help in the connection of the investigators and the prosecutors. How do we go about this? We need to make it a victim based process.

- 81.** How do we make it important? The other challenge is how to make the case so important, to ensure that it is handled within a short time. We need to make sure the laws are strict to ensure protection.

**Hon. Jamila Mohamed**

- 82.** We have issues with the Sexual Offences Act on how to go about the mandatory sentences; they take away the discretion of the judge. I have had the opportunity to use the precedent from other jurisdictions. We had a case of an accused jointly charged for gang rape. The prosecutor said that the charge sheet was very faulty. He had held an individual at his house for two weeks then dropped her off in the hospital. We had an issue with this but were able to look over the purely technical aspects and we dismissed the appeal.

**Michelle Jarvis**

- 83.** Most of the questions are better placed to the panel in the afternoon. For appeal judges, there must not be too much emphasis on technicalities. In the future, there needs to be written policies, focal approaches, and institutional strategies.

**Prof Gregory**

- 84.** We dealt with mandatory sentencing guidelines. What is the view on mandatory sentencing? Mandatory sentencing guidelines can be helpful. However, it makes it harder to actually appraise the sentencing success. In the US, sentencing guidelines are only advisory. In international criminal law, we have judges from different jurisdictions. They must have guidelines but not too much to remove their discretion. The point is that we must look at the substance and not the form.

## **Thembile Segoete**

**85.** Prosecutors must establish a relationship between the investigators and the prosecutors. The prosecutors must make the first move. It will not magically happen. Investigators and prosecutors must be willing to work closer together. They ICTR prosecutors went to Kigali seeing and talking to witnesses. when States say that crimes must be reported first? During investigations, the investigators should not assume that there was no SGBV because it was not reported. They must ask the questions themselves. There is a lot of lack of knowledge in the legal landscape.

**5. SESSION TWO: PANEL DISCUSSION ON ADDRESSING CHALLENGES FOR PROSECUTION OF SEXUAL AND GENDER BASED VIOLENCE CRIMES IN EAST AFRICA IN CONFLICT AND PEACE TIME.**

The panel consisted of:

**Tobiko Keriako, Director of Public Prosecutions, Kenya**

**Mike Chibita, Director of Public Prosecutions, Uganda**

**Monica Mbogo, Office of the Director of Public Prosecutions, Tanzania**

**Jean Bosco Mutangana, Office of the Director of Public Prosecutions, Head of the International Crimes Unit, Rwanda**

**Suzan Nyuon, Human Rights lawyer, South Sudan**

**Moderator: Dr. Serge Brammertz, Chief Prosecutor, ICTY**

- 86.** Good afternoon, we have had a fantastic morning with a very inspiring and insightful keynote address from Hon. Justice Lenaola. He posited fighting sexual violence is an issue and responsibility for all of us, starting with our families, in our schools and even in our workplaces.
- 87.** Every part of the society has an obligation to their part in curbing sexual violence; in relation to prevention, investigations, prosecutions, heading the medical sector and the non-governmental organizations to establish a global approach to a global problem. It is a global problem, we have seen through the discussions in the morning panel that sexual violence is a prevalent issue in international tribunals.
- 88.** Adama Dieng, the special advisor to the office of the UN Secretary General for the prevention of genocide, has explained that this violence also occurs in situations of conflict. Unfortunately, it is not just parties to armed conflicts who commit these sexual violence crimes but also peacekeeping missions. This goes to show that it is important for international bodies as well to ensure that their members are in check and do not commit these crimes, there is emphasis on a zero tolerance for these crimes.

- 89.** It was also mentioned this morning, that it is instrumental for investigators, prosecutors, and judges to have training and also cooperate together. Moreover, when considering the role of the prosecutors, they are an actor in the middle since they are dependent on the judges as the decision makers, and on the investigators who find the evidence. I said this morning that it was a privilege to conduct the advanced training for prosecuting sexual violence crimes for the last six days, and I would like to thank the directors of the different prosecution authorities in East Africa for sending their staff members for the training.
- 90.** It was also made clear that prosecutors have to analyze evidence but we take note that investigations are not easy, due to the nature of the crime, stigmatization, collection and availability of evidence.
- 91.** I would like to conclude with an example; a few weeks ago I was having a discussion with a fellow prosecutor and I informed her of the advanced training on prosecution of sexual violence crimes. The fellow prosecutor stated that she had just taken a statement of a victim of sexual violence committed in the year 1992, 24 years ago. When the victim was questioned why she waited so long, she explained that she was waiting for her husband to die due to fear of shaming him. This is an example showing how difficult it can be for the prosecutors and investigators to look for evidence over a crime that happened 24 years ago.
- 92.** Lastly, I feel privileged to be part this panel and this discussion. To make a translation between cases held in international tribunals and at the national level and to enable sufficient prosecution of these crimes, there must be cooperation at both levels.
- 93.** I now welcome the Panel; the Director of Public Prosecutions from Kenya, who has played an instrumental role in the establishment of SIASIC, Mr. Tobiko Keriako; the Director of Public Prosecutions from Uganda, Mr Mike.Chibita who I have interacted with severally, an active and committed chief prosecutor; the Prosecutor General of Rwanda, an office that has had vast experience in the prosecution and investigation of genocide investigations represented by the Head of International Crimes Unit in the office of prosecution of Rwanda, Mr. Jean Bosco Mungatana who has great experience in this field. We also have the Director of Public Prosecutions from Tanzania represented by Ms Monica Mbogo, thank you for being with us and your cooperation thus far, and Ms. Suzan Nyuong, a human rights lawyer from South Sudan who took part in the advanced training in prosecution of SGBV. As a non-prosecutor who took part in the training, she played a critical role in reminding us

of the victims behind each crime and of situations like South Sudan where it is difficult to find accountability or transparency. I now yield the floor to the first speaker.

**a) Tobiko Keriako, Director of Public Prosecutions, Kenya**

94. International crimes require networking both at the vertical and horizontal level between national and international jurisdictions. The positive complementarity principle requires that international jurisdictions assist national jurisdictions to build their own capacity, because the primary responsibility to fight international crimes rests with the national jurisdiction. International tribunals only deal with people with the gravest responsibility.
95. The DPP's office is new and we got our independence five years ago in 2011 under the new constitution. Before then, we were a department of public prosecutions in the office of the Attorney General. Now we are autonomous as is established in the constitution. We exercise powers of prosecution, we supervise, gazette prosecutors, and we issue policies and guidelines to ensure that prosecutorial services and investigations are done effectively. We also handle extradition and matters of mutual international cooperation.
96. We have four thematic departments, each headed by a director, who reports to the DPP. The departments include the department of offences against the person, department of economic crimes, department of international and emerging crimes and department of county affairs and central facilitation. Each department has specialized units and divisions. We have the SGBV division whose head is here, Jacinta Nyamosi, the international crimes division, the children's and victims' division, the anti FGM division and the human trafficking unit, the mutual legal assistance division and so on. We are represented in all of the counties and now we have trained prosecutors on all the divisions and units. We have 115 court stations and each one of them is manned by trained prosecutors. In 2011 about 98% of cases including SGBV cases were prosecuted by police prosecutors, whereas as we speak now all prosecutions are handled by trained prosecutors. This has a significant positive impact in terms of efficiency and conviction rates.
97. Secondly, I want to deal with the question of why SGBV is such a serious crime? It is the most heinous form of criminality. It causes physical harm and violates the dignity and humanization of the victim. There cannot be a more egregious offence than SGBV, it goes to the very essence of the person, both of the woman and the man.

98. In most cases, SGBV has been used as a tool of war and to perpetuate international core crimes as emerging jurisprudence confirms. There is therefore an obligation on every State to investigate, prosecute and punish these crimes. That obligation also goes to the international community because they are international crimes. As we punish the perpetrators, there is a corresponding duty to deal with the integration of victims and the perpetrators. Kenya has a huge array of legal instruments to deal with SGBV, starting with the constitution. Based on Article 2(5) and 2(6) international laws are part of our laws automatically, without specific domestication. The constitution protects dignity, outlaws sexual slavery and servitude and many other acts constitutive of sexual violence. Other legislations are the Sexual Offences Act, the Penal Code, the Prohibition of Female Genital Mutilation Act, the Counter Trafficking of Persons Act, the Children's Act, and the International crimes Act. My presentation will look at these statutes. In addition to these, Kenya has protective legislation for victims including the Victims Protection Act, which sets up a trust fund for them and the Domestic Violence Act. Kenya is also a signatory to a number of international and regional instruments relating to SGBV.

**i. Challenges in investigation and prosecution of Sexual and Gender Based Violent Crimes**

- The fear of stigmatization and reprisals is universal owing to the limited services available and the slow pace of the process. Even in settings where there are facilities, we need more capacity building.
- There is no reporting or under reporting. Societal and religious factors, threats risks, lack of awareness, no trust in law enforcement agencies are causes for that. In most cases, survivors are ostracized.
- Lack of awareness on their rights, or people who wash and clean themselves after the crime, or late reporting.
- In rural communities, initial reports should help investigators and police. Such are made to chiefs and assistant chiefs instead. The provincial administrators have no training at all.
- Handling reports in police stations: there is no gender parity and no P3 forms available.

- Limited health care facilities (they provide clinical care and forensic investigations and prepare reports), as well as inadequate safe shelters in recovery centers causing victims to feel threatened. Governments have not invested in this critical infrastructure. Civil societies and humanitarian agencies have been forced to take up.
- There needs to be better preservation of evidence.
- There is no forensic equipment or database for sexual offenders.
- Poor investigations by people who have not been trained at all.
- The issue of how to get evidence from victims and witnesses. They use a lot of euphemism. *Alinifanyia tabia mbaya*, he pricked me with a needle, *tulilala kama bwana na bibi*, we slept like a husband and his wife. Training is needed to recognize what the witness is actually saying.
- Witnesses get compromised.
- Traditional means of settling disputes (paying of camels for example) are being used.
- Experts are few.
- There is need for specialized prosecutors to try SGBV cases.
- Challenges with trials and adjudication. They take too long and magistrates are not trained. There are no special courts to try SGBV cases. The same magistrates adjudicate cases of being drunk and disorderly, and also for the defilement of a child.
- The victims are put through harassing questions and asked about their sexual history and are then victimized again.
- Post adjudication failures (for instance, what happens when a relative is acquitted of the crime?)
- Absence of structure and reintegration of victims, lack of reparation and long-term psychological support. Victims continue to suffer long after the crime.

## **ii. What we have done about to alleviate the effects of these challenges**

- We have taken over from police, who were previously the prosecutors of these crimes, by establishing a specialized division on SGBV
- We have come up with training manuals for prosecutors and investigators.
- We have modeled new charge sheets.

- We have also collaborated with international prosecutors.
- We have entered into MOUs with other organizations for capacity building and investigations
- We have a prosecutor's investigation module where prosecutors are embedded in a case from the very beginning and we have realized the obvious benefit of efficiency and speed.
- We work closely with civil society organizations and other services. We have a distinct role and complement each other. In most cases, they are the first ones at the ground to collect evidence along with the first responders.

### **iii. Recommendations**

- We need our country to have a fully-fledged forensic lab. We still have to take samples to South Africa and other jurisdictions.
- We need a data bank for sexual offenders.
- At a regional level, we need to harmonize our laws (we have a multiplicity of laws).
- We have too much bureaucracy.
- We need to set up a one-stop shop where investigators and prosecutors must work together with health care workers.

### **iv. Conclusion**

**99.** In conclusion, we must fight SGBV with all the resources we have. We must do it in a multi-sectorial way. No single institution or agency can do it alone. We need regional and international cooperation. I have tried to summarize my paper and I am happy to engage after the discussion.

### **b) Mike Chibita, Director of Public Prosecutions, Uganda**

**100.** We have the department for SGBV crimes and we also have the international crimes division on SGBV.



- 101.** I was a judge for ten years before I became Director of Public Prosecutions. The issue of medical evidence is particularly interesting. You can get a conviction without medical evidence and without the victim being present. We have to be bold and creative as prosecutors and set our own precedent.
- 102.** When the police make the file, they have to do a medical check up. In one of the cases I adjudicated, there was an accused person with HIV, and the police needed to check if the victim contracted it. As a judge, I had to adjourn a case to get the results on the positivity of the girl on HIV, because it would determine the sentence passed. As a prosecutor I have made sure to make it compulsory among prosecutors to check on this. It has brought up issues of insufficient facilities. We have partnered with UNICEF as they can do checks with certain kits.
- 103.** Sodomy is also an issue, we have to talk about this. I will talk about sodomy of young boys. There are those who talk about it and those who don't. It is because they don't want to cause controversy.
- 104.** Further, I will touch on the language of sexual offences. In our culture one cannot talk openly about sex. In one case a man had slept with the daughter of his wife and when the mother was brought as a witness she could not clearly describe the facts. The defense counsel did not let that go. I asked the translator to help out and he bluntly asked, "Did he fuck her?" I realized that I had made matters worse. We need to train investigators and prosecutors to use sensitive language.
- 105.** It is also difficult for victims of SGBV to describe what happened. We have partnered with UNICEF and they have provided screens so that the witnesses do not have to confront the perpetrators again when in court.
- 106.** Also, because some offences were done in a state of war, the government passed the Amnesty Act and many people involved in the conflict surrendered. We could therefore not prosecute them.
- 107.** The ICC is another challenge for us. I have great respect for the court. The Ongwen case has trivialized the matter. After he was taken to the court, he looks cleaner and he wore a suit. It seemed as though the court made him a better issue. Then there was an issue about which wife would visit him. However, those were not his wives. They were girls who had been kidnapped and been forced to become his wives.

108. Another issue comes through the fact that once a girl is defiled, she is often married off to her abuser. This seems like a form of punishment.
109. Amongst the issues, stigma still exists among survivors, making it more difficult for them to come through.
110. The victims are usually traumatized and they need counseling, which our office has no capacity to provide.

**c) Monica Mbogo, Office of the Director of Public Prosecutions, Tanzania**

111. I am representing the Director Public Prosecutions of Tanzania, accompanied by my colleagues. The office of the Director of Public Prosecutions, is headed by the DPP who is a presidential appointee. Under him, we have five divisions, headed by deputy directors.
112. The division that deals with the section on gender based violence is the one on offences against person. The powers of the DPP are found under the National Prosecutions Act of 2008. The powers are to coordinate the investigation and trial stages of a case and to control the criminal proceedings in courts. In dispensing the duties, he ensures that justice is served.
113. Gender offences are not committed in a particular country but are committed worldwide. In some jurisdictions these offences are committed by certain gender only for example male or female. In Tanzania, a female cannot commit rape but in South Africa, a female can rape a male person.
114. The Constitution of the United Republic of Tanzania enshrines human rights in adherence to international treaties and conventions. Article 12 of the Constitution deals with equality. It states that in Tanzania everyone's rights should be protected. Article 13 prohibits discrimination based on gender, ethnicity, political affiliation or religious belief. Article 14 deals with the right to life and Article 15 deals with the freedom of movement. Apart from the Constitution, we have other statutes that deal with sexual and gender based violence such as the Penal Code, the Law of Marriage Act, the Charge Act and the HIV and AIDS Control Act among others.
115. We have formulated policies for dealing with gender based violence, but they are few.

### **i. Challenges**

- Corruption: some adjudicators, investigators and prosecutors are corrupt.
- Poverty: In most cases, the victims and their families prefer compensation rather than going to court.
- There is an issue with the witness protection program. Witnesses are reluctant to go to court to adduce evidence, because of threats to themselves and their families. The laws are not exhaustive enough to protect witnesses.
- Poor investigations: The investigators don't know what they are supposed to collect. They either don't have skills or are not well trained on how to collect evidence and carry out investigations.
- Delayed investigations: This leads to investigations being distorted and lost and sometimes evidence deteriorates. The delay of the victims in reporting the matter may prevent the investigator from collecting the sample on time to be examined.
- The victims lose interest to testify in court because they come and go frequently and eventually decide not to attend court at all.
- Legal technicalities: The court requires the victim to give evidence before the accused and their families, which is a threat to the victim. Requiring the victims to describe exactly what happened, such as what went where, is traumatic to explain. For example in gang rape cases, the court wants the victim to explain who first raped her.
- We have a requirement for voir dire for minor witnesses, which makes it hard to get the evidence. It is unfortunate because adults also tell lies.
- There is failure to conduct medical investigations due to delayed reporting of incidents and limited access to health centers. Sometimes, medical reports are not adequately filled and are inaccurate, making it hard to prove sexual and gender based violence, for example rape.
- Sometimes the police tell the medical practitioner to if the victim is used to having sexual intercourse. The doctor writes, "Yes, they are used to it." They forget that it is not an

ingredient for the crime to be proven. Just because they are used to having sexual intercourse does not warrant sexual and gender based violence.

- The investigator, judicial officers and adjudicators fail to understand and do not know the elements of rape. It affects the adjudication of such crimes.
- SGBVs committed at the family level are settled through arbitration so that the public doesn't know what is going on in the family. There is shame among the family leading to settling of rape cases.
- Reluctance to report and testify against the abuser. Especially if the victim and the abuser have a relationship, the victim may want to protect the abuser.
- Other victims depend on the abuser financially. For example, a victim whose abuser is an uncle who pays her school fees, she may not be willing to testify because she knows that the benefits she is getting from the uncle will stop.
- Customs and traditions. The Maasai believe that to be recognized as a mature woman, you must undergo female genital mutilation. It is then difficult for people to come forward and say that such things happen in their society.

## **ii. Strategies**

- Creation of continuous public awareness. We are working closely with NGOs like Legal and Human Rights Centre and UNICEF.
- Establishment of the system of civilianization whereby the prosecutor leads the investigator from when the matter is reported to the police, up to the time when the matter is brought before a court of law. The prosecutor instructs them on what evidence to take and which witnesses to take statements from.
- We have gender violence desks, 417 in total. There is one in every police post. In the office of the DPP we have the office on SGBV and the DPP has appointed two focal persons in each region to report SGBV crimes.

- We established one stop centers. The police will meet the victim at the health center and give her a P3 form and connect her to a doctor. We have 6 one stop centers in Tanzania.
- We have platforms where sexual and gender based violence is discussed at the national level. The national criminal justice forum is chaired by the DPP.
- There is capacity building among the stakeholders including magistrates, prosecutors as well as investigators in order to improve knowledge to fight SGBV.
- We are strengthening cooperation between investigators and the prosecution sides.
- We are developing policies that govern SGBV.
- Development of a platform where investigators, prosecutors and magistrates will discuss challenges of prosecuting SGBV.
- Development of standard procedures for prosecutors on how to deal with sexual and gender based violence.

### **iii. Conclusion**

- Sexual and gender based violence, like other offences must be prosecuted with the aim that people should enjoy their rights. Let us fight against sexual and gender based violence. I know that we can do it. Let us play our part.

### **d) Jean Bosco Mutangana, Head of the International Crimes Unit, Office of the Director of Public Prosecutions, Rwanda**

**116.** Good afternoon ladies and gentlemen. I am pleased to speak to you this afternoon. I have been here for the past ten days undertaking the Strathmore Institute for Advanced Studies in International criminal Justice (SIASIC) training on the prosecution of SGBV, which was a very enriching experience. I will now talk to you as a representative of my country on how we are confronting sexual and gender based violence (SGBV) in Rwanda. You know that

we had the worst crimes committed in my country in 1994, the genocide against the Tutsi in Rwanda and because of that history, SGBV is not something new to us. We have tasted it, we have lived in it, we have confronted it and we still confront it.

**i. Structure of the Rwandan prosecution**

- 117.** Until 2003, the Rwandan prosecution was under the ministry of justice and it was called the office of the prosecutor general. The new constitution came in 2003, and the National Public Prosecution Authority was established under the DPP (the prosecutor general of Rwanda). We have different departments including the inspectorate unit which I haven't heard from our partners in East Africa. It looks at the performance of individual prosecutors and we have to sign individual contracts with the prosecutor general. If you are given for example 50 files in a period of 6 months you should be able to complete them and report back on the conviction rates, and explain why you lost or won cases. There is the genocide and fugitives tracking unit which is working on mutual legal assistance issues and cooperation in criminal matters with other countries. We have the gender based violence unit, the economic and financial crimes unit and the international crimes unit which I head. In the international crimes unit we are primarily focusing on the prosecution of international crimes before the high court chambers. The cases we handle have been transferred to Rwanda from the ICTR, or regard individuals who were extradited from other states.
- 118.** Between July and December 2015, 69 out of 192 cases that were decided were on rape. For the remaining cases, investigations are still going on. For child defilement there were 282 decided cases out of 550 reported cases. The numbers in child defilement are higher than rape because young girls are easier to coerce than older people. The sexual and gender based violence acts and offences in Rwanda are in categories such as sexual torture and sexual violence. The new Penal Code from May 2012 brought in marital rape. It sounds uncommon but it was passed by parliament and states that it is possible for a husband to rape his wife. We haven't received many cases of this and I only know of one. The people who argued this said that some men think that marital sex is their right, while it is not a right for the spouse, and believed that the woman should also be protected so that she enjoys the right to marital sex. If it occurs it may be prosecuted.

## **ii. The legal framework**

- 119.** It is both domestic and international. We have the legislation on prevention and punishment of SGBV, covered in the wide range of issues related to gender. We use it along with the Penal Code. In Rwanda, a number of punitive measures are taken from different legislations so at times we are required to read other legislations together with the Penal Code in order to ensure that we come up with certain decisions.
- 120.** A child in Rwandan law is under 18 years old. Under 18 years of age there is no consent to sex so any sexual relations with an under 18 year old is a crime, seriously punished up to life imprisonment.
- 121.** We have some laws that cover matrimonial regimes to ensure that there are no high tensions in families as far as property is concerned. The law on matrimonial regimes and succession ensures equal rights to succession. Traditionally, Rwandan women did not have any rights to succession, only men did, and this law has come to change this.
- 122.** From the international perspective, Rwanda has ratified the Universal Declaration of Human Rights, the Convention on the Elimination of all forms of Discrimination on Women, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the existing body of International Humanitarian Law (the Geneva Conventions and their Additional Protocols, the African Charter on Human and Peoples' Rights and the Convention on the Rights of the Child, just to mention a few). They have elements of gender and child protection. In addition to our domestic laws, they make up the legal framework we follow while investigating and prosecuting these cases.

## **iii. Challenges**

- The definition of rape in the Rwandan Penal code: In 1975, we ratified the Genocide Convention but it was not translated and so there was no punishment for it in the Penal Code. The Penal Code we used in 1996 to investigate crimes committed was old fashioned and defined rape as unconsented penetration by a male sexual organ into a female sexual organ. This definition is less than what was established by ICTR precedent especially in the Akayesu case. The new Penal Code of 2012 provides for rape as a crime against humanity when committed as part of a widespread and systematic attack. Currently, we are making

changes to our Penal Code in order to ensure that we get a very clear definition provided by the international tribunals and jurisprudence.

- Sometimes, when we investigate we have women reporting then withdrawing their complaints. Some young girls report rape and then later come to discharge the accused person. When you start investigating the boyfriend they withdraw, saying that they love them.
- Sometimes when it is an uncle, the economic and family interest interfere with the case. Sometimes when a young girl is raped, she reports it and after a few days she says that she was coerced by an aunt to come forward because of a family feud.
- Lack of evidence: In order to prosecute rape cases for a minor you need a birth certificate. However, sometimes people are not registered. Sometimes you have a girl aged 17 but looking like she is 30 years old, reporting that she has been defiled and we need a birth certificate to ascertain her age. Rwanda doesn't have marked addresses. So someone may be born but moved away, and was never registered where they were born making it hard to track individuals.
- Medical reports are not very clear. The medical report will come saying that x was raped and that there was sperm in the sexual organ. The medical report doesn't say who raped x. It just says that x was raped. Besides that, it also comes late. An expert report can take two weeks to get.
- In paternity cases, we don't have forensic labs. We have police forensic labs which only work on documents. DNA tests are taken to Germany and South Africa, causing delay.
- Absence of witnesses: Few victims say that they were raped several times, the same applies to women testifying against their husband in order to protect the household.
- Child testimony is challenged in court because of what the language they use. For example, a child victim may say, "He had a stick which he put it in me." That language is not convincing.
- Sometimes the suspects say that the victims consented. They are ignorant and do not know that under 18 year olds cannot give consent for sexual acts.
- Delayed reporting: It happens that women only report the rape after they find out that they are pregnant. This may be four months after the rape occurred.
- Counselling services are limited, though we have established some mechanisms.



- Lack of budget for reparations for victims: For rapes committed during the genocide, there was no reparation in Rwanda. We don't even have a law that provides for reparations for rape victims in war time.
- Evidence for rape committed during genocide is hard to obtain. We are currently prosecuting Nyagishari. Nyagishari is a former commander of militia in Giseni town which borders the Congo and he was transferred from the ICTR. We have a lot of evidence of people who heard the woman screaming but no one saw it and there is no medical report or DNA results. It becomes difficult. If you look at international jurisprudence, I think it is possible to prosecute these crimes.
- We need to have corroborative evidence, which is difficult considering that most sexual violence cases are committed in private.
- Tampering with evidence: Some girls are raped and then they are cleaned and taken to the hospital taking away the evidence.

#### **iv. Strategies**

- Commitment at the political level to respond to SGBV by establishing departments such as the gender based violence unit and the witness protection unit (established especially in the wake of transfers of cases from the ICTR). Rwanda has its first witness protection and victims support unit, which is currently operational. In addition, we have safe houses where victims are accommodated as they testify before court because of trauma.
- The review of the penal code, particularly the rape definition, so that it reaches international standards.
- Trainings like the one we had here with the Strathmore Institute for Advanced Studies in International criminal Justice (SIASIC), and others we have had on the east African level. Joined training for prosecutors and investigators.
- Holding trials on rape at the scene of the crime, by taking the suspects at the scene of the crime so that they pass a message of deterrence. They set up make shift tents and the trial is held there. They take the victims to the community where the rape was committed.
- The punishments are very heavy. Life imprisonment is meted out for rape, unless there are mitigating factors. Once there is strong evidence, the law is clear that life imprisonment must be passed and the law is interpreted strictly.

- We have institutional measures in place. We have established a one stop center, *isange* meaning feel at home or welcome. It provides doctors, and takes them to hospital for victims of rape and human trafficking, especially women who have been trafficked for sexual exploitation. It is within the police post and it is managed by the ministry of health and the ministry of gender. We have the gender monitoring office, under the ministry of gender, also involved. The national council for children ensures that children are well taken care of.
- Awareness programs such as evening forums for parents. Evening forums are held twice a month, whereby the local leaders will gather the people especially during community work, *mganda*. Every end of the month everyone including the president cleans the community. Through the forum, people meet and talk about problems they have in the family level like teenagers taking drugs or a child who has run away. It is an initiative where all parents meet for peaceful coexistence and better parenting.
- Media awareness.
- Clubs in high schools ensure that teenagers know the consequences of premarital sex; unwanted pregnancies. They are also taught on the use of condoms. They discuss the issues in the clubs.
- Involvement of police in community policing, where the population works with the police. There are toll free lines where individuals can report a case to the police.
- Economic development of women through microfinance is something included within the economic development and poverty reduction strategy (EDPRS), which was run from 2012 to 2017.
- Need for more regional and international forums that address sexual and gender based violence like the one we have had here with SIASIC.

**123.** Rwanda like other countries in the region is willing to cooperate to ensure that our investigators and prosecutors and others all learn, because if the prosecutors are trained but the lawyers or judges are not, then there will be an imbalance. We want to harmonize the legal fraternity.

**124.** Different partners are supporting us. Regionally we are supported through the East African Association of Prosecutors. The DPP of Kenya is currently our president. We have had trainings in the association. Locally, we have the UN, World Bank and other embassies to enhance capacity building among judges, lawyers and prosecutors.

**125.** In conclusion, we are handling this in a post conflict situation. The legacy of the genocide is a difficult one. In a country that had no highly qualified persons, where lawyers were killed, participated in the atrocities or are behind bars, and where young lawyers handling genocide, the worst of the crimes without it being in any of our laws, is a challenge. We have also received extradited cases. Regardless of other factors, we are prosecuting these cases we have received from the ICTR.

**e) Suzan Nyuon, Human Rights lawyer, South Sudan**

**126.** I am not a prosecutor but I am a human rights lawyer, and a civil society activist. I will speak about my experience with SGBV crimes in South Sudan.

**127.** Most of the problems have been mentioned by the other speakers.

**128.** One feature of SGBV is common and similar in African countries. In African culture, we don't talk about sex.

**129.** I will talk about sexual violence in the context of conflict. All of you are aware of the conflict in my country, South Sudan. Since we got independence we have never had peace.

**130.** No perpetrator has been brought to face the law. We don't have a sexual offences act. We have the Criminal Procedure Act, Penal Code and the Children's Act. The government has failed, I have never heard of any perpetrator being brought from a conflict region before a court of law.

**131.** When the war started in 2013, sexual violence was used as a tool of war.

**132.** In South Sudan, war has been ongoing since 1950. Sexual violence has become taboo. It is not something we condone, but it was not prosecuted either when we were part of Sudan or after we became independent.

**133.** In relation to the peacekeeping force in South Sudan, as South Sudanese, we ask ourselves whether one can really talk about an intervention. We don't understand the mandate of the UN there. Men and women have been raped in front of the peacekeeping forces, without any reaction from them. We are not sure what more peacekeepers are going to do given the crisis at hand.

**134.** Recently, the peacekeepers were reported for abusing children for exchange of food. Women and girls have been raped in the peacekeeping protection site.

**135.** We have the legal framework to try these SGBV cases. We have the police, the DPP and the judiciary. The rule of law is in place. The questions is, is there any practice of it?

**136.** We believe that South Sudan will be a great nation again. The recent agreement for the resolution of the conflict in chapter 5 talks about a hybrid court for war crimes, and a truth and reconciliation commission. Justice delayed is justice denied and soon as peace comes and we will hold the perpetrators accountable.

**6. SESSION THREE, HELD ON 5<sup>TH</sup> AUGUST 2016: PANEL DISCUSSION ON IMPROVING COOPERATION BETWEEN LEGAL JUSTICE ACTORS AND MEMBERS OF CIVIL SOCIETY IN PREVENTING AND ADDRESSING SEXUAL AND GENDER BASED VIOLENCE**

The panel consisted of:

- **Jacinta Nyamosi – Head of the Sexual and Gender Based Violence Division, Office of the DPP in Kenya**
- **Christine Ochieng – Executive Director, Federation of Women Lawyers (FIDA)**
- **Tina Alai – Human Rights Lawyer, Physicians For Human Rights**
- **Professor Dr Marleen Temmerman - International Centre for Reproductive Health and Aga Khan University**
- **Hon. Justice Lydia Achode – Judge of the High Court of Kenya**
- **Florence Gachanja – United Nations Population Fund (UNFPA)**
- **Moderator: Ms. Friederike Mieth, Nuremberg Principles Academy**

**a) Ms. Friederike Mieth, Nuremberg Academy**

**137.** Firstly, I would like to introduce to you Nuremberg Academy. This is a one year old institution interested in the promotion and advancement of International Criminal Law and Human Rights.

**138.** Secondly, I have divided today's session into three (3) key sections and each section will have two speakers. The sessions will be as follows:

- i) Cooperation between legal justice actors and civil society during investigations
- ii) Cooperation between legal justice actors and civil society in litigation
- iii) Issues of healthcare, advocacy and prevention of sexual violence

## **A. COOPERATIONS DURING INVESTIGATIONS**

### **b) Ms. Jacinta Nyamosi, Prosecutor, Head Of The Sexual and Gender-based Violence Division Of Kenya**

- 139.** Firstly, I would like to emphasize that cooperation must begin from the starting point. I will give you a case study; a case of sexual violence is reported and the victim is rushed to hospital. The victim calls her Advocate and when they get to the hospital, the victim and Advocate decide to remove the exhibits that comprise of her clothes and tear them into half so that the Advocate can keep one half and the police the other. The question of what part of the clothes contains the sample of the evidence arises. This amounts to tampering with the victims' case. Yes, victims sometimes compromise evidence not because they want to but maybe they are not aware of the correct procedure and this is why we all must cooperate with them and ensure from the beginning a correct chain of custody is created.
- 140.** If we do not cooperate and trust the police we will lose the case, cooperation must begin from the point of report. The doctor must know what happened, investigation is not just about the victim but everyone else, which is precisely why cooperation must begin from the onset. Cooperation must be present among all stakeholders: the victim, the Advocate, the police and the medical officers. It is of paramount importance to ensure that all these stakeholders have the information such as the right sample in the above instance. If evidence is kept in the victim's custody, the case cannot proceed.
- 141.** Additionally, reports should be made to the right persons. There are now gender desks in police stations where people can report matters of sexual violence. Further, in situations where the victim is injured, the victim need not go to the police immediately, but can go to hospital as a matter of urgency first. However, there should be another party keenly noting what is happening and when the victim is ready, a report can be made. The nurses or other medical staff can also get counselors to talk to the victim to determine if the victim is ready to report the case, because victims cannot be forced to report. If the victim is a child, even a doctor can make a report to the police, it is an obligation to report this matter if it concerns a minor. Alternatively, the family of the child can also be informed so that a report is made to the relevant authorities.
- 142.** Investigation is the second phase, quickly after a report is made. The investigator must go to the crime scene and probe into the matter. The first piece of evidence in a crime scene is

the body, and thus the investigator must ensure that they have all samples and pieces of evidence, keeping in mind that cooperation should already be in practice between the prosecutors and the police. Prosecutors can guide the police right from the beginning, from when the evidence is collected to the point when a complete file is created, to ensure that legal challenges are limited as much as possible.

143. In the instance of *Justice for Liz* there was a good rapport between the police and the prosecutors and this is why the case was successful. Cooperation in this case did not interfere with the work of the police but ensured effective guidance on both ends showing that indeed this relationship is a profitable one. This in my view is the best way to go about cooperation, guiding each other.
144. In conclusion, a correct path in cooperation must be followed, amongst all stakeholders must start from the beginning, including the victim (who plays an important role especially when it comes to the collection of evidence).

**c) Ms. Tina Alai, Human Rights Lawyer, Physicians For Human Rights**

145. I work with Physicians for Human Rights and our work focuses on enhancing the capacity of key actors in the access to justice chain with a particular focus on collection, documentation, preservation, analysis, interpretation and application of forensic evidence in the investigation and prosecution of sexual violence.
146. We have launched an SGBV program which has been running in Kenya since 2011. There is also a program running in the Democratic Republic of Congo concurrently.
147. I would like to share some of the key elements that should be put in consideration when dealing with SGBV crimes and related issues.

**i. Evidence**

148. We need to consider the nature of evidence we obtain when prosecuting SGBV crimes. It is important to understand the context in which we are working. The circumstances around crimes committed in peacetime situations are different from the circumstances in conflict situations. In the latter, victims are unable to access medical facilities or police stations with ease. A survey was done after the post-election violence and there was at least a one month lapse time before survivors made their reports.

*ii. Widespread and systematic violence*

149. Situations of armed conflict are characterized by widespread and systematic attacks where it is difficult to pin point the direct perpetrator, unlike in a peacetime situation. Therefore, in a conflict situation one is better suited looking at the level of responsibility, who authorized this conduct, who was in charge and how did the offence occur? It is important to find the linkage of evidence in order to successfully prosecute these crimes.

*iii. Practical considerations*

150. There are situations where people decide to promote peace and seek reconciliation while others prefer to prosecute perpetrators and have them punished. These are factors that relevant stakeholders must also put into consideration.

*iv. Fear of reprisals*

151. Survivors fear that if they speak out will be shunned by their community, family or relatives. They also fear being threatened by their perpetrators. Therefore, they prefer not to report these crimes.

*v. Lapse of time*

152. The length of time between the commission of the offence and its reporting may be too long. This can pose numerous challenges for the prosecution of sexual offences.

*vi. Capacity incompetence*

153. Lack of the necessary resources and infrastructure to prosecute sexual offences.

*vii. Evidence to demonstrate the consequences of the harm*

154. It is not just about the evidence around the offence, but the effect of such offence on the victim, their social-economic status and the effect on their family. This has an important implication on the types of reparations that can be offered by the court to the victim.

155. These considerations should always be kept in mind when investigating or prosecuting sexual violence crimes. One should not look for one type of evidence or evidence in



isolation; but several types of evidence including direct evidence, circumstantial evidence, medical evidence and testimonies.

- 156.** Additionally, I would like to posit that one does not seek to find forensic evidence to corroborate evidence but to strengthen a case. The forensic industry needs to be given more importance and attention as it plays a critical role in helping to prove a case beyond reasonable doubt. This however, does not mean that one must have forensic evidence to prosecute these crimes, but States need to be implored to put in strategies to strengthen facilities for forensic evidence for the future. This will strengthen the access to justice for survivors.
- 157.** I would also like to highlight the role of civil societies when dealing with sexual violence and related issues because these societies play a very pertinent role in the matter:
- Civil societies are often the first point of contact where survivors will report when they have experienced sexual violence. This is made possible by the legal aid programs in these societies that make access to justice easier for survivors once they report. The societies also work closely with paralegals and play a critical role in documenting evidence for survivors once they report.
  - Secondly, civil societies also possess critical information based on their areas of expertise, by virtue of their proximity to where the offences took place or due to the fact that they understand the context within which the offences occur.
  - Thirdly, these societies act as the link between communities where the survivors come from and government agencies where service provision is provided.
  - They offer support to survivors in receiving medical aid as well.
  - Civil societies also report to the police and follow up on the cases, for example organizations like International Justice Mission provide case managers to the survivors who work with them throughout the entire process.
  - These organizations also create awareness within the communities on what they should do and who to contact in case these crimes are committed.
  - Lastly, they offer counseling services and safe centers to survivors.
- 158.** After the post-election violence in Kenya, the Waki Commission of inquiry was established. The commission gave attention to SGBV Crimes due to the highlighting of these issues and collaboration of civil society organizations. Prior to conducting

investigations, the commission worked closely with the civil societies. There were about forty (40) organizations that came together in the midst of the crisis to reach out to women who had been violated. These organizations gathered under the Inter-Agency Gender Sub-Cluster. The latter included a variety of groups from the government and civil societies who worked with the commission in aiding it to collect evidence.

- 159.** Furthermore, the commission also worked with organizations such as FIDA Kenya, Care Kenya, The Kenya Women Empowerment link and the Catholic Diocese of Kenya to communicate with the victims on the ground. Additionally, the organizations like Care Kenya held workshops for victims of sexual violence to explain to them what the commission was doing and find out from them who was willing to testify.
- 160.** I would like to stress that the handling of forensic evidence is very important, so there must be collaboration between all stakeholders. A good relationship should be created so that prosecutors engage with police and with medical personnel.
- 161.** Awareness creation is vital to inform people on what they should do when the crime has been committed, for example, how to package the evidence. Also, the gap between the community and administrative officers should be narrowed to ensure effective guidance of survivors once these offences are committed so as not to compromise their quest for justice.
- 162.** Research and policies regarding sexual violence should be implemented effectively. It is the collaboration between civil societies and government actors that bore the comprehensive guidelines in dealing with sexual violence. For instance, the Sexual Offences Medical Treatment Regulations that implements Section 35 of the Sexual Offences Act (which posits that both survivors and perpetrators will get free access to medical care) clearly outlines the procedures to be followed in order to ensure this is complied with. The regulations also outline the steps a clinical practitioner should take once a victim reports to a medical facility which include physical examination, psychological examination, collect forensic evidence, ensure the forensic evidence is transported well for access to justice
- 163.** In addition to this, there is the multi-sectoral standard operating procedures on prevention and response to sexual violence that outlines all agencies, their roles and their interconnection to each other when dealing with these crimes.

### **i. Challenges**

- a) Lack of trust hinders progress because of the failure to look at the progress made and increased focus on the negative aspects.
- b) Perceived bias where the prosecution relies on information given to them by only one stakeholder and do not want to go out themselves.
- c) Lack of adequate protective mechanisms, for instance, key informers disappearing or being killed.
- d) Sustainability issues in that many of these civil societies are donor funded projects so when the financial tap stops running, the societies cannot carry on with their operations effectively.

### **ii. Suggestions**

- a) Ownership of the process and clarity in that civil society organizations come in to support the State and they should work together.
- b) Clarity in policy and guidelines – the laws, rules and guidelines we have should be implemented and enforced practically and should be clear enough to be understood.
- c) There should be a focal point of an oversight body that looks at all key stakeholders involved in the access to justice and ensures that these actors working together fulfill their obligations.

## **PANEL INTERACTION WITH THE AUDIENCE**

**164.** Comments made by the panellists on the two speakers' submissions:

- a. Christine Ochieng – non-collaboration exists because investigators are not sensitive to the victims and the kind of questions they ask survivors make them uncomfortable. These investigators need to be trained on how to conduct interviews. Further, investigators should go through a proper training on response to these crimes and how to handle them.
- b. Professor Marleen– medical practitioners need to give the necessary attention to victims when they come to hospital. Also, this care is important because evidence is lost during this treatment. Where I work, we came up with the idea using rape kits where victims maintain all the evidence so that it can be preserved up until the trial.
- c. Lady Justice Achode – I fully agree with previous speakers that the investigation stage is important or the evidence is lost at the start. When this happens, it will be hard to prove

the case in court. It is also important to have training for all stakeholders, to teach them that they all need to work together.

**165. Comments from the Audience:**

- d. Justice Aluoch – the police need to be trained and they should attend these fora too. Further, the gender desks at the police stations should have both male and female police officers manning the desks to avoid a perception that this is ‘female thing’, running a risk of stereotypes that will not do anything to save the situation.

**166. Questions:**

Q. Clarification on who conducts prosecutions and whether something is being done about defective charges?

Q. Are the police trained effectively?

Q. Is the offences data bank active for the benefit of future references for example where a perpetrator commits a crime twice?

Responses:

**167. Ms. Jacinta Nyamosi**

1. Prosecutions are conducted by the office of the DPP. Key persons concerned with drafting charges are trained but we will make sure the same is looked into to avoid any errors.
2. With regards to the training of police, there is a police training in Kiganjo here in Kenya where the police are trained on how to handle sexual offences.
3. On the offences data bank, the idea of the tool was launched and it is awaiting confirmation from the office of the chief justice.

**B. COOPERATION IN LITIGATION**

**d) Hon. Justice Achode, High Court of Kenya**

- 168.** Primarily, the fight against sexual and gender based violence is a multiagency fight, and this has been stressed enough by the previous speakers. No stakeholder can work on their own. The key role that the judiciary has played is in coming up with the Court Users’

Committees (CUC's), which is an efficient way of collaborating with all stakeholders in the justice system and to know of the problems being faced (all of them are involved in different aspects of dealing with sexual violence).

- 169.** Last year I took part in an exercise, I went round the country with a team developing bail and bond policies. We visited the courts, the prisons, the police and the court user committees getting views from these different actors, and I found that the CUCs are the best ways to collaborate. For example in Eldoret, specifically when dealing with cases of sexual violence, the court users complained that there were too many people in prisons but the police argued that they were perpetrators and should be put in prison, and we were able to consider these two views and tried to reconcile them.
- 170.** We hold meetings with these stakeholders where we observe that we should stop this blame game amongst stakeholders as it will only hinder progress. We have civil societies taking part too in these meetings as they are the first line of connection for victims. All actors need to realize we are all addressing the same issues and that we should all get on board.
- 171.** Innovative ideas come out of these meetings, for instance, in Eldoret, when dealing with cases of sexual violence where the victims are minors, the evidence is taken either on the day of plea or within that week when the crime was committed. This is because it was found that if the children go back home, they do not show up to testify because at the family level fear has been instilled in the victims. Therefore, the court user committees came to an agreement that the police should try as much as possible to have the witnesses on day one of the day of plea to take their statements.
- 172.** The right to bail enshrined in Article 49 of the constitution is important because it can be denied if there are compelling reasons. If the alleged perpetrator is a family member, who if released may influence the victim or the victim's family against testifying, the alleged perpetrator can be kept by the police to ensure noninterference with the victim.
- 173.** It is important to consider the culture and the community backgrounds that victims come from. These backgrounds influence how these crimes are handled. For instance there are communities where speaking out is unheard of or where African Customary Law is applied and compensatory measures like giving a cow or camel as reparation for rape are used. Stakeholders must come in to give these survivors means to access justice with that in mind.

- 174.** It is also very important to take care of the victim. The jurisprudence in Kenya is about punishing the offender but the victim should be taken into account and not to be mishandled.
- 175.** The policies that are being made to curb SGBV are of no use if stakeholders do not know about them. Implementation of these policies entails informing the people about them and creating awareness.
- 176.** It is true that sometimes the judiciary errs in its decisions, particularly where the rationale behind the decision is that the victim is to blame for the crime being committed. I find it hard to understand how one can arrive to a conclusion that a thirteen year old is to blame for taking herself to the perpetrators house. This however is not always the case, because there are instances and cases where perpetrators have been held accountable to the full extent of the law. Judge Ngugi recently ruled on a defilement case involving a teacher and two students, it did not matter that the court case happened way after the commission of the act, with the help of civil societies, the perpetrator was still brought to justice for his acts.
- 177.** We also have many policies in Kenya that curb sexual violence crimes in school and even work places. Let us use them, people should be aware of them, they are of no good if they are not implemented.
- 178.** Another example was a case involving a large number of children who were being defiled repeatedly in their homes and within their communities. Sadly, when the children made reports to the police, they were shunned away or made fun of. This shows that training is key, we need more of it to know how to handle these cases. Fortunately, with the help of civil societies, the children went to court and order of mandamus was rendered as well as orders to the effect of pronouncing justice for the children.
- 179.** We can see sexual violence takes different forms, in schools, in families and even in the work place. For instance, the courts determined an employment dispute where a lady was being sexually mistreated by her employer. The police aided the woman, and arrested the man for sexual harassment. Thereafter, a civil society instituted a claim against the man on her behalf and sought redress for the woman. People should not be terrified of their workplaces and this is why such cases are important, employers should respect their employees. Here, we can see the positive role that civil societies play in the access to justice for victims.

- 180.** Another issue is that of commercial sex workers, sometimes it is so difficult for them to get justice when such acts are committed against them or even their children because people say that they deserve it. I would like to posit that no one deserves sexual violence to be committed against them.
- 181.** In conclusion, we must all work together to curb SGBV. Training is key to help different stakeholders to know how to handle these crimes.

**e) Christine Ochieng', Executive Director, Federation of Women Lawyers (FIDA)**

- 182.** Firstly, I agree with the previous speakers on the importance of cooperation especially at the investigation stage. Therefore, I will talk about cooperation at the investigation stage and I will also highlight the gaps that as FIDA we have noted. FIDA is an organization that targets the representation of women in court and advocating women's rights.
- 183.** There is a very strong vital link starting from when cases are reported at the police station and how the police handle this. Sometimes, police pose demeaning questions to victims like how they were dressed when the act was committed. Others blame the victim for the crime. These are the kind of questions and actions that make victims turn away from the courts or from modes of seeking justice.
- 184.** There needs to be sensitivity when dealing with these cases and making the victims feel as comfortable as possible. I also agree that there should not only be women manning the gender violence desks but also men so that it doesn't become another 'women's affair'.
- 185.** I will give you a case study of a four year old girl who was defiled and murdered. The police treated it as a murder ignoring the aspect of whether sexual violence had happened to the girl. The police claimed that they did not have the expertise to conduct a post mortem. Therefore, through FIDA a post mortem was conducted and it revealed that indeed the girl had been defiled severally. We went on further to question members of the community of where the girl lived. This depicts how important it is to not only have cooperation between different stakeholders but also to be thorough in the investigations.
- 186.** This however is not to place blame on the police, there are times they do not know where to start, and that is also why cooperation amongst all stakeholders is needed. It should be noted that even in training, not all police are trained but only a handpicked few, and for most of them only once. It is therefore important to have trainings at all stages for all police.

In addition, some are not concerned with cases that do not have a monetary value attached to it.

- 187.** It has also become hard to collect evidence over time. For example, nowadays perpetrators use condoms especially in child sexual abuse cases, making it more difficult to collect evidence. Furthermore, victims need to be educated on how to handle evidence, they need to be explained that for instance when the crime happens they should not shower before reporting, as the shower interferes with the evidence. Collecting DNA samples is also not easy. Primarily, we must start with informing people on what DNA is, how is it collected, where is it collected, its transport and how much money is needed. Therefore, there needs to be cooperation in handling of evidence, especially if it is coming from rural areas and importance must be placed on how the evidence gets to Nairobi.
- 188.** We should not forget the victims and taking care of them so that they have the stamina to go through the entire legal process. Some of them become tired of the legal process or feel neglected if the case takes too long. Others forgive the perpetrator, and this makes it hard to prosecute the perpetrator. Others are affected by the views of their families and the fear of testifying. Victims must be treated with care, they need psychological care and counseling throughout the legal process. Many of them are traumatized and need to be prepared even before they go to testify.
- 189.** When it comes to litigation, it is a positive step that there are now prosecutors who have studied the law. Previously, it was a challenge having police prosecutors because of their ignorance of the law, no preparation and lack of sensitivity to the cases.
- 190.** However, even with the legal prosecutors, they need to be trained more on sensitization of these issues. For instance, their demeanor when dealing with these cases, treat these cases with seriousness and exude a confidence when prosecuting these cases. Doing so makes the victims feel assured that they are in the right hands.
- 191.** Similarly, judicial officers need to be sensitized on the importance of treating these issues well. For instance, conducting legal proceedings concerning SGBV should be done in private, but some do it in public, thereby shunning off the victims. Furthermore, these cases should not take too long, judges and other officers should try to observe this; lengthy proceedings tire the process. Additionally, when judicial officers give the sentencing, they



should adhere to provisions of minimum and maximum sentences. They should also try not to insert statements that allude to blaming victims for the crimes committed against them.

**192.** In conclusion, it is important to conduct trainings at regional levels so that all stakeholders take part. Furthermore, medical PR actioners should be involved in these trainings as they play a pertinent role especially as expert witnesses.

### **C. HEALTHCARE, ADVOCACY AND PREVENTION OF SEXUAL VIOLENCE**

#### **f) Prof. Dr. Marleen Temmerman, International Center For Reproductive Health and Aga Khan University**

**193.** I would also like to stress the importance of improving cooperation between legal justice actors and members of the civil society in preventing SGBV.

**194.** During the course of my work, I worked in Pumwani Maternity Hospital where I met a nurse whose daughter had been defiled. The nurse refused to report the matter because she already knew the perpetrator was a member of the family who took care of the daughter while she worked. Consequently, the nurse felt powerless to bring an action against a member of her own family. This is an example of how the family set up affects prosecution of these issues.

**195.** I also took part in the creation of a non-governmental organization in the year 2000; the International Centre for Reproductive Health in Kenya. I have also worked in other parts of the world and I am also a senator in Belgium, my home country. This post is instrumental empowering the fight against these violent crimes.

**196.** Women-centered care and our attitude towards the victims are very important. We should ensure to be non- judgmental and supportive, to provide practical care, to ask about the history of violence and listen to the victim carefully, to help the victim access information or other resources, and to provide gender sensitive care where men are tended to by male medical personnel while women are attended to by female personnel to ensure comfort.

**197.** When taking care of survivors of sexual assault, we can implement the following:

- First line of support; this entails having a complete history of the violence or even a video record that can be used.
- Emergency treatment should be given to the victim, within 72 hour (for instance, emergency contraception, STI treatment, safe abortion as per the national law -because

there are women who want an abortion and if you deny them this, they will seek unsafe methods to procure the abortion-)

- Strategies for taking care of the mental health of the victims, coming up with coping strategies for dealing with anxiety and stress, training for health care providers to ensure that they give better care.

**198.** Some of the policy recommendations for the provision of care:

- Integrate care into existing health care and have stand-alone services that deal with sexual violence victims.
- These centers should be kept open 24/7 because this violence can happen at any time.
- The health care providers in these centers should be trained as well. For example, in Mombasa there is a gender based violence and recovery center that has been established through an initiative that began in 2006. The center receives about 1000-1400 victims per year and provides legal support, medical and psychological support, training and collaboration, advocacy and activism. Through the center, we have come up with materials that allow victims to tell their stories and we use this and work with Shimo la Tewa Prison to read it to the perpetrators in this prison. The perpetrators feel remorse when they listen to these stories. We hope that we can set up a centre in each county.

**g) Ms. Florence Gachanja, Program Analyst, UNFPA**

**199.** We have listened to a lot that has been said in response to SGBV and these are not issues that are easily dealt with as we consider social cultural norms, inequalities, gender stereotypes and discrimination that result in SGBV.

**200.** I work in UNFPA on the prevention and response to SGBV including Female Genital Mutilation (FGM) and other harmful cultural practices like child marriages. We are aware that for a long time FGM was not considered SGBV but as a cultural norm. Moreover, the cost of curbing SGBV is quite high, from collection of evidence, legal proceedings and medical expenses. This leads to the government having difficulties in reducing poverty and achieving gender equality, as well as ensuring sustainable development.

**201.** Most of the programs run on SGBV are on response but we mustn't forget that prevention is of paramount importance and that is why I will make it the core of my

presentation today. I would also like to emphasize that training is very important and it should begin from the community level so that people can understand these issues.

**202.** The prevention of SGBV involves a behavioral change and mind-set since these issues are culturally sensitive. People are more comfortable dealing with issues amongst themselves.

**203.** Some of the recommendations on how to prevent SGBV:

- Address the underlying causes which are the social norms and cultural practices. This entails effective awareness creation and finding ways to ensure this information is disseminated well. I suggest that we could have a group of people from the community like the elders who can be trained and they can distribute the information to the rest of the people.
- Involve all the stakeholders as has been previously mentioned. For instance, the work of the medical personnel is not to just provide medical services but they can also talk to the community about these issues.
- Empower our children especially the boys, teach values and principles to our children and have safe homes for the girls.
- Enhance negotiating skills and communicating skills for girls to be able to reach out to their mentors.
- Use our laws to advocate for rights, this should start at the national, county and even religious levels. These laws should also be disseminated to the people in a way that they can understand.

**204.** Some of the challenges being faced in the prevention of SGBV include:

- Social cultural norms and practices will take time to change.
- Problems in the communities, where there are no community structures where survivors can go to seek help.
- Services like medical facilities should be established in areas that are proximate to the community especially in the rural areas.

## **PANEL INTERACTION WITH THE AUDIENCE**

**205.** Comments from the audience

- a) Ms. Thembile Thegote - Training should go back to the basics of the law of evidence. Secondly, cases should not be closed on the basis that there is no evidence on the medical form; we should be able to have convictions based on corroborated evidence. Thirdly, even if you have a victim who has forgiven their perpetrator, that should not stop prosecutions. It is the state that prosecutes, not the victims and that is why we still hold prosecutions for murder cases.
- b) Comment - accountability is very important; not only of the perpetrators but even the stakeholders should be held accountable.
- c) Comment - The Media should be invited to these forums so that more people can listen to these kinds of talks. Further, these conferences should be progressive, for instance, we should not speak of the same issues next year, we should speak of ways we have tried to address the issues discussed this year.
- d) Comment - We should have had male representatives in the panel so that they can give their perspectives.

**206. Questions**

- Q. Is the wellbeing of refugees being considered in these issues?
- Q. DNA Facilities are scarce in Kenya, is there a way DNA tests can be done in Level five hospitals?

**207. Responses**

- a. Ms. Jacinta – the office of the Director of Public Prosecutions has no bias towards refugees and encourages them to report these cases, because they too have a right and they will be listened to.
- b. Ms. Tina – While medical samples are important, we need to understand it might take a long time before forensic labs are accessible in all parts of the country. Therefore, we should not base our cases on just DNA Evidence, if we can get other pieces of evidence we should use them.

## **7. BOOK LAUNCH: PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY**

*(Edited by Dr. Serge Brammertz and Michelle Jarvis, published by Oxford University press)*

### **I. DR. SERGE BRAMMERTZ – CHIEF PROSECUTOR, ICTY**

- 208.** The idea behind the book was to leave a legacy for all the work done (prosecuting international crimes) at the International Tribunal for the Former Yugoslavia (ICTY).
- 209.** One of the prevalent topics in the book is sexual violence. There were about fifteen (15) colleagues from the ICTY who participated in coming up with the book. Additionally, all royalties from the book will go to victim organizations in the former Yugoslavia. All participants in the training we held will receive a copy of the book.

### **II. MICHELLE JARVIS – DEPUTY CHIEF PROSECUTOR, ICTY**

- 210.** We wanted to maximize on the work we had done at the ICTY. We used a victim-centered approach and this was also a thinking we had when coming up with the book.
- 211.** The cover of the book was from an art competition we conducted in different universities to depict the concept of justice and the winner was a young woman from Sarajevo. Her idea when she came up with the art for the cover, was a fading image showing how the victims/witnesses were fading over time.
- 212.** We also used the perceptions of other experts across the world on strategies in curbing sexual violence and this was instrumental to the writing of the book.

## **8. CLOSING CEREMONY**

### **Closing remarks**

#### **a) Hon. Justice Joyce Aluoch, Judge, ICC**

- 213.** I am happy with the activities of the past two days during this conference. I have learnt a lot and I will take it with me.
- 214.** I would just like to stress that training is key for all stakeholders because all actors are involved and they need to learn to work together.

215. Secondly, we should be practical when talking about issues concerning SGBV for example when talking about P3 Forms, we should bring them to the forum so that people can see what forms these are.
216. We should also ensure that there is no language barrier between the victims and the institutions of justice, a good rapport should be created.
217. Additionally, reparations are very important and victims should be duly compensated.

**b) Bernd Borchardt, Ambassador & Founding Director, The International Nuremberg Principles Academy**

218. I am also very happy to be here and with the output of this conference, organised by SIASIC with the support of the Nuremberg Principles Academy. There is a lot to learn from.
219. I would like to just briefly inform you on who exactly the Nuremberg Principles Academy is. The institution was founded in 2014 to promote International Criminal law. The founders are the Republic of Germany, Bavaria, and the town of Nuremberg. The academy takes part in the following:
- Applying interdisciplinary research; currently conducting research on the deterrent effect of the international criminal court and is also about to start a research on hate speech and inciting international crimes.
  - Human rights education; teaching about past experiences and teaching on protecting human rights against international crimes.
  - Capacity building; working in conflict and post conflict countries where we build research centers. Secondly, we also conduct capacity building trainings like the one done prior to the conference for East African prosecutors on prosecuting SGBV.
220. The Academy is happy to have taken part in such an initiative as it is a positive stride in the fight against sexual and gender based violence.

**c) Elizabeth Gitari, Director, SIASIC**

221. I would like to conclude the conference with a vote of thanks to all the panelists for the contributions, as well as the audience for the engaging sessions and all persons who took part in preparing the conference.