



Kingdom of the Netherlands



Women who kill in the context of domestic violence in Uganda:

How does the criminal justice system respond?



Kampala 2021

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Executive Summary

The research was carried to assess the response of the criminal justice system to homicides committed by women particularly the victims of domestic violence. It analyses the circumstances under which victims of domestic violence kill and how the criminal justice system treats women offenders who are victims of violence. The study further evaluates the extent to which the law is aligned with the principles embodied in international law.

The research was informed by the need to document the gaps within the criminal justice system with a gender-sensitive approach in perspective with policy, structural and legal reforms through experiences of women who have resisted domestic violence by killing their abusers.

The target group was 269 (111 convicts) aged between 18-60 women and girls convicted for murder and manslaughter in detention places specifically prisons in the districts of Arua, Gulu, Jinja, Masaka, Mbarara, Soroti, Mbale, Fortportal, Bushenyi and Wakiso at Kigo. The research shows 19 percent of the women who participated in the survey killed a male partner or family member.

Domestic violence is mainly directed to women by men and the women often hide it due to fear of being stigmatized by the already patriarchal society. The hidden nature of domestic violence makes it hard to prove in courts of law.

The findings also show that some of the stakeholders including judicial officers, lawyers and the general public are not aware of the Domestic Violence Act 2010 which also explains why domestic violence as an offence is rarely reported and the victims receive limited legal support.

This study shows that women offenders who are victims of violence have limited access to psycho-social services due to the absence of qualified health practitioners at most of the women's prisons.

The study analyses the legal framework and judicial practices in homicide cases involving women who are victims of domestic violence. Although a history of abuse is not a defence in law, some judges have taken domestic violence into account as a mitigating factor.

1. BACKGROUND

Women represent 5 percent of the total number of prisoners in Uganda. Approximately 86 percent of all women in prison are either charged or convicted for murder, manslaughter or assault. One quarter of all homicides by women in prison in Uganda involves the death of an intimate partner.

Research shows the majority of women imprisoned for offences against life (murder, assault or manslaughter), have experienced prolonged domestic violence at the hands of a partner, spouse or another family member and for many the abuse had occurred several times. A study on women's violent crimes in Uganda revealed that women can act, and that women sometimes retaliate against specific kinds of oppression.

By killing their abusers, women actively deal with the abuse they have endured. Killing a violent partner exposes the degree and nature of women's resistance against oppressive gender relations.

A UN report on Kyrgyzstan noted that 70% of women convicted of killing a husband or other family member had experienced a "longstanding pattern of physical abuse or forced economic dependence". Similar statistics from Jordan, South Africa, United States and Argentina demonstrate that this is a global phenomenon, extending across countries and regions, traversing cultures and levels of development.

Rule 61 of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures (Bangkok Rules) requires that courts have the power to consider 'mitigating factors such as a lack of criminal history and relative non-severity and nature of the criminal conduct in light of women's caretaking responsibilities and typical backgrounds'. Mitigating factors include the offender's background such as violence they have experienced which includes a history of violence.

The killing of women by men is oftentimes the final stage in the cycle of domestic violence. On the contrary, women who kill an intimate partner are victims of domestic violence. This demonstrates an important correlation between women who kill their

partners and women who have been killed by their partners, as both are victims of domestic violence.

Two psychological patterns have been recognised in female victims of domestic violence: a) battered women syndrome which explains the emotional and psychological mental state of female victims of domestic violence that causes women to stay in abusive relationships and, b) the slow burn reaction which posits that the psychological state and physical makeup of women which regards an imminent reaction to physical abuse futile or dangerous given the disparity in the physical strength of the victim and the aggressor.

Domestic violence is therefore an important context for homicides committed by women in Uganda. In recognition of the high prevalence of domestic violence, Parliament passed the Domestic Violence Act, 2010 (DVA), to *inter alia*, provide for the protection and relief of victims. At the time Domestic Violence Bill was debated in Parliament, 40% of crimes in the country were either crimes of passion or crimes related to domestic violence. It was further established at the time that domestic violence was the leading cause of deaths and disabilities.

The DVA broadly defines domestic violence to include harm to physical and mental health, including, economic, sexual, verbal, emotional and psychological abuse.

In 2020, 46 percent of the victims of intimate partner/family related homicides in Uganda were female, killed by their intimate partner or a family member. The highest cases were recorded in Amuru, Mubende, Ntugamo, Kakumiro, Kisoro, Yumbe, Kitgum, Arua, Kyenjojo and Kyegegwa. These districts are geographically representative and symbolic of high domestic violence rates across the country.

This study is therefore to assess the response of the criminal justice system to homicides committed by women, particularly, victims of domestic violence. The use of the term "victim" in this report is intended to align the terminology in the findings with the usage

in the law, and not to further stigmatize women who have survived domestic violence.

Description of the problem and Subject of the research study

The majority of women in prison are either charged with or convicted of offences against life (murder, manslaughter or assault). Many women had experienced domestic violence from their partner or another family member at some point in their lives and for some the abuse occurred many times.

Despite a significant amount of literature on domestic violence, little has been written on intimate partner homicides; and the response by the criminal justice system. The study is therefore an important step in the enhancement of justice delivery for women charged or convicted of homicides, more broadly, gender and punishment.

In more specific terms, the study analyses the circumstances under which victims of domestic violence kill; examines how the criminal justice system treats women who kill in the context of a

violent relationship; and assesses the extent to which the law is aligned with the principles embodied in the Bangkok Rules and in particular Rule 61.

The study reveals gaps in the criminal justice system and calls for policy, normative and structural reforms, as critical to the enhancement of justice delivery for victims of domestic violence. We hope it contributes to the task of developing legal and practical reforms in the criminal justice system by highlighting the experiences of women who resisted domestic violence by killing their abusers.

The research was carried out among 269 (111 convicted) women in prison aged between 18- 60 years who were convicted or charged for murder or manslaughter. The survey was carried out in Arua, Gulu, Jinja, Masaka, Mbarara, Soroti, Mbale, Fort Portal, Bushenyi and Kigo. The figure below shows the number of women who participated in the survey against the total number of women prisoners in Uganda.

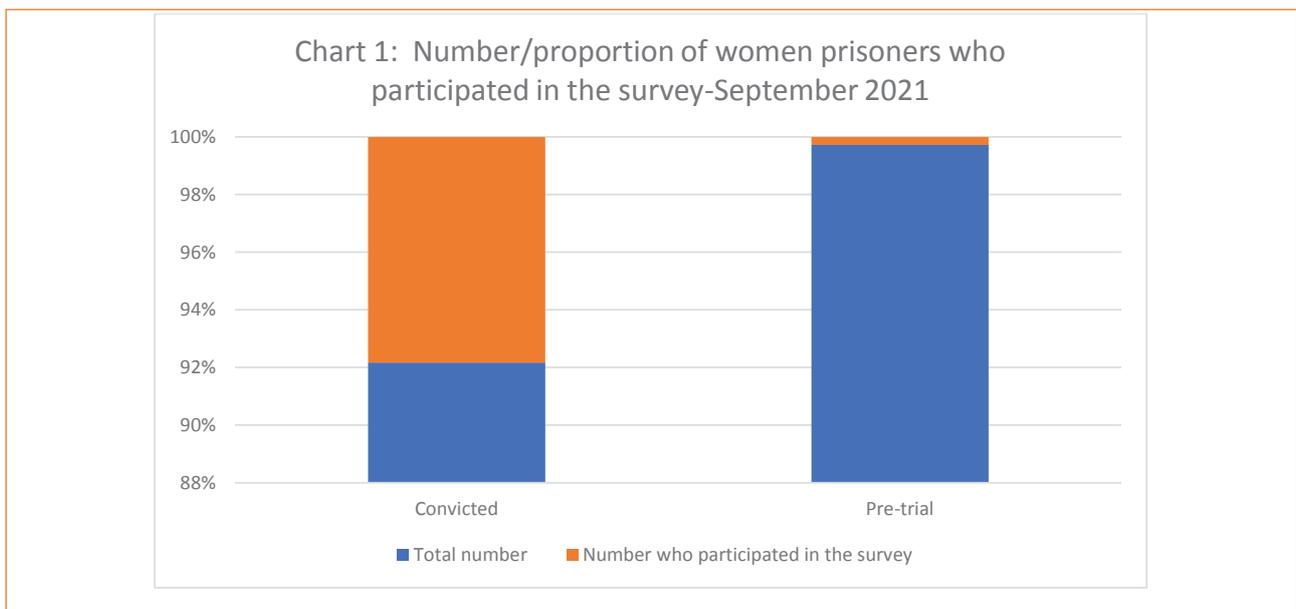
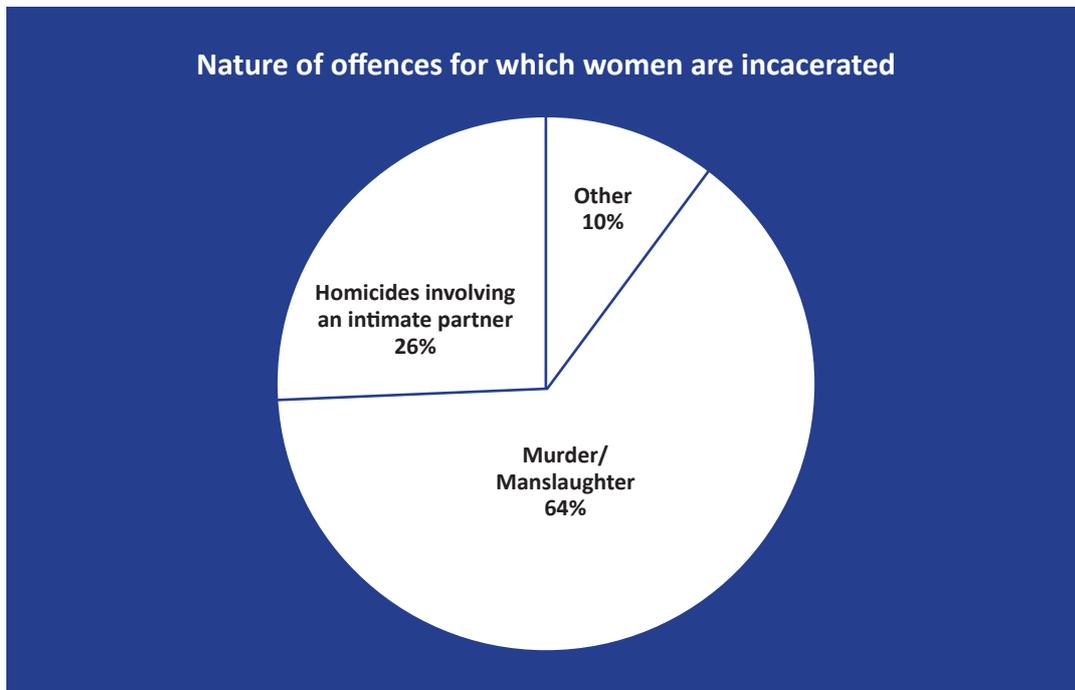


Chart 2. Nature of offences for which female detainees are charged/convicted



64percent of incarcerated women are either charged or convicted of manslaughter or murder, while 26 percent are charged or convicted of a homicide involving and intimate partner.

Although victims of domestic violence include men and women; this report focuses on women as the victims of domestic violence and men as perpetrators. It also reflects the fact that domestic violence is overwhelmingly directed at women by men and that many homicides by women involve an intimate partner.

However, Penal Reform International(PRI) acknowledges that domestic violence and domestic homicide do not always occur in that way.

The recommendations are intended to apply to ‘all ’ victims of domestic violence including men, children and people in same sex relationships.

Terminology

Domestic violence means a range of sexually, psychologically and physically coercive acts used against adult and adolescent women by current or former male intimate partners.

Intimate partner is defined as people who are married, separated, divorced or de-facto. In the Ugandan context, intimate partners are categorized as a “domestic relationship”, defined in Section 3 of the DVA as “a family relationship, relationship similar to a family relationship or a relationship in a domestic setting that exists or existed between a **victim** and a **perpetrator**” and includes current and previous marital relationships, persons who shared or share a residence, house servants who may or may not share a residence and domestic relationships determined by the court as such. It should be noted that courts determine a domestic relationship based on the amount of time persons spend with each other, when and where the time is spent and the duration of the relationship, among others.

Description of research methodology

A mixed methods study design was adopted for the study for both data collection and analysis. The study was participatory and included both quantitative and qualitative data collection methods. The quantitative methods included a survey administered to female detainees, 269 women aged between 18- 60 years who were convicted or charged of murder or manslaughter. The identification of respondents was done in accordance with international principles of safeguarding vulnerable adults.

Qualitative methods were literature and desk review and interviews with key informants, primarily, justice sector actors.

In sum, within the framework of a complex research, the following activities were planned and implemented.

- i. Qualitative and quantitative research – considering the complexity of the research, the interviews with women prisoners were conducted on a voluntary basis. Preliminary work included the development of a survey questionnaire which consisted of a series of questions and prompts

needed to collect the relevant information. In-depth interviews and focus group discussions revealed the experiences and requirements regarding the improvement of services. In order to compliment the quantitative with qualitative research, discussions with focus groups and in-depth interviews with key stakeholders were conducted.

- ii. Face to face interviews were conducted with sector experts including police, prison staff, lawyers, prosecutors, community service officers and magistrates.
 - ii. Data analysis: Quantitative data collected was coded and analysed using Social Scientists (SPSS) versions 21 to obtain tables, frequencies and pie-charts. Further analysis was done using cross tabulation to determine the relationship between the victims and the ones they kill. Qualitative data was obtained through critical assessment and explained using thematic interpretation in accordance with the main objectives of the study using Atlas-ti.
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2. DYNAMICS OF DOMESTIC VIOLENCE

It is important to understand the nature and dynamics of domestic violence in order to understand domestic homicides. The three components of domestic violence that the legal system and community at large need to understand were well stated by the Law Reform Commission of Australia, as follows:

- i. Domestic violence is multifaceted and constant;
- ii. The victim is captive; and
- iii. Domestic violence is hidden.

The 'Constant' nature of domestic violence

Domestic violence is constant due to the persistent fear and stress it instills in the victim. Some studies argue that the persistent threat of violence by a violent male partner has a cumulative impact as a pattern of behaviour and that a woman's violent response should be interpreted as a defensive response to the cumulative acts of violence.

Fear is used as a weapon of control in abusive relationships. Justice Derrington in a Queensland Supreme Court case expounded on how fear can be a form of constant abuse when he stated that:

"To live in an atmosphere where there is a constant threat of violence, you might think, is a very hard thing and must be emotionally wearing. And, of course, after a while it becomes a case where not only is there physical violence, but the mere endurance of the threat also becomes a form of psychological violence as well."

Tibatemwa-Ekirikubinza, in her book "Women's violent Crimes in Uganda: More sinned against than sinning" refers to women's role as passive and argues that the term refers to the fact that women experience suffering at the hands of men, for long periods, without opposition.

Is the victim of domestic violence 'Captive'?

Research shows that when ordinary people confronted with the 'battered wife' syndrome, they question why a woman would put up with an abusive partner and why they cannot 'leave?'. Below are some of the reasons why women victims of violent relationships do not leave:

- i. Fear for their safety or the safety of others;
- ii. Financial dependence;
- iii. Isolation;
- iv. Lack of assistance;
- v. Lack of faith in other peoples' ability to help;
- vi. Shame and embarrassment;
- vii. Lack of access to housing; and
- viii. Hope that the partner's behaviour will change.

Whereas in Uganda relatives and friends readily interfere in marital conflicts, it is largely for purposes of reminding women of their duty to remain married.

Leaving an abusive partner can be difficult and dangerous. It can heighten a relentless pursuit of the victim since the abusive partner does not want the relationship to end. The legal system is usually inadequate in its ability to protect and respond to the victim. These difficulties in most cases cause victims to reconcile with their abusers.

The danger a victim trying to leave a violent relationship face was observed by Justice Wheeler, who contextualized women's failure to leave violent relationships as:

'The reality that confronts women who are subject to domestic violence is frequently brought home to judges of this court who preside over wilful trials, in which, in a depressing number of cases, the victim is a woman who has been killed by her husband or de facto, very often in circumstances in which she is seeking to assert herself and to separate from him, or to continue to live separately from him.'

Domestic Violence is Hidden

Unlike other forms of violence, domestic violence is hidden. The victims/survivors conceal domestic violence due to the stigma attached to it that creates a sense of shame and embarrassment of the victims/survivors. Perpetrators conceal domestic violence because of denial, own sense of shame and fear of exposure.

Since victims often deny that domestic violence occurs; a history of domestic violence is seldom adduced in courts of law and when it is, proof is difficult. Put differently, where a man kills his victim, evidence of previous abuse might not be available to the prosecutors, and where woman kills her abuser, the extent to which previous violence contributed to her actions may be difficult to prove at trial.

3. SURVEY RESULTS

Context

Domestic violence is an increasing public health concern in Uganda. According to the Police Annual Crime Report 2020, a total of 17,664 cases of domestic violence were registered compared to 12,541 cases reported in 2019. Of the 17,664 cases reported in 2020, 3408 victims were male adults, while 13,145 were female adults and 2319 (1186 girls) children. 418 of the 17,664 cases registered at police resulted into death of either the victim or the perpetrator.

The most commonly reported forms of domestic violence are physical threats, physical beatings, sexual violence, family neglect and verbal abuses.

The Domestic Violence Act, 2010 is yet to be fully implemented. PRI staff interview with a senior family lawyer indicated that the law is not known amongst lawyers and some judicial officers.

It was further observed that lawyers do not appreciate the importance of a history of violence (or do not believe that it can be used to establish a defence) and therefore do not seek detailed supporting evidence about the violence.

While there have been some positive recent steps to fight violence against women in Uganda, in particular the adoption of the Domestic Violence Act, 2010 which criminalises domestic violence, measures necessary to ensure the implementation of the law are still lacking. In recent years, research shows incidents are increasing with a 16.1 percent increase in deaths caused by domestic violence in 2020.

Domestic violence is still a very common occurrence that is rarely reported to the authorities. There are many reasons for this including stigma, lack of knowledge about rights to protection, lack of knowledge about available support networks, poverty, and a common belief that domestic violence is culturally acceptable.

While some organisations offer support and legal aid to victims /survivors of domestic violence in the community there is very little support for women victims of domestic violence in conflict with the law.

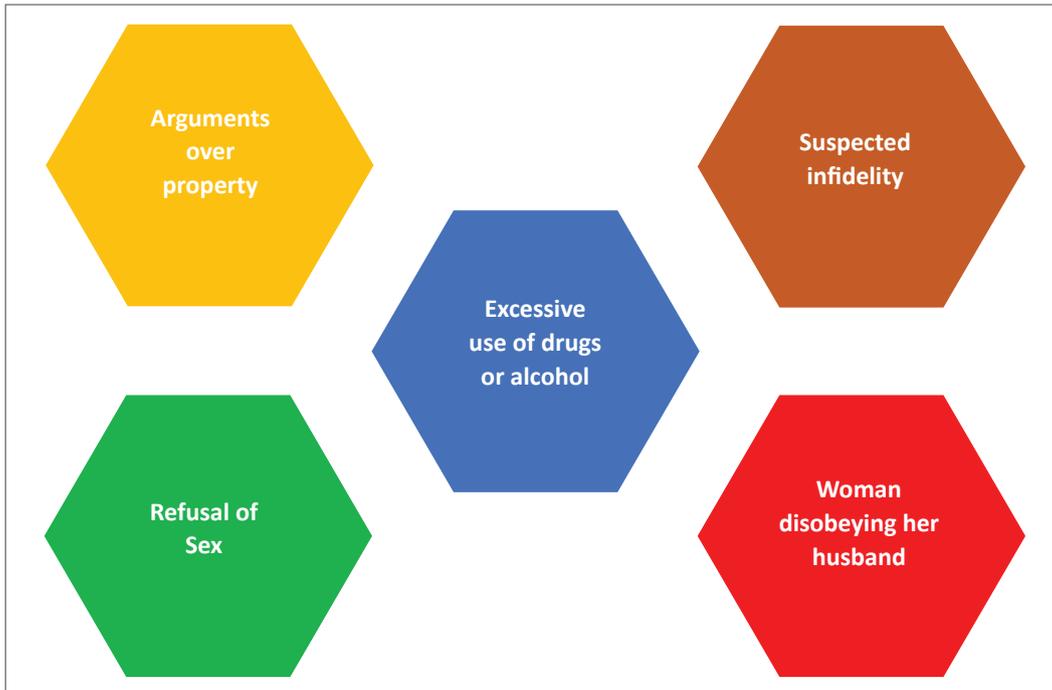
Age, marital status and family background

The largest percentage of women surveyed are aged between 18 and 29 years old- 34percent. The proportion of women between 30 and 39 years was 26 percent. Women aged between 40 and 49 years were 18 percent and just 22 percent of the women were aged above 50 years. Therefore, 78 percent of women who participated in the survey were aged between 18 and 49 years old.

The majority of the women who participated in the survey- 91% were married or separated or lived with a partner prior to imprisonment. 9percent of the women surveyed categorised themselves as single. Of the 256 women who were mothers, 17 percent lived with their children in prison.

26 percent of the women surveyed said they had experienced violence from an intimate partner or family member. Majority of the women said that this was a frequent occurrence.

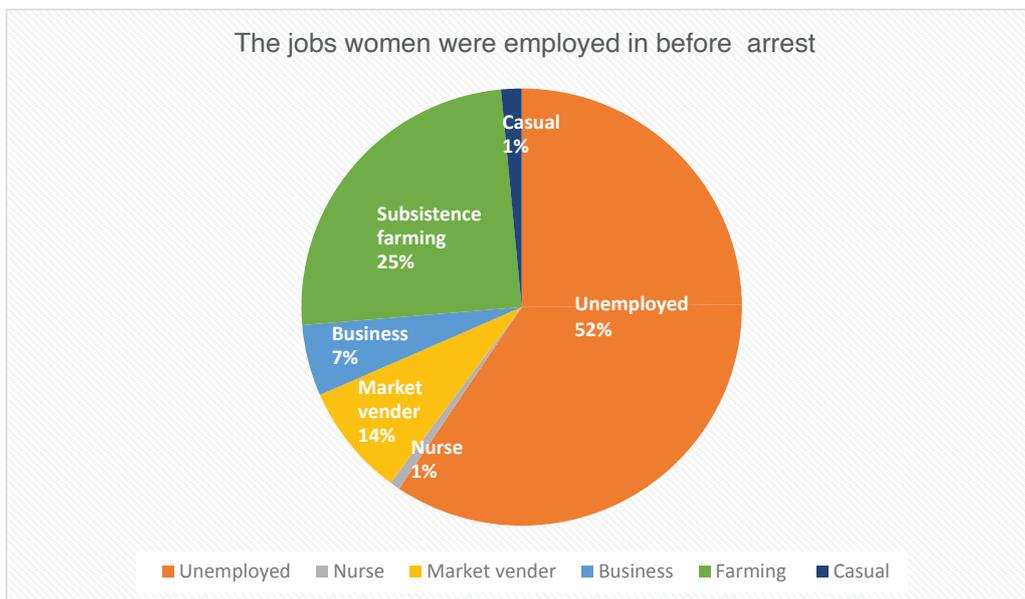
Figure 1: Primary reasons for domestic violence among the women surveyed



48 percent of the women said that they were working at the time of arrest either in paid work or business. Majority of the women- 52 percent who participated in the survey said they were not employed at the time of their arrest. Some women-25 percent were

engaged in subsistence farming while 14 percent said they were working as market vendors. Other forms of employment the women indicated include nurse, business and casual labourer.

Chart 1: The jobs women were employed in before their imprisonment.



Levels of Education

The largest group of the women surveyed – 61% had never been to school. 35percent of the women surveyed had only been to primary school and only 4% of the women surveyed had attended secondary school.

Table 2: Level of education of the women surveyed

Education type	Percentage
Primary	35%
Secondary	4%
Never been to school	60%
Certificate	1%

Women charged or convicted of murder or manslaughter of an intimate partner

19 percent of the women surveyed were charged or convicted of killing a male partner or male family member. The women said that the deaths occurred during or soon after a fight. Below are some of the women’s stories:

Barbara, 35 years

“I got married to my husband and we have 8 children. I did not go to school. I was farming before prison. My husband was a drunkard and always got violent when he drunk. Many times, he had ordered me to sell a piece of land that my father gave me so he could buy a motorcycle. I knew he just wanted money for himself. Many times, he sold items in the house to get money to buy alcohol. On the day he died, he came home drunk. He abused and started beating me when I told him I could not sell the land. Because he was drunk the stick fell. I got it and hit him in anger. He fell down and died. I went to plea bargain and sentenced to 6 years...”¹

Trisha 27 years,

“I have 3 children with my husband. We were two wives in the same compound. My husband tried to chase me away, but I refused. He said he did not love me anymore. One day he came home with a panga and tried to cut me, but it fell down. I picked it up, cut him and ran away. He later died because of over bleeding. I was arrested with my last born and I am with her here in prison. I went for plea bargain and got 11 years.”²

Margaret 31 years,

“I was raised by my mother single handedly. I did not go to school and our source of livelihood was farming. I got married and dowry was paid to my mother. After a short period in marriage my husband started behaving badly towards me. He chased me away from our home. He later demanded that we return his dowry which my mother did. The man never stopped disturbing me. The day he died, he came and found me in the kitchen. He started pulling me towards my mother’s house to have sex with me. I told him to stop but he could not. My mother was away from home. She had gone for burial. The man insisted and dragged me. I got some energy and pushed him down. He was drunk. When he fell, he hit his head and died. I was arrested with my mother. I am okay but my mother should be set free.”³

Susan,21 years,

“I was married and have 3 children. I am a farmer. My husband was a drunkard and we used to fight a lot. He spent most of his time drunk and did not provide for us. The day he died, we fought and I pushed him. He hit his head on the cupboard and died.”⁴

The study showed that the women who killed an intimate partner were serving varying sentences.

1 Not real name. The names have been changed for the safety and confidentiality of the interviewee.

2 Not real name
3 Id
4 Id

Table 3: Length of sentence for women convicted of murder/manslaughter of a partner or male family member

1- 2 years	0
3-10 years	40
11-20 years	8
Above 20 years	3

Analysis of Rehabilitation and Reintegration programs for women in prison who are victims of violence

Psycho-social services

Given the fact that women are fewer in number compared to men in prison, in most of the regions there is no stationed nurse for social or welfare officer in the female prisons. The social worker attached to the male prisons is the one responsible for the women prisoners. But given her huge portfolio (approximately 16 prisons per social worker) s/he rarely visit the women's prisons.⁵

The inadequate number of social workers means that women's individual needs including a history of abuse are often ignored while in detention. There are no individual actions plans for the women which would support their rehabilitation and re-socialisation.

Health services

There is a health worker attached to each main prison. Women are also supported by their fellow prisoners in cases of minor health problems and referrals are made for major medical needs. However, the drugs received by the prison are insufficient and there is no medication for terminally ill.⁶

Informal education/ training courses

To prepare women for resocialisation, education and personal empowerment programs are offered in some prisons. Programs offered include making handcrafts, netball, making liquid soap and candles

among others. In a few prisons counselling and guidance is also offered to the women by NGOs. However, these programs are limited to a few prisons.⁷

The rehabilitation and reintegration for women is scarcely done. Where it exists, vocational training programs for women have been constructed around the traditional role of women in society such as the art of making handcrafts and hair dressing. Although learning such skills may in itself be a positive achievement, there is not sufficient market demand for such skills to facilitate are usually not enough for these women to secure gainful employment.

Legal aid

Majority of the women surveyed- 91 percent said they had no access to a lawyer. 7 percent of the women surveyed said they received legal aid and only 3 percent said they had a private lawyer. While many women are likely to have had some form of legal representation during their trial but the fact that they were not aware of this, reflects dissatisfaction with the service including inadequate time spent with their legal representatives and ignorance of the legal process.

The legal framework on homicide in the context of domestic violence.

Domestic violence is recognised under international law as a human rights violation. General Comment No. 19 by the Committee on the Elimination of Discrimination Against Women (1992) and the Declaration of Elimination of Violence Against Women (1993) included gender-based violence as a form of discrimination against women by saying that:

“The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Conven-

⁵ PRI staff interview with a Social worker(name withheld) attached to prison on the 5th of December 2018

⁶ At the time of our visit, one prisoner had been diagnosed with cancer.

⁷ Jinja, Luzira, Kigo, Gulu and Arua

tion, regardless of whether those provisions expressly mention violence.”

Recommendation 19 also specifically addressed domestic violence as a form of discrimination against women, stating:

“Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women’s health at risk and impair their ability to participate in family life and public life on a basis of equality.”

Article 2 of the Declaration of Elimination of Violence Against Women (1993) provides that:

Violence against women shall be understood to encompass, but not be limited to ...Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.

Under Ugandan law⁸, domestic violence is defined to constitute any act or omission of a perpetrator which-

- a. Harms, injures or endangers the health, safety, life, limb or wellbeing, whether mental or physical or the victim or tends to do so and includes causing physical abuse, sexual abuse, emotional, verbal and psychological abuse and economic abuse.
- b. Harasses, harms, injures or endangers the victim with a view to coercing him or her or any other person related to him or her to meet any

unlawful demand for any property or valuable security.

- c. Has the effect of threatening the victim or any person related to the victim by any conduct mentioned in paragraph (a) or (b); or
- d. Otherwise injures or causes harm, whether physical or mental to the victim.

Establishing the crime

Ugandan law provides for the offences of murder⁹ and manslaughter¹⁰. A person who of malice aforethought causes the death of another person by an unlawful act or omission commits murder. The offence focuses on the mental element of the accused. Malice aforethought¹¹ is established under the following circumstances:

- a. an intention to cause death of any person, whether such person is the person actually killed or not.
- b. knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not by a wish that it may not be caused.

Section 187 of the Penal Code Act Cap 120 provides for the ingredients of manslaughter. It is provided that, any person who by an unlawful act or omission causes the death of another person commits the felony termed manslaughter. An unlawful omission meaning an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

The criminal principle of malice aforethought is used to distinguish between murder and manslaughter.

8 Section 2, Domestic Violence Act, 2010

9 Section 188 of the Penal Code Act

10 Section 190 of the Penal Code Act.

11 Section 191 of the Penal Code Act

Defences and domestic violence

Research shows that in domestic violence, the threat of violence by persistently violent male partner has a cumulative impact as part of a pattern of behaviour and a woman's violent response should be interpreted as a defensive response to the cumulative acts of violence.¹²

The law in Uganda

The Constitution of Uganda presumes every suspect or accused person innocent until proven guilty or until that person has pleaded guilty.¹³ This principle has been recognised by the courts in a number of cases. In *Nalongo Naziwa Josephine vs Uganda*, the Supreme Court observed:¹⁴

Under Article 28(3)(a) of the Constitution, a person charged with a criminal offence is presumed innocent until proved guilty or until that person pleads guilty. The onus is on the prosecution to prove that the accused person committed the alleged offence; and the standard is proof beyond reasonable doubt.

The Penal Code Act establishes a number of defences for an unlawful killing. The defences include provocation¹⁵, diminished responsibility¹⁶ and self-defence¹⁷. The extent to which each of these is applicable in the context of domestic violence is analysed.

Self defence

The doctrine of self-defence was articulated by the High Court of Australia in *Zecevic v Director of Public Prosecutions*¹⁸ as a two-limbed test:

1. the accused person genuinely believed that it was necessary to do what they did (subjective test);
2. the accused person had reasonable grounds for that belief (objective test).

Under Ugandan law, self-defence can be pleaded in accordance with the principles of English law¹⁹. Self-defence has been used in many homicide cases. For example, in *Uganda versus Kamyuka Ivan*²⁰ the ingredients of self-defence were stated to include:

- An attack on the accused person or a close relative.
- Reasonable belief that he was in imminent danger of death or serious bodily harm.
- Belief that it necessary to use force to repel the attack.
- Reasonable belief that the force used was necessary to prevent or resist the attack

Self-defence has been used in many homicide cases against an intimate partner, but the defence has not been very accessible to women who kill following a history of abuse. There are several barriers to women successfully relying on self-defence when they kill their intimate partners. These include:

- a. the requirement of an apprehension of death or grievous bodily harm.²¹ This test is problematic because it requires that the accused who uses force in self-defence must have a reasonable perception of suffering death or grievous bodily harm at the hands of the attacker.

Some form of harm including emotional abuse, economic abuse, threats of harm, may not fall within the definition of grievous bodily harm. In addition, if an accused is not able to show an actual threat at the time that the responsive force was used, the use of force may not be viewed as reasonable. This is the case even where an accused has legitimate fear for her life based on previous threats. In *Uganda versus Nakalyango Grace and another*²², the accused reportedly had marital problems and experienced violent quarrels, threats to kill her or her children. The Court noted that:

‘...this Court would like to denounce the increase in cases of domestic violence, whereby marital problems like the present

¹² Jan Arno Hessbruegge, ‘Human rights and personal self defense in international law,’ 2017, Oxford University Press, Pg. 251.

¹³ Article 28(3)(a) of the Constitution of Uganda 1995 as amended.

¹⁴ (Criminal Appeal No 35 of 2014.

¹⁵ Section 193 of the Penal Code Act

¹⁶ Section 194 ,id

¹⁷ Section 15 of the Penal Code

¹⁸ (Vic) (1987) 162 CLR 645

¹⁹ Section 15, id

²⁰ Hight Court Criminal Case number HCT-00-CR-0970-2016

²¹ Tarrant, Self-defence: The law of self-defence is gender biased.

²² High Court Criminal Case No. 452 of 2010

case involving jealousy and rivalry by co-wives could have been solved amicably in civil courts as opposed to criminal intentions of killing the husband.'

- a. The requirement for an assault. In order to successfully raise this defence, the accused should have been assaulted before he or she was able to respond in self-defence. The requirement for an assault means that there must be an existing confrontation or an immediate threat before self-defence can be relied upon. However, many women who are victims of domestic violence do not respond during a confrontation and respond later because they recognise that they are physically weaker and unlikely to overcome their abusive partners. In *Uganda vs Terezina Karawali*, the accused had been beaten, strangled, kicked and boxed for two hours by her husband and had bruises all over her body which were apparent to the police officer who took her statement three days later. Her clothes were torn, and she lost ability to hear properly. Despite this, she could not be acquitted on grounds of self-defence. The court stated that:

It [was] apparent ...that she could have escaped had she so wished and that when she struck the deceased with a stick she was not doing so purely by way of self-defence but ... in retaliation for the severe and illegal beating which she had received at the hands of her husband...²³

- a. Reasonableness: This concept requires that a person can only respond with the same kind of force they are threatened with.

In order to meet the provision of the defence, it is necessary for the accused to have been assaulted before he or she responds in self-defence, using proportional force.

Tibatemwa-Ekirikubinza examines the doctrine of self defence and the concept of reasonableness.²⁴ She cites the case of *Uganda vs Magaret Kazigati*, where the deceased and another man had a drink from the house of the accused. The accused asked them to

leave but the men wanted to drink more. She went to sleep in her bedroom and closed the door and switched off the light. Later she woke up to someone strangling her. She struggled with the stranger and in the course of the struggle got a knife and stabbed him. After the injury the deceased revealed he was her brother in law. The accused stopped but the deceased had been fatally injured.

His Lordship Justice Sekandi stated:

This appears to be a boarder line case. On the facts, the accused could have been entitled to self defence ...It might as well be that she went far with the knife on a person whose designs in advancing towards her were clear. The intruder quite obviously was not a robber or killer. It appears he was seeking to assault the accused sexually. The use of a knife would have been the last resort but not the immediate alternative.

Tibatemwa-Ekirikubinza argues that robbery and rape are both felonies and that the distinction between them is not sustainable.²⁵ Since the law scales two offences as equally serious, the force allowed of persons threatened with both should be equal. However, the judge viewed the force that had been utilized to ward off a sexual assault as "unreasonable." This decision lends credence to contention that the laws reasonable man represents a male point of view.²⁶

Many women victims of domestic violence in Uganda may find it difficult to rely on self-defence due to the three aspects of the code test. This is because in domestic violence cases the nature of the threat faced by the victim of domestic violence is anticipated and constant. It is from an intimate partner or someone of greater strength and power than the victim and usually occurs in private. This challenge can be observed in *Uganda versus Lydia Draru alias Atim*²⁷ where the accused killed her abusive partner with a metal bar. The accused testified that the deceased had told her that he was going to kill her and that he had earlier placed her at gun point and threatened to kill her... that on the

²³ *Uganda vs Terezina Karawali* H.C.C.S.C No.593/70, cited in Ekirikubinza, *supra*, p.

²⁴ Tibatemwa-Ekirikubinza, pg.168, *Supra*, Note 6.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ High Court Criminal Case No. 0404 of 2020

fateful day the deceased stood up to leave saying he was going to fetch his gun and kill her. The accused did not have reason to doubt this. Court observed that although the accused testified that the deceased had threatened her life, the allegation was not corroborated by any other witness. While the court accepted that the accused could have responded to the threat in self-defence, the force used in the attack against the deceased was said to be excessive and unjustifiable.

In *Uganda vs Terezeza Nakayima*, H.C.C.S.C No. 373/71, the deceased wounded the accused on her forehead, cut her left index finger and bruised her middle finger. However, court held that she did not act in self-defence because her actions were in response to completed acts of assault against her. Despite evidence being led that that her husband had relentlessly persecuted her and despite court noting that her actions were “desperate”, court nevertheless stated that:

... Justice [was] done by ... imprisonment, ... since the law must be observed and wives cannot be allowed to go and kill their husbands even when persecuted by them, without receiving punishment.²⁸

Tibatemwa-Ekirikubinza argues that:

...when the criminal justice system punishes women like Tereza, it ignores that fact that these women are doubly victimized, once by the men who have battered them and again by a system of criminal justice which holds them to an unrealistic standard of accountability.²⁹

Tibatemwa-Ekirikubinza further argues that the definition of the concept of imminence is too narrow, and the importance attached to it is unnecessarily strict in the context of women’s violence.³⁰

Finally, Tibatemwa-Ekirikubinza explains that the terror and anxiety of threats should offer justification for self-defence.³¹

Provocation

A defence of provocation is available to an accused if the act which causes death is done in the heat of passion caused by sudden provocation³². A person is deemed provoked if the act or insult is done or offered by one person, (a) to another or in the presence of another person who is under the immediate care of that other or to whom that other stands in any such relation as aforesaid.³³

The defence can reduce the charge of murder which would lead to a sentence of death or life imprisonment to that of manslaughter.

The law on provocation was summed up in the case of *Sowedi Ndasire versus Uganda*³⁴ where the court held that for a charge of murder to be reduced to manslaughter on a plea of provocation, (a) the death must be caused in the heat of passion before there is time for the passion to cool down. (b) the provocation must be sudden, (c) the provocation must be caused by a wrongful act or insult (d) the wrongful act or insult must be of such a nature as would likely deprive an ordinary person of the class to which the accused belongs of the power of self-control and (e) the provocation must be to induce the person to assault the person by whom the act or insult was done.

The way provocation happens in domestic violence cases reveals significant problems with this defence whether it is the victim or the perpetrator who is killed. Given the fact that domestic violence often occurs in private, in many circumstances the courts have no other way of finding out whether there has been violence in a relationship and the extent of the violence. In addition, research has shown that women do not generally respond to provocative conduct in the same way that men do.³⁵

A victim of domestic violence who kills is often responding to a threat of future violence which is understood in the context of past violence. This was observed by the Law Commission of England and

28 *Uganda vs Terezeza Nakayima*, H.C.C.S.C No. 373/71.

29 Tibatemwa-Ekirikubinza, p.175, *Supra*, Note 6.

30 *Ibid*.

31 Tibatemwa-Ekirikubinza, P.175, *supra*, note 6.

32 Section 192

33 Section 193 (2)

34 Supreme Court Criminal Appeal No. 28 of 1989

35 The Model Criminal Code Officers Committee report on appropriateness of the defence of provocation for women, Australia (1994)

Wales³⁶ which stated:

“An angry strong man can afford to lose his self-control with someone who provokes him, if that person is physically smaller and weaker. An angry person is much less likely to ‘lose self-control’ and attack another person in circumstances in which he or she is likely to come off worse by doing so. For this reason, many successful attacks by an abused woman on a physically stronger abuser take place at a moment when that person is off guard.”

The challenge of relying on this defence can be observed in the case of *Lydia Draru alias Atim versus Uganda*³⁷ in which Court rejected the defence of provocation noting that, ‘the accused had been harangued, insulted and assaulted by the deceased for most of the wee hours of that fateful morning so the purported provocation was neither sudden nor was the death ceased in the heat of passion.’

Justice Batema expounded on this difficulty of applying the defence in domestic violence cases:

“The defense of provocation cannot stand in domestic violence cases. It can only be tenable where there is gender equality which is usually absent in domestic violence cases. Women are trained to be submissive, and they cannot stand up against their perpetrators in just one instance. Therefore, they store the anger. It is through the accumulated anger that even a tiny insult can lead them to explode.”³⁸

Diminished responsibility

Diminished responsibility is a defence to murder if a person suffers from an abnormality of the mind that is a result of disease, injury, inherent causes, arrested or retarded development.³⁹ For the defence to succeed, the ‘abnormality of the mind’ must have ‘substantially impaired’ the accused person at the time the offence was committed.⁴⁰ Once satisfied that

the accused indeed suffered from an abnormality of the mind that affected his/her actions, the court must enter a special finding that the accused is “guilty of murder but with diminished responsibility.”⁴¹ The law mandates courts to enter an order for the accused to be detained in safe custody, in such instances.⁴²

It therefore appears that a victim of domestic violence must satisfy court that they suffered from an abnormality of the mind as a result of injury resulting prolonged acts of physical, mental or psychological abuse.

Domestic violence as a defence

Studies have shown that where women are imprisoned for violent offences, there is often a background of domestic violence and or sexual abuse which in many cases motivates the crime. There are two scenarios⁴³ recognised:

- Battered woman syndrome which describes the psychological mindset and emotional state of female victims of abuse and
- The ‘slow burn reaction’ where women in a situation of abuse tend not to react instantly to the abuse, partly for psychological reasons but also because of the physical mismatch between the abuser and the victim.’

The effect of abuse and its influence on a woman to kill her intimate partner was observed by the Supreme Court of South Africa in *Anieta Natasha Ferreira & Others V S*⁴⁴. In reducing the life sentence to imprisonment for six years Court stated that:

The appellant had been subjected to a grossly abusive seven-year intimate relationship by the deceased. She had no way of escape as every time she tried to escape, the deceased would trail her and bring her back to his house and punish her. The court found that the sum total of the sexual, physical and moral torture, together with the threat of exposing her genitals to laborers, had an influence on the appellant's state of mind. The court further found as a fact that

36 Law Commission(England and Wales), Partial defence to Murder, final report 2004

37 HCT-00-CR-Sc-0404 OF 2010

38 PRI staff interview with Justice Batema, Justice of the Hight Court on 29th September 2021.

39 Section 194 of the Penal Code Act.

40 Ibid.

41 Ibid.

42 Ibid, Section, 194 (3).

43 Developed by Dr Lenore E Walker

44 [2004] 4 All Sa 373

a proper analysis and understanding of the evidence shows that what the first appellant subjectively did feel and what she experienced and eventually did conform to a victim's behaviour in response to grave abuse to a similar pattern of abused partners. The court emphasized that the court ought to understand the subjective state of mind of such an abused partner.

In the State of New Jersey in the United States⁴⁵, the law explicitly regards a history of abuse as being relevant to substantiate a defence of duress (which is only a partial defence that might reduce a murder charge to a manslaughter charge). Texas State law also recognises abuse as being capable of substantiating other defences such as defence of 'deadly force in defence of a person' (i.e., self-defence) or 'self-defence in defence of the third person'

In Uganda, there is no legislative basis for a history of abuse to be considered as a defence in homicides. Although the law does not automatically confer a right to the above defences to women victims of domestic violence who kill their intimate partners, some judges have taken domestic violence into account as a mitigating factor.

A history of domestic violence and mitigation.

The United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures (UN Bangkok Rules) requires that courts have the power "to consider mitigating factors such as lack of criminal history and relative non-severity and nature of the criminal conduct in light of women's caretaking responsibilities and typical backgrounds", which includes the high proportion of those who have experienced domestic violence.

The UN Special Rapporteur on violence against women, its causes and consequences noted that, 'while recognising the gravity of their crimes, women's criminality under situations of extreme abuse and violence needs to be treated with

diligence and their cases must be assessed in light of the mitigating circumstances'.⁴⁶

Mitigation in Uganda is provided for under the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013. Paragraph 6 provides for the general principles including gravity of the offence, nature of the offence and effect of the offence among others. The Guidelines also provide that in order to determine an appropriate sentence, the court shall take into account matters required to be taken into account by any law and shall make the inquiry in the case... The Court has the power to summon and examine anyone to give evidence regarding the background against which the alleged offence was committed⁴⁷. The Court may also consider any other factor it considers relevant.⁴⁸

The Second Schedule of the Sentencing Guidelines enlists domestic violence as a factor to be considered in sentencing.

Under the law, domestic violence is not explicitly listed as a mitigating factor for the offence of murder or manslaughter. However past history of abuse has been considered by some courts in cases where women have killed their abusive partners. For example, in the case of *Uwihayimaana Molly versus Uganda*⁴⁹ the court in quashing the death sentence observed that:

"...the appellant was a victim of domestic violence which had been continuous over a long time. She appeared to have been constantly under fear for her life. She was an orphan with nowhere else to flee. The deceased was a habitual drunkard who was violent and the night he was killed, he had attempted to strangle the appellant."

⁴⁵ PRI and Linklakers, A multi-jurisdictional study on domestic violence, 2016.

⁴⁶ United Nations Human Rights Council report of the Special Rapporteur on violence against women, its causes and consequences: Mission to Tajikistan, UN.Doc A/ARC/11/6/Add.2, April 2009 para 37

⁴⁷ Paragraph 14(3) Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013.

⁴⁸ Paragraph 21(0), id

⁴⁹ Criminal Appeal No. 103 of 2009

In *Uganda versus Kamuhanda Emmanuel and Another*⁵⁰ the trial judge observed that,

‘...I am now setting a precedent by considering accumulated anger from repeated acts of domestic violence, and more so when they are committed with impunity, as a partial defence for murder in a domestic setting. It is also in my opinion a serious mitigating factor for sentences in homicides and other crimes committed in a domestic sphere...’

Conclusion and Recommendations

This study is unprecedented and is the first attempt to document the experiences of accused or convicted women with a history of domestic violence. The study reveals that incarcerated women are largely uneducated, poor, ignorant of the law and suffered from domestic violence. The study does not provide a detailed assessment of the support offered by women victims of violence who commit crimes, nor does it provide information on the extent to which the Government of Uganda has implemented the UN Bangkok Rules. The recommendations below are intended to improve the support offered to women, men and children victims of domestic violence who commit violent crimes. It is hoped that the recommendations will inform the review of penal laws and policies to bring them in conformity with international standards including the UN Bangkok Rules.

- It is important to introduce a special mechanism which will identify victims of violence and especially domestic violence among women in conflict with the law especially in detention in order to select and offer needs-based services including psychological, medical and educational during their imprisonment and upon release.
- The law on murder/manslaughter should be revised to permit Courts to take into account domestic violence as a defence in cases where a homicide is committed in the context of a violent relationship.
- Prosecutors, lawyers and the judiciary should be sensitized about the Domestic Violence

Act, 2010 and there must be a better public awareness on its provisions.

- Courts should be given the authority to consider mitigating and gender specific factors when sentencing women charged with offences against life.
- Women in conflict with the law should be provided with access to legal aid services that incorporate a gender perspective in line with the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.⁵¹
- Research showed that over half of the women surveyed were not represented. The low quality of legal aid was noted as the main drivers for women choosing to plead guilty. The poor quality of legal aid should therefore be addressed and extended to all regions of the country to ensure that all women can access legal representation at all stages of the criminal justice process.
- Rehabilitation and reintegration of women prisoners, former prisoners who have been subjected to sexual violence need to be planned with a particular professional approach. Re-socialisation and rehabilitation of these women is not implemented in practice. Efforts of a multi-disciplinary team is essential to provide the much needed psychological assistance for the women victims of violence while in detention and upon release.
- The role of local governments should be strengthened to ensure the successful rehabilitation and resocialisation of women who are victims of domestic violence. This is because local governments are well aware of the situation in their area of action. Gender quality desks should be established in Councils where they are not and should be permitted to engage with women ex-prisoners to identify their needs; their budgets should include gender specific reintegration and empowerment support for women(former prisoners) informed by the women’s specific needs.
- The frequency of High Court criminal sessions should be increased across the country to reduce the time spent on remand by women. Despite their numbers, women should be included in all criminal sessions

50 HCT-01-CR-SC-2012/24 [2014] UGHCCRD 21 (13 February 2014)

51 Guideline 9

- Deliberate effort should be made to recruit and assign social workers to women's prisons to provide the much-needed rehabilitation and resocialisation support.
 - It is important to note that women that are victims of violence often have mental health problems, cardiovascular disease and endocrinological problems. It is therefore necessary to create a separate treatment programme for women victims of violence and it is also important to monitor their state of mind.
 - Consideration should be given to establishing a national Strategy and Action Plan on rehabilitation and resocialisation of convicts. The strategy should fill the gaps in the inter-agency coordination as well as cooperation between civil society and other sectors.
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Sub-Saharan Africa Office

Plot 4999, Kironde Road
Muyenga Kampala, Uganda
P. O. Box 11455 Kampala, Uganda
+256 3920 01139
africaoffice@penalreform.org
www.penalreform.org
@PenalReformInt

London Office

The Green House
244-254 Cambridge Heath Road
London E2 9DA
United Kingdom
+44 (0) 203 559 6752
info@penalreform.org