

Negotiating Gender Justice

An Assessment of Plea Bargaining
in Cases of Violence Against
Women and Girls in the
High Court of Uganda

Acknowledgements

This report is a product of the work done by the UN Women program on the Elimination of Violence Against Women and Girls with support from the Embassy of Sweden. The study was commissioned by Center for Domestic Violence Prevention (CEDOVIP) and undertaken by Kathryn Wilkes and Shelley Martin (Consultants).

CEDOVIP acknowledges and would like to express gratitude to the various actors of the Ugandan Justice, Law and Order Sector who made this study possible, including the High Court of Uganda, the Office of the Directorate of Public Prosecutions (ODPP), Defence Counsel representatives, and the Uganda Prisons Service. We thank Nicole Banister of the Pepperdine University Judiciary Partnership and Andrew Khauka the Technical Advisor to the Judiciary for their time and insight, and most especially all the key informants who voluntarily shared their experiences with plea bargaining.

The assessment depended on the contributions of over 17 Key Informants, including survivors of violence against women and girls (VAWG) and representatives from the Judiciary, ODPP and Defence Counsel, as well as 516 sexual violence cases from Kampala and Soroti High Court Circuits. Identities of persons involved in case studies have been protected for safety and ethical reasons, however without their valuable input this study would not be possible.

CEDOVIP also acknowledges the input and insight of the various groups and individuals consulted during the validation meetings, including the Domestic Violence Coalition (DVC) and senior management of the Office of the Directorate of Public Prosecutions.

Sincere thanks are extended to the staff of CEDOVIP and UN Women Uganda for leading the review and editing of the report: Tina Musuya, Dianah Kagere, Susan Oregede, Jordan Colon and Anna Mutavati.

This report has been funded by UN Women and the Embassy of Sweden through the Center for Domestic Violence Prevention (CEDOVIP) in Kampala, Uganda (2017) under the EVAW/G program. Parts of this report may be reproduced without express permission from, but with acknowledgement to, CEDOVIP and UN Women, with recognition of the Consultants.

Author: Center for Domestic Violence Prevention

Publication date: August 2017

Design and Layout: Samson Mwaka.



Plot 16, Tufnell Drive, Kamwokya.

P.O Box 6770, Kampala, Uganda

Phone: +256 414 531249

Fax: +256 414 531249

info@cedovip.org

www.cedovip.org

Table of Contents

Executive Summary	vi
Introduction	1
Methodology	1
Limitations	2
Background	3
1. Violence Against Women and Girls	3
2. Plea Bargaining Globally	4
3. Plea Bargaining in Uganda	5
Results and Analysis	8
1. Plea Bargaining Advantages	8
2. Plea Bargaining Concerns and Questions	15
3. Additional Gender Analysis	26
Recommendations	32
1. Improve Provisions for Victims' Rights, Role, and Voice	32
2. Address Unique Challenges Faced by Victims of VAWG	35
3. Improved Transparency, Consistency, and Appropriate Sentencing	36

4. Improve Support for Victims of Violence in the Criminal Justice System	37
5. Improve Justice Sector Data Quality, Collection, and MEAL Systems	38
6. General Plea Bargaining Recommendations	38
7. Recommendations for Further Research	38

Conclusion	39
------------	----

Annexes	1
---------	---

Annex I: Data Collection Tools	1
--------------------------------	---

Annex II: Violence Against Women and Girls Background	1
---	---

Annex III: Procedural Safeguards	5
----------------------------------	---

Annex IV: Case File Review of Recent Plea Bargaining Sessions	7
---	---

Annex VI: Step-by-Step Through the Plea Bargaining Process	12
--	----

Annex VII: When Plea Bargaining Agreements "Fail"	14
---	----

Annex VIII: Recommended Revisions for the Plea Bargaining Form	15
--	----

Annex IX: Additional Recommendations for Plea Bargaining Generally	16
--	----

Acronyms

CEDAW UN Convention on the Elimination of All Forms of Discrimination Against Women (1981)

DEVAW UN Declaration on the Elimination of Violence Against Women (1993)

FGD Focus Group Discussion

IPV Intimate Partner Violence

JLOS Justice, Law and Order Sector

KII Key Informant Interview

MEAL Monitoring, Evaluation, Accountability, and Learning

ODPP Office of the Directorate of Public Prosecutions

RSA Resident State Attorney

SA State Attorney

SDG Sustainable Development Goal

SGBV Sexual and Gender Based Violence

UGX Ugandan Shillings

VAWG Violence Against Women and Girls

Executive Summary

In May 2014, the Judiciary of the Government of Uganda initiated a new plea bargaining initiative in Uganda's High Courts, with the aim of addressing crippling criminal case backlogs and the extensive pre-trial detention of accused persons. In addition to its institutional and human rights advantages, its framers sought to increase the role of victims in the process, by ensuring that victims' interests were considered in the plea agreement and that victims had an opportunity to provide impact statements during sentencing.



Uganda's plea bargaining initiative is set against the backdrop of significant levels of gender inequality and violence against women and girls (VAWG). Although Uganda has passed numerous laws to protect the rights and interests of women and girls, implementation remains limited and abuse rampant. Reporting of VAWG remains low and cases experience dismissal more often than conviction, resulting in impunity for many VAWG-related crimes.

Although plea bargaining is often examined by governments and academics from the perspective of the accused or its impact on the rule of law, few researchers or practitioners have evaluated the specific impact that plea bargaining has on women and girls, and in particular on prosecuting cases of VAWG. This report is intended to be a preliminary analysis of Uganda's new plea bargaining initiative, through the lens of its impact on women and girls who have experienced violence and abuse. It provides an overview of a number of potential advantages and areas of concern that arose from a literature review, key informant interviews (KIIs), and a limited case review. A more comprehensive analysis and evaluation is needed, some of which will only be possible after a higher volume of cases have been plea bargained and additional data is collected. Nonetheless, we believe that the preliminary findings from this report can and should be used to strengthen the plea bargaining initiative during its initial stages, to allow Uganda avoid the pitfalls experienced in other jurisdictions and to ensure that protections for victims and gender-sensitivity become integrated throughout all aspects of the programs, rather than a 'fix' added on after years of avoidable harm.

Plea Bargaining Advantages

The research identified a series of potential advantages of the new plea bargaining initiative. Note, however, that each of these individual areas warrant additional analysis and research in order to determine the extent to which plea bargaining is actually achieving the stated objectives and advantages.

Institutional Advantages

1. Reductions in case backlog and faster adjudication of criminal cases. As of 2016, 18,000 criminal¹ cases were backlogged (pending more than two years) or potentially backlogged (pending more than one year).
2. Reductions in pre-trial detention periods for accused persons. Accused persons currently spend, on average, four years in pre-trial detention.²
3. Cost savings to the Judiciary, ODPP, and accused persons, through reduced pre-trial detention and shorter adjudication proceedings.

Possible Reduction in the Prevalence of VAWG

4. Reduction in impunity for difficult to prosecute crimes, including defilement and rape. In Uganda, cases of VAWG receive dismissals more often than convictions. By reducing delays and requirements for victim and witness testimony, plea-bargaining may be able to secure convictions in cases that would otherwise be withdrawn, resulting in quantitatively more justice for women and girls.
5. Possible increase in general and specific deterrence. If plea bargaining is able to increase the number of convictions for VAWG (increasing *certainty of punishment* and *un-italicize impunity*) and do so more promptly (increasing *celerity*) it may result in increased deterrence, and ultimately lower prevalence of VAWG.

¹ THE JUDICIARY, A REPORT OF THE CASE BACKLOG REDUCTION COMMITTEE (29 March 2017).

² Interview with Director of Public Prosecutions (18 April 2017).

Potential Benefits for Survivors of VAWG

6. Potential to increase victims' voice and participation in the criminal process by involving them in the plea negotiations and hearing.
7. Potential to increase victim's safety and reduce recidivism by (1) reducing the length of time a case is pending, thereby reducing the opportunity for community intimidation, harassment, and re-victimization; and, (2) avoiding victim court testimony, thereby allowing a victim to "hide behind" the prosecutor.
8. Opportunity to spare victims from the psychological traumas of testifying at trial and enduring protracted legal proceedings.
9. Potential to increase victim satisfaction and confidence in the justice system, through victim engagement and transparency.

Plea Bargaining Concerns

The research likewise identified significant concerns with plea bargaining. As with the advantages, more comprehensive research is needed to evaluate the magnitude of the identified concerns, and potential mitigation strategies.

Rights of Accused Persons

1. Plea bargaining overrides certain procedural safeguards designed to protect the rights of accused persons and prevent innocent people from being convicted.

Sentencing

2. Sentences in plea bargaining bear limited, if any, relationship to established Judicial Sentencing Guidelines. For example, the average custodial sentence for aggravated defilement during the 2016-17 plea bargaining session was 7 years and 4 months, whereas the minimum sentence stipulated in the Sentencing Guidelines is 30 years.³
3. Plea bargained charges and sentences are almost entirely discretionary and thus unduly reflect the inherent biases and attitudes (discriminatory, protectionist, etc.) held by Judicial Officers and State Attorneys. This may also increase the potential for corruption in the charging and sentencing process.
4. Overly lenient plea agreements may be unfair to victims, fail to take into account the impact of structural or systemic violence, and undercut the deterrent effect of sanctions.

Public Confidence

5. Plea bargaining may further erode public confidence in the justice system, due to the appearance of corruption and the lack of transparency in the plea agreement, particularly in charging, sentencing, and victim involvement.

Victim Participation

6. The Plea Bargaining Guidelines do not adequately articulate and protect the rights of victims. The Guidelines require prosecutors to consider the victim's "interest" in the plea agreement and give the victim an opportunity to speak at sentencing. The Guidelines do not expressly require the prosecutor to consult the victim on the possible plea deal, consider her views or stated opinion (as opposed to her "interest"), keep her informed of case progress, or advise her of her right to be present and make an impact statement.

³ The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013.

7. The system lacks accountability to ensure victim participation and protect victims' rights, resulting in the inconsistent application of the rules and the limiting of victim participation, particularly in sensitive cases of VAWG and with difficult to reach victims.
8. Some judicial officers resist victim participation and create additional obstacles to engagement. For example, by discouraging State Attorneys from bringing victims to plea bargaining sessions or requiring State Attorneys to make prior arrangements with the court before a victim may present an impact statement.
9. Significant case delays reduce a victim's willingness to participate in plea bargaining, particularly in cases of VAWG. The closer in time the hearing is to the crime, the more likely it is that a survivor of VAWG will be willing to testify. This may change if plea bargaining is able to achieve its key objective of the timely adjudication of cases by clearing case backlogs.
10. Logistical obstacles subvert the full participation of victims in plea bargaining, including insufficient airtime and time for State Attorneys to contact victims, insufficient victim transport funds, missing police files and contact details, and insufficient police resources to trace complainants who have changed phone numbers or locations.

Conclusions and Recommendations

Plea bargaining, if implemented in a victim-centered and gender-sensitive manner, may increase the voice and agency of women throughout the adjudication of "their" case, by providing the opportunity to participate in the plea negotiations and hearing. To realize this advantage, it requires commitment by the ODPP and Judiciary to:

- Strengthen the rights and role of victims;
- Remove obstacles to victim involvement;
- Provide a range of avenues whereby victims can provide input, including *in camera* and confidential communication;
- Implement accountability and monitoring mechanisms to protect victims' voice, agency, safety, and participation;
- Train officials not only in the mechanics of plea bargaining, but also on the rights and role of victims in plea bargaining, the impacts on victims of trauma and domestic violence, power dynamics, and the pressures that would lead a victim to "agree" to forgive, refuse to testify, or request that the assailant be released; and
- Develop a fast tracking mechanism and/or specialized courts for cases of VAWG, which will promote victim involvement and support.

Plea bargaining also has the potential to benefit female accused persons by giving them the opportunity to receive more prompt adjudication of their charges and raise mitigating factors, including any history of severe and pervasive domestic violence. To achieve this advantage, plea bargaining should be more deliberately expanded to include cases of female offenders. In addition, to ensure consistency in application, the Sentencing Guidelines should expressly include a history of severe and repeated domestic violence as a mitigating factor in a charge of murder or manslaughter, where the accused suffered such violence at the hands of the deceased.

As noted above, plea bargaining may reduce impunity for offenders and the prevalence of VAWG. However, the current sentencing and plea bargaining framework undermines (1) public confidence, due to its lack of transparency and inconsistency of application; (2) accused persons' willingness to participate in plea bargaining, given the lenient sentences they hope to receive at trial; and (3) the rights of victims and the

deterrent effect of sanctions, in providing overly lenient sentences in cases of VAWG. For plea bargaining to ensure justice, deterrence, and protection for women and girls, the ODPP and Judiciary should:

- Develop and publish Prosecutor Guidelines that outline specific and detailed charge and sentence bargaining ranges and procedures, along with accountability and documentation requirements;
- Revise the Judicial Sentencing Guidelines to more accurately reflect sentencing gradation, include sentencing ranges for plea bargaining, clear and transparent aggravating and mitigating factors, and mechanisms for enforcement; and
- Conduct an evaluation of whether mandatory sentencing minimums are needed to ensure appropriate sentencing in cases of VAWG.

Finally, additional research and analysis is needed to evaluate the efficacy of plea bargaining and its impact on women and girls. This report provides high-level analysis based on a small sub-set of available research and JLOS data, but more in-depth research and analysis is needed. In addition, JLOS data collection and reporting is insufficient for ongoing monitoring and learning. We recommend amending ODPP and Judiciary plea bargaining data collection methods to include, *inter alia*, information about the victim, the relationship between the victim and the accused, the nature of the victim's involvement in the plea agreement, specific justification for any sentence that deviates from the Sentencing Guidelines, and the sex of both the victim and accused person.

This report is intended to be a preliminary analysis of Uganda's new plea bargaining initiative, through the lens of its impact on women and girls who have experienced violence and abuse.

Introduction

Criminal justice mechanisms that incentivize guilty pleas are usually adopted for the sake of efficiency, often in the context of countries instating broader legal reforms or modernizing criminal procedure. The appeal of such abbreviated systems is understandable, given how full trials can easily become delayed, protracted, contested, traumatic, and costly.

Many countries simply can't afford the rigors of a fair trial. The result can be a cycle of impunity and lawlessness – the breakdown of the rule of law. More commonly, people continue to get arrested but, with underfunded courts incapable of processing cases, the justice system grinds to a halt. Detainees fester, forgotten for months or years in prison just waiting for their day in court.⁴

A variety of innovations have been introduced in justice systems around the world to address inefficiencies that lead to degradation in the rule of law. Under such “trial waiver systems” as plea bargaining in Uganda, charge and sentence incentives are offered to accused persons who plead guilty, which is expected to contribute to a reduction in impunity, corruption, excessive pre-trial detention, and prison overcrowding.

However, when assessing the assumptions and provisions of plea bargaining as it was designed and currently operates in the High Court of Uganda, questions of its efficacy emerge, particularly in relation to gender sensitivity and cases of violence against women and girls (VAWG). Human rights auditors frequently evaluate the safeguards in place from a defendant’s perspective when trials are waived. But beyond the risk of side-stepping the procedural rights of the accused, women’s human rights organizations are also concerned about the ability of plea bargaining to ensure: victim voice and agency, safety of witnesses, child protection, equal access to justice for female defendants, consistently fair sentencing, perpetrator accountability, and deterrence.

The current study is timely in its commissioning, as it seeks to address a number of these key questions at an early stage in the pilot of the national plea bargaining project. This report seeks to elucidate more about the process of plea bargaining as it presently operates in Uganda, and specifically how victims of VAWG are impacted by it, making recommendations to strengthen the mechanism for increased access to justice for women and girls.

Methodology

This study used three main data collection strategies: a literature review, key informant interviews (KIIs), and a sample case file review from recent plea bargaining sessions.

The literature review identified and analyzed documents related to emerging themes, which framed the results of this study.

Key informant interviews were conducted with the Technical Advisor to Judiciary; the Director of Public Prosecutions; the Head of the Gender, Children and Sexual Offences Department of the ODPP; three high court judges; four female State Attorneys, two male State Attorneys; an official from the Complaints and Victims’ Rights Department of ODPP; a defence attorney specializing in child-related cases; and three victims of VAWG. Additional reference conversations were held with the Registrar of the Central High Court; three State Attorneys who prosecute VAWG cases; two additional defence counsel attorneys; two legal researchers; and other stakeholders involved in JLOS activities.

Case file data was also collected from existing plea bargaining reports produced by the High Courts of Kampala and Soroti, from ODPP documentation, as well as during attendance in three plea bargaining sessions in Kampala.

Limitations

The initial scope of work indicated the need to:

1. Conduct a systematic review of published and unpublished studies on plea bargaining as a strategy and specifically its usefulness and impacts on VAWG cases;
2. Assess how gender-sensitive the process is and identify key successes and lessons from interviews with a victim or complainant from six cases of VAWG that have been handled through plea bargaining;
3. Establish how the practice of Plea Bargaining operates and is perceived by relevant actors within the Justice, Law and Order Sector (JLOS); and
4. Review case files, where possible, in courts offering a plea bargaining option to VAWG offenders, assessing the appropriateness and consistency of sentences.

Some challenges that surfaced included:

1. **Government delays:** Obtaining clearance through proper channels takes time and at some junctures delayed beyond the scope of this report. The researchers had hoped to conduct two focus group discussions with male and female inmates of Luzira Prison. However, due to the pending permissions required to conduct research within the Uganda Prisons System, this initial study was unable to include firsthand perspectives of convicted criminals in the report. In addition, government meetings or other engagements prevented several scheduled interviews with officials from the Judiciary and ODPP.
2. **Difficulty securing victim interviews:** In several instances, victims changed their minds or were not able to share their experiences; for example, four rape cases were identified but ultimately victims were either untraceable by phone, too traumatized or emotionally unstable to share, called for another activity the day of the KII, or decided later they were unwilling to be interviewed.
3. **Selection bias:** Working with the ODPP to source victims or complainants presents some bias, as State Attorneys are likely to select respondents based on their positive experience with prosecution. The study also reflected a degree of elite capture, as most interviews were conducted with educated English-speakers occupying positions of relative power.
4. **Inability to trace VAWG-related cases other than those involving grave sexual violence offences:** At present, plea bargaining is limited to predominantly High Court circuits where only capital offences are handled. Therefore other “lesser” VAWG crimes are not yet plea bargained in any significant numbers and could not be reviewed in this study. The most common case types were aggravated defilement, rape, and attempted rape. However, given the lack of data in plea bargaining reports on sex of offenders and victims, the Sample Case File Review also took liberties in assuming that inmates brought from men’s prisons who were convicted of rape or aggravated defilement through plea bargaining perpetrated these crimes of sexual violence *against girls or women*, which may not have uniformly been the case.

⁴ FAIR TRIALS, THE DISAPPEARING TRIAL: TOWARDS A RIGHTS-BASED APPROACH TO TRIAL WAIVER SYSTEMS (Apr 2017), <https://www.fairtrials.org/wp-content/uploads/2017/04/Report-The-Disappearing-Trial.pdf>.

Background



1. Violence Against Women and Girls

The United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1981) underlines that *gender-based violence* (GBV) does not occur randomly, but rather because of a victim's gender and associated normative roles. Rooted in unequal power relations, GBV can affect both males and females. However, as the primary targets, women and adolescent girls "suffer exacerbated consequences" as compared to male victims.⁵ GBV perpetrated against females, also termed *violence against women and girls* (VAWG), is defined by the CEDAW as "violence that is directed against a woman because she is a woman or that affects women disproportionately." The subsequent UN Declaration on the Elimination of Violence Against Women (DEVAW, 1993) further stipulates VAW as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivations of liberty, whether occurring in public or in private life." With far-reaching effects on victims and their communities, VAWG is a human rights violation with gross consequences for men, women, children, and society at large.

The UN's 2015 Sustainable Development Goals (SDGs) also recognize gender equality and women's empowerment as cross-cutting goals that are prerequisites for development. The main targets for the fifth SDG—Gender Equality—are to end all forms of discrimination against women and girls everywhere, as well as to eliminate all forms of violence against, and exploitation of, women and girls in the public and private spheres. **A corollary SDG, Goal Sixteen, recognizes the centrality of access to justice, rule of law, and accountable institutions in achieving sustainable development.**

Gender inequality is manifested throughout the life cycle in countless ways in Uganda. Most critically, *violence* is perpetrated against women and girls in both private and public spaces, including but not limited to: physical abuse and assault; sexual violence such as rape and defilement; female genital mutilation; early childhood marriage, which is forced on an astounding 40% of girls⁶; abandonment; trafficking of women and girls; controlling behaviors and threats; sexual harassment at work and school; denial of inheritance rights; and widow abuse, including illegal deprivation of women's assets such as land, livestock, and property.

The Government of Uganda is party to many international protocols, and has made symbolic progress towards its commitments on gender equality and the prevention of and effective response to VAWG in the form of numerous laws, action plans, and institutional measures, including the National Action Plan on Elimination of Gender-Based Violence (2016). Uganda's protections for women and girls are enshrined in its Constitution and codified in the Penal Code,⁷ as well as in several relatively new laws, including the Domestic Violence Act (2010) and the Land Act (2010).

Despite many legal provisions, protectionary measures, and strong rhetoric, intimate partner violence (IPV) and VAWG remain rampant and widely tolerated in Uganda. Over 51% of women ages 15-49 experience physical and/or sexual IPV over their lifetime, and some 35% experienced it in 2011. An additional 4% of women in the same age bracket have experienced sexual violence perpetrated by someone who was not an intimate partner at least once.⁸ What's more, survivors are often re-traumatized or even re-victimized if attempting to report and prosecute their assailant, and many times lack meaningful social and legal protection from local government or the Justice System.

5 GENDER, HUMAN RIGHTS AND CULTURE BRANCH UNFPA, UNFPA STRATEGY AND FRAMEWORK FOR ACTION TO ADDRESSING GENDER-BASED VIOLENCE 2008-2011, AT 7 (2008) https://www.unfpa.org/sites/default/files/pub-pdf/2009_add_gen_vio.pdf.
6 UN WOMEN, GLOBAL DATABASE ON VIOLENCE AGAINST WOMEN IN UGANDA (2017), <http://evaw-global-database.unwomen.org/en/countries/africa/uganda?pageNumber=1> (citing UNICEF Global Databases 2016).
7 See e.g., UG CONST., cap. IV, arts. 20(1), 21(1 and 2), 24, 25, 33 (1-5), 34, 44 (1995); Penal Code Act, cap 120, art. 123; The Land Act, cap 227.
8 UGANDA BUREAU OF STATISTICS AND ICF INTERNATIONAL INC., UGANDAN DEMOGRAPHIC AND HEALTH SURVEY 2011 (Aug 2012), <https://dhsprogram.com/pubs/pdf/FR264/FR264.pdf>.

Enforcement of laws remains a pervasive challenge due to cultural and gender norms, systemic and societal pressure on victims not to report or to withdraw cases, negative attitudes towards victims of VAWG and low regard for VAWG cases, critical gaps within the administration of justice itself, and institutional weaknesses.⁹ Failure to timely and failure to investigate and adjudicate cases in a timely and efficient manner has a profound impact on VAWG victims' willingness to proceed with prosecuting their offenders; thus it comes as no surprise that of those women and girls who recognize the act perpetrated against them as criminal, many will drop the case or never report at all.

See Annex II for additional background on VAWG globally and its manifestations in Uganda.

2. Plea Bargaining Globally

One mechanism jurisdictions have adopted to address overloaded criminal dockets and to expediently handle large numbers of criminal cases is *plea bargaining*. A plea bargain is a negotiated agreement between an accused person and prosecutor wherein an accused person agrees to plead guilty and waive his/her right to a trial, in exchange for an agreement by the prosecutor to drop a charge, reduce a charge to a less serious offense, and/or recommend a reduced sentence. Depending on the jurisdiction it may include only *charge bargaining* (agreement to reduce or eliminate specific charges), only *sentence bargaining* (agreement to a more lenient sentence for the offence charged), or a combination of both. Internationally the scope of "pleable" offences varies according to jurisdiction. For example, the United States allows plea negotiation for all types of cases, whereas Germany and Bulgaria only permit pleas for minor offences.¹⁰

In the United States, more than 90% of cases are resolved through plea bargaining. In their recent report, Fair Trials estimates that trial waiver systems (including plea bargaining) have increased globally by 300% since 1990.¹¹ South Africa and Nigeria use plea bargaining regularly and an increasing number of other African countries have adopted various forms of trial waiver systems, including Kenya, Zambia, Senegal, Zimbabwe, and Rwanda (during the post-genocide trials). South Africa has adopted both charge and sentence bargaining, whereas Kenya, Nigeria, Zambia and Zimbabwe adopted only charge bargaining.

Victim Involvement

The global trend has been towards expanding the voice and role of victims in criminal proceedings. In 1985 the General Assembly of the United Nations issued the *Declaration of Basic Principles of Justice for Victims of Crimes*, imposing a duty on prosecutors to keep victims informed of case developments, including in plea bargaining and sentencing. In 2001, the Council of the European Union adopted a Framework Decision, including outlining victim's rights to information. In the United Kingdom, Crown Prosecutors are required to ensure that a plea agreement is in the victim's interest *and* takes into account the views of the victim, where possible.¹² Victims are also entitled to make a Victim Personal Statement, orally or in writing.¹³ Federally, the United States enacted the *Victims' Rights and Protection Act* in 1990, including the right to be kept informed of case progress, and all 50 states have some form of victim's rights legislation.¹⁴ The majority of U.S. states require the prosecution to consult with or obtain the views of victims during plea bargaining and some states give victims the right to participate in the plea hearing.

⁹ In 2016, the World Justice Project ranked Uganda 105 out of 113 countries scored for rule of law. Under the Criminal Justice domain, Uganda scored 0.34 (where 1.0 is highest), ranking 15th out of 18 in Sub-Saharan Africa, and 93 out of 113 globally. WORLD JUSTICE PROJECT, RULE OF LAW INDEX (2016), <http://data.worldjusticeproject.org/#/groups/UGN>.

¹⁰ JENIER I. TURNER, PLEA BARGAINING ACROSS BORDERS, Aspen Publisher (2009).

¹¹ FAIR TRIALS, *supra* note 4.

¹² The Code for Crown Prosecutors, § 9.3 (Jan 2013) ("ensure that the interests and, where possible, the views of the victim, or in appropriate cases the views of the victim's family, are taken into account when deciding whether it is in the public interest to accept the plea").

¹³ Code of Practice for Victims of Crime (Oct 2015).

¹⁴ U.S. DEPT. OF JUSTICE, U.S. ATTORNEY'S MANUAL § 9-16.030 (citing Victim and Witness Protection Act of 1982, P.L. 97-291, § 6, 96 Stat. 1256) (stating that United States Attorneys should make reasonable efforts to notify identified victims of, and consider victims' views about, any proposed or contemplated plea negotiations).

In South Africa, a prosecutor may not enter into a plea agreement without first "affording the complainant or his/her representative, where it is reasonable to do so and taking into account the nature of and circumstances relating to the offence and the interests of the complainant, the opportunity to make representations to the prosecutor" regarding the agreement and any proposed compensation or benefit for the victim.¹⁵ Similarly in Kenya, a prosecutor must first, "unless the circumstances do not permit," afford the victim the "opportunity to make representations to the prosecutor regarding the contents of the agreement" and may give a victim impact statement at sentencing¹⁶ (§ 371(2)(b)). Nigeria statutorily enacted plea bargaining in 2015, although it had been practiced for a number of preceding years, particularly in corruption cases. Nigeria is unique in that plea bargaining is only permissible for cases where the prosecution is *unable* to prove its case beyond a reasonable doubt and requires *consent* from the victim.¹⁷

Jurisdictions have also adopted a range of procedural safeguards to help protect the rights of accused persons. See Annex III.

3. Plea Bargaining in Uganda

Genesis

In May 2014, the Ugandan Judiciary, in partnership with Pepperdine University, launched a new plea bargaining initiative as part of an overall effort to reduce the case backlog of some 114,512 pending cases, as well as to reduce the time accused persons spend on Remand, increase court efficiency, and realize cost-savings. At that time, over 38,000 inmates were then occupying facilities with capacity for 15,000, making Uganda's prison system the most congested in East Africa.¹⁸ In response to vast court and prison overcrowding, the architects of plea bargaining studied Los Angeles County, California's plea bargaining rules as the "benchmark." It was first initiated through Practice Directions issued by the Principal Judge, but later codified by Statutory Instrument 2016 No. 43 in June 2016.¹⁹

Plea Bargaining Guidelines

Uganda adopted both charge and sentence bargaining, defining a "plea bargain" as:

The process between an accused person and the prosecution, in which the accused person agrees to plead guilty in exchange for an agreement by the prosecutor to drop one or more charges, reduce a charge to a less serious offense, or recommend a particular sentence subject to approval by court. (Rule 4)

It did not statutorily limit the types of offences eligible for plea bargaining, meaning that it can apply to both serious and minor offences.

Role of the Court

Under Uganda's Guidelines, the court plays an active role in the plea negotiations, provides an independent check to ensure that rights of accused persons are being protected, and determines the final sentence to the bargained-for charges.

For example, the Plea Bargaining Guidelines provide that the court "may" participate in plea bargaining discussions. Parties are required to inform the court of negotiations and consult the court on proposed sentences before the final plea agreement is presented in open court (Rule 8). This practice is unique to Uganda – all other African countries evaluated for this report expressly preclude judicial officers from participating in plea negotiations, presumably to ensure prosecutorial and judicial independence.

In addition to participating in negotiations, the court is required, as a precondition for approval, to

¹⁵ Criminal Procedure Act 51 of 1977, § 105A(1)(b).

¹⁶ Criminal Procedure Code Cap 75 §§ 137D and 137I (2)(b). See also The Victim Protection Act No. 17 of 2014, 9(1)(c) (Sept 2014).

¹⁷ The Administration of Criminal Justice Act 2015, 28, §270(2).

¹⁸ World Prison Brief, Uganda Overview, Int'l Center for Prison Studies, <http://www.prisonstudies.org/country/uganda>; Ephraim Kasozi, *Ugandan jails most crowded in East Africa*, DAILY MONITOR (8 Aug 2013).

¹⁹ The Judicature (Plea Bargain) Rules, 2016, §4.

determine whether there is a factual basis for the agreement and must reject an agreement that “may occasion a miscarriage of justice” (Rules 12 and 13).

Victim Involvement

The Guidelines also provide some rights and considerations for victims and complainants during the plea bargaining, including consideration of the victim’s interest and the opportunity to present a victim impact statement during sentencing.

For example, the prosecution is required to “take into consideration the interests of the victim, complainant and the community” before entering into a plea agreement (Rule 11). However, obtaining the victim’s consent, considering the victim’s views, or even notifying victims is not expressly required by the Guidelines (although the ODP has instructed prosecutors to make reasonable efforts to notify victims). Information about the victim, the relationship between the victim and accused, the victim’s interest, and the victim’s views are not included in the prescribed Plea Bargaining Form (Schedule 1), and the prosecutor is not required to attest that s/he contacted the victim (see Statement of Prosecuting Agent).

However, *if a victim or complainant is present* during the presentation of the plea agreement, s/he is entitled to be heard on the issue of sentencing (see Schedule 2 at 17). The intent of the framers to include the victim’s voice is also evidenced by two of the six stated objectives of the Rules: “(b) to enable the accused and the prosecution in consultation with the victim, to reach an amicable agreement on an appropriate punishment;” and “(f) to involve the victim in the adjudication process” (Rule 3).

Objectives

In addition to increasing victim involvement, additional objectives include to enhance the efficiency of the criminal justice system, reduce case backlog and prison congestion, provide quick relief from the anxiety of criminal prosecution, and to encourage the accused person to take responsibility for their actions (Rule 3).

Current Status of Plea Bargaining in Uganda

Since its launch in 2014, the Judiciary - with leadership from the Principal Judge, Chief Registrar, and Technical Advisor to the Judiciary - has introduced plea bargaining in 11 Circuits of the High Courts of Law across the country. Although plea bargaining may take place anytime during the criminal proceeding, the vast majority of plea agreements are presented during special Judiciary-sponsored plea bargaining sessions. The Judiciary has held numerous plea bargaining sessions, disposing of more than 6,000 cases²⁰ and saving the Judiciary an estimated 1.7 billion UGX.²¹ The majority of these sessions have taken place in or around Kampala; however, sessions have also been held in, *inter alia*, Mubende, Fort Portal, Bushenyi, Tororo, Gulu, Arua, Soroti, and Jinja. Except for a pilot plea bargaining project in the Chief Magistrate’s Courts in Mukono and in Gulu, plea bargaining is currently limited to High Court cases. Charges include murder, attempted murder, manslaughter, rape, aggravated defilement, and aggravated robbery. The Judiciary intends to continue expanding plea bargaining by both extending it to additional Magistrates Courts and increasing its utilization across all High Courts.

The precise procedures vary between sessions, but generally a representative of the Judiciary visits a prison to raise awareness about the new plea bargaining procedure and identify potential participants. This participant list is provided to the Director of Public Prosecutions who assigns the potential plea²² bargaining cases and sessions to specific State Attorneys (currently approximately 1 SA for every 35 files). Based on KIs, State Attorneys generally then have one to two weeks to locate the police file, contact the accused and his/her advocate to negotiate a plea deal, and contact the victim or complainant for input. Where plea agreements are successfully reached, they will be presented to a High Court Judge over a one to two day plea bargaining session.

²⁰ THE JUDICIARY, A REPORT OF THE CASE BACKLOG REDUCTION COMMITTEE, at 43 (29 March 2017).

²¹ See *Judiciary Urged to Increase Victim Participation in Plea Bargain*, Uganda Radio Network, 29 March 2017 (citing Technical Advisor to the Judiciary), <https://ugandaradionetwork.com/story/irregularities-mar-plea-bargaining-initiative>

²² Interview with Female State Attorney (13 April 2017).

Plea agreements can also take place during the ordinary course of court business; however, this is not the norm. In such cases, the defence counsel will generally speak with the prosecutor when the case comes up for plea and/or trial. They will advise the court that the accused wants to plea bargain and the court affords the parties additional time to negotiate an agreement. State Attorneys indicated that the physical presence of victims and witnesses in the courtroom greatly enhances the likelihood that the accused will decide to plead guilty or negotiate a plea agreement.

Results and Analysis

1. Plea Bargaining Advantages

The KIs and literature review highlight key objectives and potential advantages of plea bargaining in Uganda, including efficiency and cost-savings, reduction in pre-trial detention and impunity for difficult to prosecute crimes, possible increases in general and specific deterrence, and *potential* to increase victims’ voice, participation, and safety, while reducing the re-traumatization of testifying and protracted legal proceedings.

1.0. Plea Bargaining Institutional Advantages

Plea bargaining has several rule of law and institutional advantages for justice systems including its potential to reduce case backlog, reduce pre-trial detention for accused-persons on remand, and cost savings throughout the justice sector.

1.0.1 Plea bargaining may reduce case backlog and pre-trial detention.

Case backlog is a significant issue in Uganda. The Judiciary’s recent national court census revealed that 9,416 criminal cases were backlogged (defined as older than 2 years), with another 8,586 potentially backlogged (defined as 1-2 years old). A remarkable 2,325 cases are more than 5 years old.²³ Due to the backlog, current criminal sessions are hearing cases from 2010-12. JLOS and the Judiciary have introduced a series of reforms to address case backlog, including the session system, the Court Cases Administration System, district coordination committees, and the creation of new High Court Circuits, as well as civil cases strategies such as the small claims procedure and mediation. Reducing case backlog and reducing the amount of time accused person spent on remand were also key rationales for the plea bargaining initiative.

Why plea bargain now, why plea bargain at all is because we don’t have the resources to prosecute 100% of the cases... The average time people spend on remand now is about 4 years before they come to trial... So that is the thing, we don’t have enough human resources, we don’t have enough financial resources to be able to prosecute 100%... The other reason we do it is because there are people in prison who are willing to say, ‘I did it’. So why should we make them wait in the line if they are willing to accept their responsibility? - DPP Officer

The challenge is that accused persons are spending too much time in jail. The judiciary model is first-in-first-out and there are only one to two sessions per year where an accused can come before a judge. So they don’t have the opportunity to plead guilty, even if they want to. - Female High Court Judge

1.0.2. Plea bargaining saves government resources.

Although not specifically confirmed through this research, the plea bargaining initiative has the potential to result in cost-savings to JLOS institutions through reduced pre-trial detention, court and prosecutor time, and resources to prepare and try a full case. For example, the Chief Registrar of the High Court Criminal Division noted considerable cost-per-cases savings from holding special reference plea bargaining sessions as compared to full criminal sessions. In addition:

²³ JUDICIARY CASE BACKLOG REPORT, *supra* note 20, at 23 (also finding that total case backlog stands at 28,864 cases and an additional 22,005 cases are potentially backlogged).

The average cost of feeding a prisoner per day is about 3700 UGX, which in a year translates to about 1,350,500 UGX. When there are more than 40,000 people in detention centers, it accounts for more than 54 billion UGX per year.

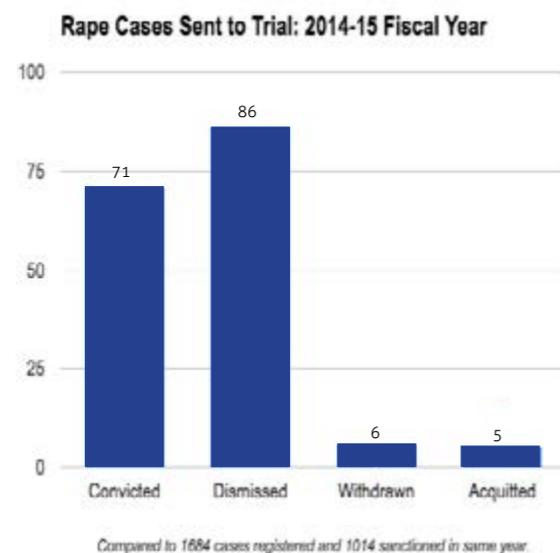
– Judiciary Case Backlog Reduction Committee Report, 2017

1.1. Plea Bargaining May Help Reduce the Prevalence of Crime

Plea bargaining, by increasing the number of cases ending in conviction, reducing impunity for perpetrators of VAWG, and increasing the certainty and swiftness of punishment, may help reduce the prevalence of VAWG in Uganda.

1.1.1. Plea bargaining may reduce impunity for VAWG.

Sexual violence offences such as rape and defilement received *dismissals more often than convictions*. In trials conducted during the 2014-15 fiscal year, 71 persons accused of rape were convicted, while 86 cases were dismissed, six withdrawn, and five acquitted. Though these offences were perpetrated in the years prior, as a point of reference: 1,684 new rape cases were registered that same year, of which only 1,014 were accompanied by sufficient evidence to be sanctioned and charged.



24

Similarly, of all domestic violence cases heard in magistrates courts during that time, 297 accused persons were convicted, while 243 were dismissed, withdrawn, or acquitted.²⁵

An additional advantage of plea bargaining may be its ability to reduce impunity by increasing convictions, for example in sexual and gender-based offences that would otherwise be withdrawn or dismissed. A key challenge faced by State Attorneys for these sensitive cases is that, particularly as time passes, victims and witnesses do not want to testify in court, “lose interest” or are pressured to drop the case, or evidence “gets lost.” Some members of the ODPP highlighted how plea bargaining can be a means by which to still achieve justice for women and girls who are victims in such circumstances²⁶

24 DPP Magazine, Vol. 1 Issue 5, July 2015.

25 *Id.*

26 One report evaluating available research on domestic violence prosecution in the United States noted that “plea bargaining may be encouraged for domestic violence as a means of avoiding case attrition by victim nonparticipation.” DAVID FORD AND SUSAN BREALL, VIOLENCE AGAINST WOMEN: SYNTHESIS OF RESEARCH FOR PROSECUTORS, NIJ REPORT FOR THE U.S. DOJ (DEC. 2000), <https://www.ncjrs.gov/pdffiles1/nij/grants/199660.pdf>. See also *id.*

We have a history of losing most of these cases in court when they go to full trial. For many reasons, but one of the reasons is that the cases take so long in the system... You bring a case after five years and [the victim] has moved on...so we often lose those cases in court. When we get the opportunity, when at least the accused is owning up to their responsibility, we grab it. We actually want to get a conviction. It is better to have a conviction with a lenient sentence than having an acquittal, if you go for a full trial. Or having a dismissal, because the witnesses did not turn up.

- Head of the Gender, Children and Sexual Offences Department, ODPP

Thus plea bargaining may be a strategy for securing quantitatively more justice for more people over shorter periods. The caution is that this practice could result in the miscarriage of justice if, rather than simply protecting victims from having to testify, it is used instead to cover-up evidentiary weaknesses in a case. Such practices would ultimately undermine the legitimacy of the Justice System, could result in innocent people being convicted of crimes, and lead to increased vulnerabilities for women and girls.

1.1.2. Plea bargaining may increase general deterrence.

Although it requires additional research and analysis for the Ugandan context, there is some academic support for the proposition that plea bargaining may increase overall crime deterrence.²⁷ In general, an individual will commit an act only if the “expected utility from doing so, taking into account his gain and the chance of his being caught and sanctioned, exceed his utility if he does not commit the act.”²⁸ Thus for deterrence to work, “the risk of discovery and punishment” must outweigh “the temptation to commit crime.”²⁹ Many scholars describe deterrence as the combination of *severity* (the nature of the consequence), *certainty* (likelihood of the punishment), and *celerity* (the proximity in time of the consequence to the action).³⁰ Thus the risks must be known to the potential abuser and, to maximize deterrence, the punishment should be appropriate, predictable, and swift. If through plea bargaining, the Ugandan justice system is able to increase the consistent, predictable, and timely application of its criminal laws, the “risk of discovery and punishment” will increase for potential perpetrators,³¹ thereby reducing the “temptation to commit crime.”

There are a number of caveats in this, however. **Some scholars point to the risk that plea bargaining, by offering a settlement and reduced punishment, actually dilutes deterrence.**³² This risk can be mitigated if the system *consistently maintains deterrence-level punishments even during plea bargaining*. Notably, these scholars did not evaluate plea bargaining’s impact in the context of crimes for which there has been historical impunity and overall lack of enforcement, as is the case with many forms of VAWG in Uganda. Arguably for such cases, the risk of discovery and punishment (certainty) is so low that *a significant increase in convictions, even if initially accompanied by somewhat more lenient sanctions, would have an overall positive impact on deterrence*. This is supported by research that suggests that an increased *certainty* of apprehension and punishment has a greater impact on general deterrence than increased *severity* of the punishment (e.g. longer prison sentences).³³ Some victim attitudes confirmed this perception that there is deterrence no matter the sentence length:

27 We have been unable to identify any published research on the preventative effects of plea bargaining in cases of VAWG.

28 Polinsky and Shavell, *The Economic Theory of Public Enforcement of Law* (Nat’l Bureau of Economic Research, Working Paper No. 6993, 1999).

29 JOHANNES ANDENAE, PUNISHMENT AND DETERRENCE (1974).

30 See, e.g., Howe and Brandau, *infra* note 34; Ritchie *infra* note 33.

31 “Deterrence depends not simply on the risk of being punished, but also on the nature and magnitude of punishment.” ANDENAE, *supra* note 29, at 28.

32 Polinsky and Shavell, *supra* note 28, at 32 (“settlements dilute deterrence: for if injurers desire to settle, it must be because the expected disutility of sanctions is lower for them”); Ralph Adam Fine, *Plea Bargaining: An Unnecessary Evil*, Marq. L. Rev. 615, 620 (1987) (“However, plea bargaining teaches the criminal that judges and lawyers can ignore the law when it is expedient to do so”); Steve Mongrain and Joanne Roberts, *Plea Bargaining with Budgetary Constraints* (April 23, 2007) (“excessive use of plea bargaining can reduce the effectiveness of higher sanctions”).

33 See, e.g., Donald Ritchie, *Does Imprisonment Deter? A Review of the Evidence*, Sentencing Advisory Council, Victoria State Government (April 2011), <https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Does%20Imprisonment%20Deter%20A%20Review%20of%20the%20Evidence.pdf>.

Two years on remand is enough for him. At least he has served. I believe he has learned something. I only talked to him at the police station; never saw him again since that day. He accepted his crime then. Maybe he is even sorry now. Prison is not a good thing for someone. [Minors, you mean?] Anyone. It doesn't matter how long the sentence is. Even if it is one year they pay for their crime, it can make him understand.

- Mother of 3-year-old girl defiled by a 17-year-old boy, Kampala

Plea bargaining may also impact *celerity* (swiftness of punishment). Classic deterrence theory holds that the closer in time a punishment is to the crime, the greater the deterrence effect. Evidence to support this theory is mixed, but some studies show a moderate effect of celerity on deterrence.³⁴ Thus if the Judiciary is able to provide more prompt justice through plea bargaining and other case backlog mechanisms, it may enhance the deterrent effect of individual sentences. See also Section 7 analysis below. Further research is needed on the deterrent effect given the cyclical nature of some forms of violence; most notably IPV and other relationally-embedded violent situations that may leave women chronically vulnerable after a plea bargained sentence has been served.

1.2. Plea Bargaining May Benefit Victims

Plea bargaining, if implemented well, would benefit victims by increasing their participation, voice, and satisfaction in the criminal justice process. In cases of VAWG, it may also increase a victim's willingness to support the prosecution, by resolving cases more quickly and with less opportunity for victim harassment, intimidation, and cultural and gender pressures.

1.2.1. By increasing victim participation and promoting reconciliation.

Many of the KIIIs noted the goal of increasing victim participation through the plea bargaining process.

Plea bargaining, more than any other process, allows for the participation of victims
- Head of Gender, Children and Sexual Offences Department of ODPP

Plea bargaining allows an amicable and good relationship with victims because we want a win/win for both parties -
- Female High Court Judge

The victims and relatives of victims have the opportunity to participate in the sentencing process. Willingness to receive defendants back in society after serving the sentence is very important.
- Judiciary Case Backlog Report 2017

However, as discussed more below, there is a gap between the law's provisions and the actual practice of victim participation. In addition, the assumption of amicable resolution and reconciliation often do not hold true in cases of VAWG because dynamics of power and control remain in tact.

1.2.2. By reducing the time frame and opportunity for threats, coercion, and pressure on victims to drop the case.

Reporting VAWG is often counter-cultural and remains difficult for victims and witnesses.

Aggravated defilement is common here. People say, 'It's not bad, you let him be, she wasn't injured.' They talk a lot, like 'This one raped that one's girl.' They know it, but you can't force someone to go to the police... If you report someone for attacking your child, the community will say, "Why did you do that? This is someone's boy!" Or if you report domestic violence, they will tell you that you should have solved it inside your house.

- Mother of 3-year-old aggravated defilement survivor, Kampala

³⁴ Edmund S. Howe and Cynthia Brandau, *Additive Effects of Certainty, Severity, and Celerity of Punishment on Judgments of Crime Deterrence Scale Value*, J. APPL. SOCIAL PSYCH (July 1988) (finding moderate correlation between celerity and deterrence); Haley Zettler, et. al. *Assessing the Celerity of Arrest on 3-Year Recidivism Pattern in a Sample of Criminal Defendants*, 43 J. CRIM. JUSTICE 428 (2015) (analyzing celerity of arrests and finding that it had a short-term deterrent effect on recidivism).

Many times in the course of reporting a crime, survivors of VAWG are subjected to threats from the family of the offender, victim-blaming from community members, shaming by authorities, and external pressure to drop the case.

The pastor who brought (the security guard who defiled my daughter) from the village wanted to apologize on behalf of him. He kept saying, 'He was a good boy, maybe he just snapped. You should learn to forgive him.' The landlady also made me feel like I was in the wrong for reporting him, like 'How can you take my boy to the police?' I asked her, 'What if it was your granddaughter? Or even you as a grown woman of 65, what if someone touched you in a way you don't want?' No woman, no man, no anyone wants to be disrespected, whether you are a kid or an old woman.
- Mother of 4-year-old aggravated defilement survivor, Kampala

Domestic violence cases are peculiar. The perpetrator often comes to the police and tries to blame the victim, saying "Yes, I beat her, but she was being disobedient - what would you do?" So the police trivialize such cases. As prosecutors we may even receive threats when taking them on. Perpetrators try to bribe the police, the prosecutors, the magistrates... Victims can even begin to feel guilty. If a defiled student is seen as the reason her classmates are now in jail, she will feel pressure to withdraw out of fear and stigmatization. She may start changing her story because of how her community is treating her.
- Female State Attorney, Kampala

Thus plea bargaining may increase victim willingness to participate in the prosecution by reducing the time available for external threats and pressure.

Even if it's an adult who was raped, her in-laws are there waiting by the roadside... We need to close that window of vulnerability. She has no counselor or guide to protect her once she is back in the community. And as the prosecution we can't afford to be concerned [with her future safety] due to limited resources.
- Female State Attorney, Kampala

If the accused is on remand for long, the girl no longer wants to testify... They want justice when they report, but this wears off. If plea bargaining can reduce the time on remand, it would help this issue.
- Female State Attorney, Kampala

Sexual violence cases are sensitive and should be heard as soon as possible. Victims want justice then, not after multiple years. These cases should get special attention. Especially because the memory of children changes. Then there is community pressure on the woman for years to drop the case. Nobody is there to support her. Whether it is bargaining or trial these cases should be fast-tracked.
- Female State Attorney, Kampala

Long delays are particularly harmful to girls in cases of aggravated defilement:

Judicial officers are subliminally affected by the woman they see sitting here who is now 19-years-old, although she was 13 when she was defiled. This can affect how they sentence offenders.
- Female State Attorney, Kampala

1.2.3. By reducing re-traumatization from testifying and prolonged engagement in protracted trials.

In addition, re-traumatization is common when survivors are compelled to share the narrative of their attack.³⁵ Plea bargaining spares victims the further trauma of testifying again in court before the offender and other members of the community.

*My girl had to retell what happened to her at least four times to the clinical officers and the police.
- Mother of 4-year-old Aggravated Defilement Survivor, Kampala*

*Victims often forget facts throughout the process and by the time of trial. This is a trauma response. But victims don't always realize they are traumatized.... The whole process is traumatizing to victims.
- VAWG Advocate, FIDA*

*It's good for a victim not to have to testify to avoid re-victimization. In trial she can't just say "I was raped." She has to go through all the details, and then the defence counsel tries to discredit the victim.... Victims are willing to accept a lower sentence (for their perpetrators) so that they don't have to testify.
- Female State Attorney, Kampala*

*I plea bargained because my mother was one of the principal witnesses. And I didn't want her to take the witness stand to be bashed by the defence lawyer, because to her, as a layperson, she feels 'My daughter was killed and died at my feet, so why are you even asking me this?' She would break down and even die.
- Sister of murder victim, Kampala*

*If a case is going to full trial, you are calling the victim to come and testify. You remember the trauma they have to go through again in court. And usually upon conviction... the victims do not participate in determining what would be the sentence.... So plea bargaining becomes a better option.
- Head of the Gender, Children and Sexual Offences Department, ODPP*

1.2.4. By increasing victim safety.

Swifter justice, as noted above, can improve safety and reduce victim harassment, coercion, and intimidation. In addition, plea bargaining may also protect victims from repeated violence from the perpetrator by allowing them to "hide behind" the State after summoning the courage to report the incident. It gives her the opportunity to "blame" the State and thereby be more protected from the wrath retribution by her assailant and the community.

*It's important that I always present to the court the risk of increased and continued violence against the victim. I often tell the victims to go back to the community and say that it is the prosecutor who is refusing to withdraw the case or to plea bargain. That provides some protection to the victim.
- Female State Attorney, Kampala*

1.2.5. By improving victim satisfaction with and confidence in the system.

External research identifies a link between victims' satisfaction in the judicial process and their ability to meaningfully participate in "their" cases:

It appears that victims of crime place considerable value on the right to be consulted on the terms of a proposed plea bargain with "their" accused. Indeed, in a study conducted by the National Center for Victims of Crime, 1,300 crime victims were surveyed. More than 80% of the respondents considered "discussion whether the defendant's plea to a lesser charge should be accepted" to be "very important to them" It is significant that victims who were notified of their rights were more satisfied with the justice system than those who were not. Similarly, victims who believed that their input had an impact on the outcome of their cases were more satisfied with the criminal justice system.³⁶

Thus plea bargaining, if implemented in a manner that safeguards the voice and participation of victims, may improve their satisfaction with the Justice System. It is also important to note that a victim's satisfaction and safety may also be greater the quicker that justice is meted out.

2. Plea Bargaining Concerns and Questions

Although there are obvious institutional advantages (efficiency, cost-savings, reduced pre-trial detention), possible societal benefits (reduction in prevalence of crime through ending impunity and increasing deterrence), and possible victim benefits (increased participation, voice, and satisfaction; reduced risk of harassment, coercion, and violence), plea bargaining has strong opposition in Uganda and globally.

Plea bargaining is most often critiqued for being a violation of fundamental rights of accused persons and for the risk of innocent people pleading guilty. Secondly, significant concerns have been raised about whether plea bargaining effectively serves the primary goals of criminal sentencing (restraint, punishment, deterrence, rehabilitation, and victim acknowledgement) and its ability to provide consistent sentencing for similarly-situated defendants. Third, issues emerge regarding the legitimacy of the process and public perception of corruption, especially in jurisdictions with a history of corruption and without transparent procedures or consistent sentencing. Fourth, critics argue that plea bargaining guidelines do not sufficiently protect the voice and rights of victims, and that the rights that do exist are insufficiently realized due to logistical and structural obstacles, as well as culturally-entrenched gender norms and power imbalances. Finally, plea bargaining fails to adequately include gender considerations and unique challenges for survivors of VAWG.

2.1. Procedural Safeguards and Rights of Accused Persons

Given the number of women accused of murder after enduring years of IPV, rights of accused persons – not only victims – should be a concern for women's protection advocates. Plea bargaining is most often criticized because it "overrides some of the in-built safeguards of the criminal justice system such as the state's responsibility to prove its case beyond reasonable doubt, the presumption of innocence, and the right of a defendant not to incriminate him/herself as provided for instance under the CRC Article (40)(2)(iv)."³⁷ Globally, critics argue that plea bargaining can be coercive³⁸ and imposes a "trial penalty" in the form of a harsher sentence for those who maintain their right to a trial, where there are facts genuinely in dispute, or who maintain their innocence.³⁹ This leads to a key concern: that plea bargaining results in innocent people pleading guilty.⁴⁰

35 There is considerable research on this topic, which is beyond the scope of this report. See, e.g., Leah Nelson, *Testifying in Court Can Amplify Trauma For Victims of Childhood Sexual Abuse*, The Association for Psychological Science (Aug 1, 2006), <https://www.psychologicalscience.org/observer/testifying-in-court-can-amplify-trauma-for-victims-of-childhood-sexual-abuse#.WTEEVBOGNE4>.

36 Simon N. Verdun-Jones and Adamira A. Tijerino, *Victim Participation in the Plea Negotiation Process in Canada: A Review of the Literature and Four Models for Law Reform*, Policy Centre for Victim Issues, at 10 (2002) (citing Kilpatrick, Beatty, & Smith, *The rights of crime victims – Does legal protection make a difference?*, Nat'l Inst. of Justice, U.S. Dept. of Justice (1998)). See also Alan N. Young, *The Role of the Victim in the Criminal Process: A literature Review - 1989 to 1999*, Policy Centre for Victims Issues (Aug 2001) ("The literature suggests that victim satisfaction is more related to process than to outcome.... Being treated with dignity and respect is more important than seeing that the offender is punished as severely as legally possible.").

The people who plea bargain are those who have totally lost hope. I've seen juveniles pleading who aren't even guilty because they're just tired.
- Female Defence Attorney, Kampala

In plea bargaining, innocence is crushed. We put aside the 'innocent until proven guilty' principle, and bargain against the death penalty, which is the maximum sentence.... But I am driven by my goal of 100% convictions. There is no smoke without fire. If people are going around pointing fingers at you, you must be somehow connected to this crime.
- Male State Attorney, Kampala

Plea bargaining also results in vastly different sentences for similarly situated offenders, which undermines notions of fundamental fairness, legitimacy, and trust in the system.⁴¹

Uganda has addressed some, although not all, of these concerns. Prior to accepting a plea agreement, the judicial officer is required to ensure that the accused person fully understands their rights and the nature of the charge to which she/he is pleading. (The Judicature (Plea Bargain) Rules, 2016 at Rule 12; see also Rule 10 and Schedule 1). The prosecution is required to disclose all relevant information to the accused person prior to a plea agreement (Rule 7). The court may only accept a plea agreement once it has satisfied itself that there is a factual basis for the guilty plea (Rule 12(3)). The court may reject a plea agreement that imposes too lenient a sentence and may reduce a sentence it believes is improper.

Although plea bargaining is currently limited to High Court cases, its expansion to Magistrates Courts and offences that do not include a right to a state-appointed advocate enhances concerns about whether plea bargaining can adequately protect the rights of accused persons. Although beyond the scope of this report, additional research is needed into the extent to which the prosecution is disclosing relevant information to the accused prior to entering into a plea agreement and other protections are being meaningfully applied.

2.2. Sentencing and Plea Bargaining

Appropriate sentencing is a second key area of concern. The research found that sentences in plea bargaining bear limited, if any, relationship to established Judicial Sentencing Guidelines; plea negotiations (charges and sentencing) are almost entirely discretionary and thus reflect the inherent biases and attitudes (including discriminatory attitudes) held by judicial officers and state attorneys; and, overly lenient plea agreements may be unfair to victims, fail to take into account the impact of structural or systemic violence, and may undercut the deterrent effect of sentences.

2.2.1. Sentencing Guidelines.

The KIIIs indicated a lack of uniform understanding of the role of Uganda's Sentencing Guidelines in plea bargaining and revealed essentially no relationship between the Sentencing Guidelines ranges and actual sentences given in plea bargaining.

In April 2013, the Judiciary issued Sentencing Guidelines to provide guidelines and principles, as well as discretionary sentencing ranges, for judges to utilize in determining appropriate sentences for select capital and non-capital offences.⁴² Two additional objectives of the Sentencing Guidelines are to provide a "mechanism for considering the interests of victims of crime and the community when sentencing" and a "mechanisms that will promote uniformity, consistency and transparency in sentencing."⁴³ Yet many individuals interviewed for this study noted that the discretionary nature of the guidelines undermined the goals of uniformity, deterrence, and consistency in sentencing.

So much of sentencing depends on the attitude of the court. Judges, during a full trial, give very lenient sentences, which impacts plea bargaining. For plea bargaining to work, full trial sentences should be higher. Judicial officers don't follow Sentencing Guidelines or plea bargaining sentencing procedures. Judges reduce plea bargaining sentences they think are too harsh... Most of the times judges reduce charges for GBV.
- Female State Attorney, Kampala

The Plea Bargaining Guidelines are silent regarding the applicability of the Sentencing Guidelines to the plea bargaining process, and there was no uniformity between respondents as to its application to the new procedure.

Sentencing in plea bargaining is the same as in trial.
- Technical Advisor to the Judiciary

Sentencing for plea bargaining should be lower than the sentences given under the normal Sentencing Guidelines.
- DPP Official

Plea Bargaining moves out of sentencing guidelines. The minimum in the Sentencing Guidelines are too high to have plea bargaining. An accused person will never agree to 30 years, but can plea bargain for 5 to 10 years. They are a guide, especially if reducing the offense, but we really moved away from them in capital cases.
- Female High Court Judge

The Sentencing Guidelines are to be used the same way in plea bargaining. We must limit the sentence to the range for consistency. In fact we should design a table with child's age and the period the defiler spent on remand. Then we can know your starting point, say for defiling a girl who was between 11-15 years, if you've already been on remand for 18 months.
- Female High Court Judge

37 UNICEF, PROSECUTING CHILD-RELATED CASES: A HANDBOOK FOR DIRECTORATE OF PUBLIC PROSECUTIONS, at 58 (2016).

38 See, e.g., John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 L. & SOC'Y REV. 2, 261 (1979).

39 Cynthia Alkon, *Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems*, 19 Transnat'l L. & Contemp. Probs. 355, 394 (2010).

40 See, e.g., FAIR TRIAL note 4 at 12 (noting that in the United States, "65 out of the 149 people exonerated of crimes in 2015 had pleaded guilty (44%)").

41 Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUMN. L. REV. 959, 992 (2005).

42 The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013. The Sentencing Committee, chaired by the Principal Judge and with the Technical Advisor to the Judiciary serving as secretary, are also developing guidelines for additional lesser offences, but as of the date of this report, the new guidelines have not yet been issued.

43 *Id.*

Multiple respondents noted how the Judiciary's failure to utilize the Sentencing Guidelines during full trials undermined the success of plea bargaining, since accused persons believe they will receive a lenient sentence at full trial.

I plea bargained a case to 20 years, but then a similar case went to full trial and he received the same sentence. So what is the pressure on the accused to plea bargain?
- Female State Attorney, Kampala

The Case File Review evidenced that the sentencing ranges have limited, if any, bearing on or relationship to plea bargaining sentences. For example, the Sentencing Guidelines provide for a range of 30 years to death for aggravated defilement and for rape, with a starting point of 35 years before considering aggravating and mitigating factors. Yet, for cases sampled from the 2016-2017 special plea bargaining sessions, the average custodial sentence for aggravated defilement was 7 years and 4 months. Similarly, the average custodial sentence for rape was 7 years. (See Annex IV for select case file review).

2.2.2. Punishment, Deterrence, and Inherent Bias

In addition to concerns about uniformity, the results of the Case File Review further raise the question as to whether "unduly generous concessions of plea bargaining are unfair to victims and undercut the deterrent effect of sanctions."⁴⁴ As the Due Diligence Project noted:

Punishment should prevent recidivism, rehabilitate perpetrators, prepare them for reintegration and deter others from committing similar offences. Sentences that do not meet these goals foster recidivism and a sense of impunity, normalizing VAW in our collective imagination and resulting in its re-enactment in our daily lives.⁴⁵

Structural Violence

Deterrent sentences should take into account the ways that *structural* or *systemic violence* contributes to *interpersonal violence* in families and communities. Rather than exclusively focusing on "dichotomized notions of *victims* and *perpetrators*, which locate the problem of violence within individuals who are deemed good or bad," our attention to *structural violence* requires the justice system to acknowledge the "'everydayness' of violence from the vantage point of complex political, social, historic, and economic processes."⁴⁶ In cases of VAWG, these processes are what have legitimized, reproduced, and now perpetuate the patterns of violence, inequality, and marginalization that women and girls experience.

All social institutions and interactions are gendered in some manner, meaning that "constructions of masculinity and femininity are intertwined in the daily life of political, economic and legal institutions" (Montesanti, *supra* note 46). *Gender justice* therefore demands that legal sanctions for perpetrating VAWG consider the ways in which offences like rape or defilement are not singular acts occurring in isolation, but phenomena resulting from recurring attitudes, cultural norms, social interactions and social institutions that maintain unequal power relations underpinning male dominance.

44 Jenialontcheva Turner, *Plea Bargaining and International Criminal Justice*, U. PAC. L. REV. 219, 222 (2017).

45 DUE DILIGENCE PROJECT, Regional Report Africa: Due Diligence and State Responsibility to Eliminate Violence Against Women (2013), <http://www.duediligenceproject.org/resources.html>.

46 Montesanti and Thurston, *Mapping the Role of Structural and Interpersonal Violence in the Lives of Women: Implications for Public Health Interventions and Policy*, BMC WOMEN'S HEALTH 15:100 (11 Nov 2015).

There is some recognition within the ODPP of the significance of certain cyclical crimes:

It is an aggravating factor if that case type is rampant, and others are now copying it.
- Male State Attorney, Kampala

(A sentence) has to be meaningful, and based on facts... in a relationship of domestic violence the sentence should be stringent! To me as an activist this is to deter the would-be perpetrators.
- Women's Rights Advocate, Kampala

Yet more sensitization must be conducted with prosecutors and other court users on the particular symbolic and structural nature of GBV offences, including specific victim-perpetrator relational categories and spaces where offences are most pervasive.

Inherent Bias

Absent enforced sentencing guidelines and clear articulations of how structural trends and other aggravating and mitigating factors should be weighted in the sentencing decision, sentencing will reflect the discriminatory attitudes held by judicial officers and prosecutors.⁴⁷ Such biases came out clearly in some KIIs, especially in cases of defilement, for example in trivializing the harm defilement has on adolescent girls:

If a 13-year-old girl is essentially practicing marriage, and is able to consummate sex, defilement is not the same as it would be for a 5-year-old. She could have already been sexually active. She is not so much a minor like those under 10 years... If she is a mango, you can already pluck the fruit and eat it. A 5-year-old isn't yet ripe.
- Male State Attorney, Kampala

Defilement doesn't have an element of violence. Unless maybe they killed the girl afterwards. They say consent is immaterial but in actual fact most these girls (above 11 years) come back pleading for the man not to be sanctioned because they were actually consenting... But defilement is never violent. Men here just love pleasure. It's usually a family member or a friend. Rarely do we get those cases of men just defiling a girl on the road.
- Female Judge, Kampala

Just because I was treated fairly, other people are not... [Why was your case different?] Because she was young, and the woman at the police station was good to me. [So they were more sensitive in your situation than in other people's cases?] I really don't know. I prayed very hard... A woman told me at the court, if she was 12 years that would be a different case. But she is so young and innocent. If she was 12, maybe she could have agreed on something.
- Mother of 4-year-old defilement victim, Kampala

47 See, e.g., DUE DILIGENCE PROJECT, *supra* note 45, at 38. Noting that in South Africa ordinary cases of rape have a minimum sentence of 10 years and aggravated or more violent cases warrant a 25-year minimum sentence. Yet, "Judicial discretion is frequently applied resulting in reduced sentences and is reflective of entrenched gender bias amongst the judiciary."

Differential treatment based on age and sex of the victim or offender should not be left to the gender attitudes and biases of the officer in the moment, rather intentional sentencing regimes that are communicated back to the parties and their communities should be utilized. Neglecting to charge and sentence an offender within the broader context of what his crime represents can diminish the penalty's deterrent capacity and effectively reinforce trends of structural violence. In its current form, plea bargaining gives broad and virtually unchecked discretion to the prosecutor in whether to reduce a charge and to a judicial officer to provide a lenient sentence. There is no requirement that judicial officers must document their sentencing decision at plea bargaining, nor issue an order setting forth the aggravating and mitigating factors considered, nor how the sentence aligns with codified sentencing priorities or mandates. Prosecutors are not required to justify the basis of charge reductions.

Judges reduce plea bargaining sentences they think are too harsh. Most of the times judges reduce charges for GBV. If a judge sees domestic violence in the case, he can just tell the man to clean the house or sentence him to community service.
- Female State Attorney, Kampala

2.2.3. Role of the Court

The research identified wide variations between respondents' understanding of the sentencing role of the court, as well as the impact of time spent on remand. The Plea Bargaining Guidelines leave the ultimate sentencing decision to the judicial officer,⁴⁸ but provide certain procedural safeguards, including (i) prohibiting the court from imposing a sentence more severe than the maximum agreed-to by the accused⁴⁹ (Rule 15(2)) and (ii) allowing an accused person to appeal a sentence that exceeds what was agreed to (Rule 12(1)(g)).

The research also revealed that many judges are more lenient than their ODPP counterparts and further reduce already reduced plea bargained sentences. However, other judges increase sentences when the plea agreement is presented to the court either through a court order,⁵⁰ by disregarding time already spent on remand, or through direct negotiations with the accused person:

When plea agreement is presented, if punishment is too harsh, the judge has discretion to reduce it. If it's in open court I will only reduce in favor of the accused person. Otherwise I will reject it, will explain why, and modify it to a higher sentence, but only with the agreement of the accused, who has to sign for the change.
- Female High Court Judge

2.3. Transparency and Public Perception

Closely related to legal concerns around sentencing is public skepticism about plea bargaining's ability to adequately secure justice for and protect the interests of victims and complainants. In legal systems that already suffer from corruption, plea bargaining's "informal negotiations may look like another form of corruption" and can lead to "serious legitimacy problems."⁵¹ Corruption concerns were a key issue in the implementation of plea bargaining in Nigeria.⁵² Even in Uganda some express doubts around the viability of plea bargaining (See also Annex V for review of plea bargaining in the media).

48 See, e.g., The Judicature (Plea Bargain) Rules, 2016, Rule 6(1) (prosecution can only make a "recommendation for a lesser sentence" in exchange for a guilty plea); Rule 8(2) (the parties "shall consult the court on its recommendations with regard to possible sentence").
49 A court's recourse, in the event a sentence is too lenient, is to reject the plea agreement. *Id.* at Rule 14(3).
50 See, e.g., *Uganda v. Orombi*, No. 0120 of 2016, UGHCCRD 58 (High Ct. Arua 19 April 2017) (increasing sentence for aggravated defilement from 8 to 14 years, plus time served); *Uganda v. Okumu Wilfred*, No. 0119 of 2016, UGHCCRD 59 (High Ct. Arua 19 April 2017) (from 8 to 11 years, plus time served).
51 Alkon, *supra* note 39 at 357. When plea bargaining was implemented in post-Soviet Georgia it was initially utilized in cases of corruption, allowing accused to pay large fines in lieu of criminal convictions, which led to "serious criticism of plea bargaining and to the perception that it existed as just another form of corruption.... This perception was extremely damaging to public confidence in plea bargaining."
52 Oziomalzuora, *Plea Bargaining and the Administration of Criminal Justice Act 2015*, THE AUTHORITY (MAY 2015), <http://www.authorityngr.com/2016/01/Plea-Bargain-in-the-Administration-of-Criminal-Justice-Act-2015/>; KehindeAdegbite, *Plea Bargaining in Nigeria: Any Legal Foundation?*, THE LAWYERS CHRONICLE, <http://www.thelawyerschronicle.com/plea-bargaining-in-nigeria-any-legal-foundation/>.

Overall the sector initiatives are good. But we have a very flawed criminal justice system. There are so many inefficiencies and dysfunctions, and those affect the entire regime. If a system is riddled with corruption, it will always affect the vulnerable the most, and it will spill over to any innovations you bring in like plea bargaining. First we must ensure that things are moving by ruling out case backlog and getting rid of corruption.

- Female Child Protection Advocate, Kampala

Whether or not it is specifically tied to the appearance of corruption, common perception that plea bargaining is overly lenient, inconsistently applied, and without transparent procedures further erodes its public legitimacy.⁵³

I remember my brother telling the DPP himself, 'It's ok to forgive (our sister's boyfriend who murdered her), and we shall forgive him. But we do not want him to have a scapegoat, to get away with this without proper accountability and remorse. Don't reduce justice to this. If he asks only seven years and court grants him that—if that's what plea bargaining means—then I'll kill him when he comes out after seven years, and I'll also go and bargain for those same seven years.'
- Sister to Murder Victim, Kampala

The community is not involved and so there is a lot of frustration, which is undermining the system. The community sees this guy back in the village (after several years) and they say, "Huh? We thought that case was nagomola?" Which means, serious, as in deserving the death penalty. They don't know what happened (i.e. plea bargaining) and assume someone was corrupted, which leads to a negative public perception of the system.
- Female State Attorney, Kampala

Victim involvement is a pillar of plea bargaining, but it usually goes missing... But if you don't involve them, there can be mob justice if the victim doesn't know that the offender plea bargained and the charge was amended, then they see this guy back in the community walking free.
- Male State Attorney, Kampala

Critics of plea bargaining have spoken out against the practice for turning justice into a transaction, where the judiciary 'profits' from backlog reduction and costs-savings, the 'consumer' who benefits is the offender, and the victim is not meaningfully involved:

(A representative from) Centre for Legal Aid contends that the programme "Plea bargaining cripples the criminal justice system because it leans more on one's power of negotiation and deal-making" instead of winning a trial Representative from the Centre for Legal Aid (source).⁵⁴

It's like a marketplace where you're bargaining for justice. The community already has this perception that justice is only for the rich, so if we don't involve them from the start then they will resent plea bargaining.
- Female State Attorney, Kampala

They don't tell (complainants) about anything. You take someone to police but they don't update you on how it is, whether he is still inside or not... and that's how it usually is, unless you have money.
- Mother of Defilement Victim

53 Alkon, *supra* note 39 at 357; see also Fair Trials, *supra* note 4 ("When conducted without sufficient transparency and regulation, trial waivers can reduce public faith in the system, and potentially undermine anti-impunity and anti-corruption efforts.")
54 Derrick Kiyonga, *Plea Bargain Innovation Helps Clear 1,500 Cases*, THE OBSERVER (3 Oct 2016), <http://allafrica.com/stories/201610030348.html>.
55 Alkon, *supra* note 39 at 357 (citing Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 Ga. L. Rev. 407, (2008)).

Conversely, global studies that evaluate the public perception of plea bargaining have concluded that **"giving more information about actual sentences in specific types of crimes and more information about the plea bargaining process in general can help lessen the negative public view of plea bargaining."**⁵⁵ Currently in Uganda, many households are unaware of the mechanism, or have an incomplete understanding of its purpose and the roles of the accused and victim therein.

I had no idea about plea bargaining until now (when a State Attorney called). But it seems like a good idea.
- Mother of Defilement Victim, Kampala

Since a tenet of accountability within the Ugandan justice system is "Justice must be seen to be done," plea bargaining depends on a positive public perception in order to function. The general public therefore requires greater sensitization and access to information in order to garner a broad support base for plea bargaining. Clear and transparent procedures and consistent sentencing are also required to improve legitimacy for the public, victims, and accused persons alike.

2.4. Role of the Victim

While respecting the rights of accused persons is of great importance in the execution of swift justice, the rights and interests of victims must also be adequately protected. This has been widely accepted as best practice by victims advocates, international institutions, and rule of law experts.⁵⁶

The literature makes clear that victim participation is good for the victim: participation promotes healing, provides a public acknowledgment of the wrong done to the individual, improves satisfaction with the Justice System, and allows a forum for forgiveness. It is good for the criminal justice system: victims are able to provide the prosecution with critical facts to ensure that innocent people do not plead guilty and perpetrators receive a sentence that matches the nature of the crime, and victim's mere presence promotes guilty pleas. It is good for the public: victim participation and transparency build public trust and confidence in the system *See, e.g., supra* note (36)

The Ugandan Judiciary and the ODPP⁵⁷ explained the intent to substantively incorporate the interest of victims in plea bargaining:

*The Judiciary's technical advisor... cautions that before prosecution enters into a plea bargain agreement with an accused person, it must take into consideration the interests of the victim or complainant... This can be done through due regard to the nature of and circumstances relating to the commission of the offence, the accused person, the interests of the community, and the loss or damage suffered by the victim or complainant.*⁵⁸

Although the framers of plea bargaining in Uganda sought to increase the victim's role in the process, significant obstacles exist to making this right a reality.

Plea bargaining is for accused persons, but the community and victim can provide impact statements.
- Technical Advisor to the Judiciary

⁵⁶ *See, e.g., supra* note 36.

⁵⁷ The ODPP is in the process of revising a Client Charter, including certain protections for victims.

⁵⁸ Derrick Kiyonga, *Plea Bargain Innovation Helps Clear 1,500 Cases*, THE OBSERVER (3 Oct 2016), <http://allafrica.com/stories/201610030348.html>. The DPP has likewise instructed State Attorneys to contact the complainant or victim to obtain her/his input into a plea deal and to keep her/him informed of case progress.

As a preliminary matter, the plea bargaining structure is predominantly designed to improve judicial efficiency and safeguard the rights of accused persons, not to protect the rights and interests of the victim.

As it is now, plea bargaining benefits perpetrators more than the victim.
- Female State Attorney, Kampala

No one thinks about the victim.
- Female State Attorney, Kampala

2.4.1. Guidelines Do Not Adequately Articulate and Protect Victim's Rights

Victims of violent crimes should have a meaningful right (i) to be **kept informed** of progress in "their" case; (ii) to be **consulted** on the terms of the proposed plea deal in advance of plea bargaining; (iii) to have their **interest and views considered** in the final plea agreement; (iv) **to be present** all hearings related to "their" case; and (v) **to present objections** to proposed plea agreement and make a written or oral **victim impact statement** (personally or through an agent) to the court before the judicial officer accepts a plea agreement and sentencing.⁵⁹

Yet the Plea Bargaining Guidelines do not effectively establish or protect these rights. The Guidelines only state that the victim's "interest" should be considered, not their articulated views or opinion; provide that the victim may express views on sentencing, but not the plea agreement or any corresponding reduced charges; do not provide an affirmative duty on any actor to contact the victim, advise the victim on their rights or the process, solicit their input, or inform them of hearing dates or outcomes; and do not provide for any mechanism for enforcing or ensuring victim's rights are protected. As a result, the research found that protections for victim's rights vary between courts, prosecutors, and cases, **denying many victims their rights and providing no recourse for violations.**

Although the ODPP is working on developing a charter outlining client's rights, such protections must also be enshrined in the law to enhance implementation.

2.4.2. Lack of Accountability for Victim Participation

The research was unable to identify effective mechanisms of monitoring or accountability for the prosecution or the court to ensure that a victim has been contacted and their views and interest appropriately considered. For example, victim information is not included in the plea agreement template, neither the prosecutor nor the court is required to attest to the fact that the victim had been consulted, and this information is not captured in any of the Judiciary or ODPP reporting tools that were available for examination during this study. As a result, many victims are not contacted, informed of their right to attend court with transportation reimbursed, nor advised before their perpetrator is released.

Never did this State Attorney contact me. The DPP believed he would call, but he didn't. [The SA] went on to negotiate with the defence lawyer (without me). I could call him occasionally to ask, How far? And he's like "Oh, the accused is saying seven years."... Never did he consult us at all or contact us for that matter. Either he wasn't interested or was so busy with other cases. He'd say, "Oh, we're going to meet with the defence lawyer." So I asked him, "When are we having our meeting? Because I know this involves a bit of reconciliation, and the victim must participate. So when?"
- Sister to Murder Victim, Kampala

⁵⁹ *See, e.g.,* The Advocates for Human Rights, *Drafting Specific Legislation on Violence Against Women and Girls*, United Nations Women (May 2011), <http://www.endvawnow.org/en/articles/485-other-measures.html>.

A year and a half later, the State Attorney called (last week Monday) to say the case was coming up soon for plea bargaining. He didn't say much about plea bargaining but explained that it is when "a group comes to me to see how we can sort the issue." [Did the State Attorney say that you could be a part of that group?] No, he didn't tell me much, only that plea bargaining is to help people in such cases... I called the State Attorney back last Wednesday, and he told me he would tell me the day. I found out this week the boy was already released, but they never told me the exact day they went to court.

– Mother to Aggravated Defilement Survivor, Kampala

2.4.3. Structural Obstacles to Victim Engagement

Some Judicial Officers Resist Victim Participation: Some prosecutors noted the reluctance of judicial officers to allow victims to testify during plea bargaining sessions.

Our system is so biased towards the accused for every type of crime. The accused gets to say something to the judge, but the judge doesn't always ask the victim. You have to go to their chambers and request an opportunity to let your client speak. The Justices say that the prosecution speaks for the victim and so they don't allow victims to testify. But the statement in open court makes victims feel like they are participating. There is nothing to ensure that the victim's voice is being heard or considered. Not in the plea agreement.

– Female State Attorney, Kampala

[Do you bring victims in so they can explain how the act impacted them?] We don't do that here. [What about when plea bargaining, do victims ever weigh in?] If complainants come to the plea bargaining session then we give them the chance to speak. [Do you insist that they are there for cases like rape or defilement?] No, it's not necessary to contact the victims of GBV. They never come anyway. If they do, they just want compensation. Maybe now they're pregnant.

– Female High Court Judge

This was not a universal view. Some of the KIIs demonstrated a firm understanding of the importance of victim input and participation. For example:

*I would like to get the victims on board and as much as possible take their considerations into account. A victim impact statement is usually given orally because there is no time for the State Attorney to follow up with witnesses and collect written statements. We alert victims to come, and if there's time they can come. But if it's too short notice, or we can't get them, we just call them and get something on record. **They are happy to participate via phone and the court also saves a lot on transport. Still they will have their voice.***

– Female High Court Judge

Case Delays and Backlog: Although plea bargaining may eventually speed up criminal prosecution, the Judiciary is still dealing with considerable backlog, and plea bargaining is not procedurally integrated into regular court proceedings. KIIs consistently indicated that the key reason victims do not participate in plea bargaining and trials is the lack of speedy resolution of cases. As noted above, after years have passed, victims - especially in domestic violence or sexual offences - are less willing to testify or otherwise participate.

Gender Norms: For more on cultural and gender-related barriers to victim engagement in plea bargaining, see Section 7 below.

2.4.4. Logistical Obstacles to Victim Engagement.

Although many of the officials interviewed for this report were committed to ensuring victim participation, they identified key logistical obstacles, including:

- Insufficient time to contact the victim before a plea bargaining session;
- Inability to contact victims from inside the prison during plea negotiations;
- Insufficient airtime and victim transport funds;
- Missing police files, which includes complainant contact details;
- Complainants changing phone numbers; and
- Insufficient police resources to trace complainants who have moved or changed phone numbers.

One RSA estimated that she was unable to contact approximate 40% of victims, adding that the older the case, the more difficult it was to trace them and the less willing victims were to participate in the process. She noted that victims of sexual offences were particularly difficult to contact and, once contacted, many declined to comment or participate. The researchers found this to be problematic even in identifying respondents for interviews.

3. Additional Gender Analysis

In addition to general concerns about plea bargaining and the victim's role, some advocates have raised concerns about the unique impact of plea bargaining in cases of VAWG. The most salient gender concerns of plea bargaining include its regard for female victims' voice and agency, survivor safety including child protection, the effects of various power dynamics, the impacts of plea bargaining on female defendants, recidivism and deterrence, and procedural protections.

Vulnerability is real. It's breeding abuse and violations, though (vulnerable women) can't tell it to your face. But is the system prepared to look deeper into such injustices and understand that these people were not taught to speak out? If not, we will cause them a double portion of discrimination. In the Judiciary, the moment a judge shuts up a woman, she doesn't talk again. She'll just look and listen, as she's losing custody of her children... Those small small things, they matter.

– Female Defence Attorney, Kampala

3.1. Striking Balance in Victim Opinion and Interest

3.1.1. Women's Agency⁶⁰

At each stage of the criminal justice system, it is important to identify ways to respect the agency of victims, while still upholding the necessary independence and authority of the prosecution and Judiciary. Thus women's agency, or decision-making power, can conceptually be sub-divided between *agency over her participation in the process* and *decision-making authority over the outcome of the case*.

With respect to the former, a victim-centered criminal justice system should avoid putting pressure on victims to participate or testify at plea bargaining sessions, while keeping it as easy as possible for them to participate and exercise their rights *if they desire*. With respect to the latter, the agency of the victim to decide the outcome of a case is necessarily limited once she has made the choice to engage with the criminal justice sector, rather than bringing the dispute as a civil case or through an informal mechanism. In this sense, her agency is limited.

A bedrock of criminal law is that the victim is *not a party to the case*, as the prosecutor and Judiciary must make

⁶⁰ For an excellent analysis of women's voice and agency, see BEYOND BORDERS, CEDOVIP, AND ICRW, WHOSE JUSTICE? WHOSE ALTERNATIVE?: LOCATING WOMEN'S VOICE AND AGENCY IN ALTERNATIVE DISPUTE RESOLUTION RESPONSES TO INTIMATE PARTNER VIOLENCE, (March 2016). In that report, which we adopt here, agency is defined as "a woman's ability to make decisions about one's own life and act on them to achieve a desired outcome, free of violence, retribution, or fear" and voice defined as "a woman's ability to speak up and be heard, and to shape and share in discussions, discourse, and decisions." *Id.* at 5.

independent decisions, within the confines of their discretion and the law, on how to proceed with a case and under what circumstances a case should be resolved. Even so, women's agency can be preserved to the extent of her participation in the process and requirements that the plea agreement adequately consider her interests and, where possible, her views. The more aware women and girls are of options to participate, the greater their opportunities to "act" in plea bargaining.

3.1.2. Women's Voice

Women's voice indicates the prioritization of female perspectives and opinions in the plea bargaining process. Respecting and privileging the voices of women and girls who have been victimized is of utmost importance in achieving gender justice through plea bargaining:

We actually need (victims) more than they need us. It's my case at the end of the day, but I should take the lead on her behalf.

- Female State Attorney, Kampala

Where a State Attorney doesn't involve the victim, you are going to have many witnesses turn up in (the DPP's office) asking 'How is this case concluded? I wasn't in court. How come this man who wronged us like this is now seen around the village?' The involvement of the victim ultimately promotes accountability. How are you hearing a case when people are not there, just because you have 'the mandate to prosecute'? Who are you prosecuting for, Uganda per se?

- Female Legal Advocate, Kampala

In actuality, the ODPP is responsible for representing the State's interest of "justice." Nevertheless, the voices of victims can and should still be respected while the prosecutor maintains independence and informed discretion in negotiating plea bargaining arrangements. Interestingly, involving the victim's articulated *opinion* and her *interest* are not always the same. For example, a victim may say that she wants a case to be dropped, when in fact this is based on years of overt and covert community pressure and gender norms that prevent her from making a meaningful, self-interested choice. Such a survivor of violence may want justice, but may have greater fear of testifying and bringing shame on herself or her family:

I had a case where a 56-year-old woman was raped by a 21-year-old on her way to church. At first she wanted justice when she complained. But after time had passed, she didn't want to 'undress herself' before the public, so she refused to testify or participate in plea bargaining. Then the plea bargain was lenient.

-Female State Attorney, Kampala

Similarly, a victim who insists on prosecution over plea bargaining may not understand the *risks of the case* and the greater likelihood that her offender will be acquitted and released in full trial.

In new cases the accused and the complainant both have a lot of energy and aren't willing to plea. The victims want to be heard. If they insist, we can send it to trial. I may have complaints made against me at an administrative level if I push a case to plea bargain and the victim doesn't want to.

- Female State Attorney, Kampala

In other instances, a prosecutor may feel strongly that a case "deserves" a trial and should not be plea

bargained. In the same way, prosecutorial discretion should be harmonized with the opinion of the victim before foregoing the plea bargaining option, particularly if the trial relies on victim testimonies. One RSA discussed such a case where an elder brother defiled his 5-year-old sister and the judge released him on bail:

As it is now, plea bargaining benefits perpetrators like this more than the victim. So I insisted the case go to full trial so that the details come out. By the time I make such a decision, I've spoken to the mother and ensured she's interested. I can't gamble. If she changes her mind, I'll lower my sentence and plea bargain for at least get 10 years. I don't want them to lose interest altogether.

- Female State Attorney, Kampala

Best practices in plea bargaining VAWG crimes require that any deviation from the victim's stated preferences should be done in conversation with the victim whenever possible. Still, a victim does not, and should not, have "veto power" in plea bargaining. This would undermine the system, and could pose a risk to her safety if she is perceived as obstructing the rights of the accused. A victim also cannot reject a plea agreement once it has been presented to a judicial officer. Thus for plea bargaining to satisfy the victim and privilege her voice, it is critical for the process to involve her from the earliest stages (See Annex VI, *Step-by-Step through the Plea Bargaining Process*).

In reality, victims are often not afforded the opportunity to meaningfully participate. The Guidelines, therefore, need *in-built procedural and accountability mechanisms* to ensure that the views of vulnerable victims are intentionally solicited, heard and addressed (See, e.g., Annex VIII for *Suggested Plea Bargaining Form Revisions*). Prior communication with witnesses about the file, the strength of the case, and supporting victim impact assessments remain vital for preserving women's voice in plea bargaining VAWG cases.

If victims' voices are to play a key part of the process, this also calls for greater *sensitization of victims* so that their initial wishes do not contravene their own ultimate interests, such as their safety, procedural protections, and sustainable justice including freedom from violence in the future. In the event that a complainant does speak (or neglects to speak) out of fear, economic dependence, or other societal forces, prosecutors who have been sensitized on handling vulnerable cases can even empower survivors of VAWG to overcome various pressures on them to withdraw the case, as the girl in this narrative likely experienced:

There was a case that came to me where a 17-year-old 'street girl' was defiled by a lame beggar. The victim returned to the police station and made an additional statement saying she was not interested in the case, and after she dropped it we could no longer trace her. The defence used the offender's reliance on a wheelchair as a mitigating factor to negotiate down to five years in prison. I accepted it because the victim's statement in court would otherwise lead to his automatic acquittal.

- Female State Attorney, Nakawa

3.1.3. Voicing Feedback

When considering 'just' outcomes, the ODPP should follow-up after the plea bargaining session to solicit feedback, inform any absent victims of the case's conclusion, and estimate the impact of the plea agreement on the survivor's ongoing vulnerability and vulnerability of other women and girls due to successful deterrence or risk of recidivism. Conflicting responses may indicate areas for improvement. For example, when interviewing a respondent immediately after the plea bargaining results were communicated to her that the perpetrator was released, she conveyed satisfaction, as well as ongoing fear and doubt of the punishment's deterrent effect:

[Do you feel that justice was ultimately served in your case?] Yes, I got justice. But I usually move with

(my children). I need to be more protective now. Defilement is getting worse. People just get defiled and they move on.

- Mother of 3-year-old Aggravated Defilement Survivor, Kampala

The right for victims to be heard and air complaints through a feedback mechanism is among the tenets of the Client Charter of the ODPP, which also stipulates such provisions as:

- Quality, responsive, non-prejudiced services;
- Gender-sensitivity in delivery of prosecution;
- Fairness and transparency; and
- Protection of human rights, e.g. for the elderly, illiterate and youth.

The 2014-15 Client Charter is now slated for revision. Additional protections will also be enshrined under the *Witness Protection Bill* that is also currently under formulation.

3.2. Power Dynamics

Power dynamics are not inherently considered or mitigated by the plea bargaining system. The extent to which it expands or restricts the options available to the less powerful, which in VAWG cases is typically the victim, depends on the competence of its actors. For example, power dynamics may affect a victim's willingness to share freely with a prosecutor who is not gender-sensitized:

(State Attorneys) feel like you're disturbing them because they're paid a salary and not from your pockets. They even patronize the victims: 'I'm not paid enough, I'm so busy, you're delaying me, sit there...' They don't offer any counseling. Many of the defilement victims who are teens are very irritated because they actually love that man and it's the parents who reported him, saying 'He misled my daughter.' So then the daughter becomes defiant. But instead of sitting down and counseling her or saying, 'You should listen to what your mother is saying' the State Attorney just says to the victim, 'Fine, it's your life.' Then her mother goes back feeling so demoralized.

- Female Defence Attorney, Kampala

Imbalanced power dynamics also come into play when survivors are intimidated by speaking out in court, especially in front of their attackers. However, as noted in Section 5 the option exists for victims to remain shielded behind the prosecution under plea bargaining.

3.3. Child Protection

Similarly, the plea bargaining process has the potential to prioritize and protect the unique needs of children. As discussed in Section 5, plea bargaining may shelter children from exploitation or re-traumatization by removing the child from the courtroom altogether.

3.4. Potential Benefits to Female Defendants

As it stands in Uganda, there is limited availability of State Briefs for accused persons on remand. Thus poor women who lack capital to invest in a private defence attorney have less opportunity to benefit from plea bargaining. The research also indicated a recurring perception that the plea bargaining cause list is less accessible to women.

Women are left out of the cause lists. I don't know whether people pay to get on the cause lists or what.

- Female High Court Judge

Rarely do women plea bargain. Though most could have their charge amended because their cases aren't so grave as these lucky men getting light sentences. We need more sensitization in the women's prison.

- Male State Attorney, Kampala

While significantly more men have made use of plea bargaining in Uganda, the mechanism should be deliberately expanded to include cases of female offenders. Plea bargaining has already had positive impacts in cases of female accused persons, for example those who have mitigated murder charges that previously failed to consider a history of domestic violence. While the "battered spouse defence" is not officially recognized in Uganda, in practice, some prosecutors consider this as a mitigating factor. Its use is still limited and can likely be expanded to protect more women under plea bargaining:

Domestic violence is a drop of water into a glass. Eventually it will pour over. I had a case of a father who was always beating the mother, so one day their son killed him. Some lawyers don't know to bring those issues out—domestic violence, alcohol use—but it would have mitigated their crime.

- Male State Attorney, Kampala

No one is advising accused women that raising domestic violence could help mitigate their sentences. Defence lawyers are doing an injustice to them. At the ODPP we have benefited from the training that CEDOVIP provided and there must be a similar training for advocates on State Brief since not all of them are knowledgeable.

- Female State Attorney, Kampala

3.5. Victim Blaming and "Forgiveness"

Victim blaming is never appropriate. Some of the Key Informants in this research even called female victims "bitter" or hostile toward "reconciliation" if they insisted on a custodial or deterrent sentence, or preferred a full trial to plea bargaining. In addition, many justice sector officials put an unusually high weight on the accused "repenting" by agreeing to plead guilty or asking for "forgiveness," without considering the multitude of factors that lead someone to plead guilty, the cyclical nature of VAWG (including the well documented "apology" phase in the middle of seasons of violence), pure acting on the part of the accused, and the likelihood of ongoing violence. Victim blaming and the significant societal and justice sector pressure on the victim to "forgive" or "reconcile" often undermines women's voice, agency, and safety in their pursuit of justice.

3.6. Gender-Proofing and Victim-Centering the Process

Since its inception, the plea bargaining process has not been specifically designed or tailored to address the unique needs and challenges of VAWG cases. Nor does it have mechanisms that take into account broader issues of gender equality or survivor safety. Yet if done effectively, plea bargaining may promote accountability and deterrence of domestic-related crimes such as intimate partner violence by enhancing the role of the victim. See Annex VI for a sample plea bargaining process where the interests of VAWG victims are protected and where they are not.

3.7. Compensation to Victims

Many victims cannot afford to hire a private attorney for filing an additional civil case to account for costs and damages incurred through the violence. Such cases are known for being lengthy, expensive, and often duplicative of the criminal case. In cases of VAWG, there are instances in which compensation can be appropriate if ethically and securely negotiated and transferred during the – particularly in the case that a victim suffered physical harm, incurred hospital bills, or sustained other losses that were not sufficiently

recouped through the restoration of property. The plea agreement must set compensation at a reasonable amount, take due effort to ensure the compensation is justified to avoid creation of *perverse incentives*, and should be paid immediately to the victim herself, or in the case of a child victim, to her guardian for use on her direct behalf. **Compensations should not be used in lieu of an appropriate custodial sentence.** Plea bargaining must ensure that punishment will actually end the violence and hold the accused accountable; compensation alone will not achieve these ends or deter wealthy perpetrators from reoffending.

Recommendations

In light of the primary and secondary research conducted for this report, we make the following recommendations in order to strengthen the plea bargaining mechanisms in Uganda, to maximize its potential benefits for survivors of VAWG and reduce the primary objections and barriers to its success. Specific recommendations fall into five primary categories: (1) improve provisions for victims' rights, role, and voice in plea bargaining, (2) address unique challenges faced by victims of VAWG, (3) improve transparency, consistency, and appropriate sentencing, (4) improve support for victims of violence in the criminal justice system, (5) improve justice sector data quality, collection and monitoring, evaluation, accountability, and learning (MEAL) systems, and (6) general process recommendations. Each of these recommendations is discussed in detail below.

Specific Proposed Mechanisms

- Develop ODPP Prosecutor Guidelines
- Revise Sentencing Guidelines
- Revise Schedule 1 Form Plea Bargaining Agreement
- Create Victims Support Office and Social Workers
- Procedural and Gender/Trauma-Sensitivity Training
- Fast Tracking Mechanism for VAWG cases
- Revised Plea Bargaining Guidelines
- DPP Victim Charter
- Witness Protection Bill

1. Improve Provisions for Victims' Rights, Role, and Voice

Although the framers of plea bargaining in Uganda sought to increase the victim's role in the process, significant obstacles exist to making this right a reality. Yet ensuring meaningful victim participation is critical to the success of plea bargaining as a whole and thus should be a priority for the justice sector.

1.1 Amend Guidelines to Clarify Victims' Rights.

The Guidelines should be amended to clearly articulate the rights of victims, beyond the right to have their "interest" considered in the final plea agreement: to be kept informed, to be consulted, to have their interest and views considered, to be present, and to present objections and provide an impact statement (see Section 7 above). The Guidelines should include affirmative duties on specific actors to protect those rights, and provide clear accountability and enforcement mechanisms.

To provide the strongest protection, the Guidelines themselves should be amended to enshrine victims' rights in plea bargaining. In the interim, the ODPP should develop internal guidelines for all prosecutors clearly

setting out victims' rights, detailed protocols for prosecutors to actualize these rights, internal accountability measures, and consequences for failure to comply. All prosecutors should be trained on the importance of victim participation and protocols.

1.2 Ensure victims understand the process, are advised of their rights, and understand the basis of the plea agreement in "their" case.

The ODPP should issue Prosecutor Guidelines with specific protocols regarding interaction and communication with victims of violence, including:⁶¹

- Contact victim before commencing plea negotiations.
- Thoroughly explain (via phone or in person) the criminal justice process, plea bargaining, and any applicable Prosecutor and Sentencing Guidelines.
- Explain possible charge and sentence negotiation options.
- Clearly explain the victim's rights and scope of her role.
- Solicit input from the victim on possible charge and sentence reductions, explaining that this will be kept confidential.
- Invite the victim to supply additional facts or information that could be beneficial to the prosecutor, for example if the police report failed to mention a history of domestic violence, the scope of injuries or damages sustained, or the type of weapon.
- Clearly explain that the victim is permitted to attend the plea hearing should she so desire, and that the court will facilitate her transportation (or in child-related cases, the transportation of a minor victim and her/his guardian).
- If the final plea agreement deviates from what victim requested, the prosecutor must explain the reason(s) to the victim or complainant.
- During the plea hearing and sentencing, the victim is encouraged to speak and provide an impact statement or express views contrary to the plea agreement.
- Explain to the victim the mechanism for complaints.
- Inform the victim of the case outcome and the perpetrator's release date.

1.3 Provide Sufficient Resources to Promote Victim Participation.

The research revealed a number of logistical and resource obstacles to victim participation in plea bargaining.

- *Airtime.* The ODPP should increase airtime allocation to allow prosecutors to contact victims by phone.
- *Victim Consultation Transportation.* The ODPP or Judiciary should provide transportation funds for the victim's/complainant's travel to meet with the prosecutor to discuss the potential plea deal, where in-person consultation would be in the best interest of the victim.
- *Victim Plea Hearing Transportation.* The Judiciary should increase allocation for victim transport and include funds for guardians of minor victims.
- *Police Victim Tracing.* The police should allocate additional staff and resources to tracing victims.

⁶¹ See, e.g., Michael M. O'Hear, Plea Bargaining and Victims: *From Consultation to Guidelines*, 91 MARQ. L. REV. 323 (2007).

1.4 Address Logistical Obstacles to Victim Participation.

Prosecutors identified the lack of victim contact details, missing police files, inadequate time before plea bargaining sessions, and delays as additional logistical obstacles to victim participation.

- *Contact Details.* JLOS should identify mechanisms to improve the capture and availability of victim/complainant contact details. This may include police training on the importance of documenting this information, transferring victim/complainant contact information to the court file or prison records, or developing a separate DPP file from the police file.
- *Time.* The Judiciary should provide an additional week before plea bargaining sessions to allow prosecutors sufficient opportunity to contact victims and defence counsel.
- *Missing Files.* Poor record keeping and file management is a critical issue throughout JLOS institutions and has a significant negative impact on public confidence, corruption, and the effective delivery of justice. Thus it is unsurprising that missing files also negatively impact victim participation, as well as the overall success of plea bargaining. To address this, police will need to conduct an overhaul of their file management protocols, accountability measures, and infrastructure. As an alternative or in addition, we recommend that the ODPP create and maintain its own files, duplicating the police file evidence and victim/witness details. This would not only allow for easier contact with victims, but would also improve the prosecutor's ability to prepare for plea negotiations and/or trial well in advance.

1.5 Amend Guidelines to Create an Affirmative Duty on Judicial Officers.

While the primary duty-holder of protecting victims' rights is the prosecutor, the Judiciary should have an independent accountability role. Drawing from the South African and the Arizona State (USA) systems, we recommend amending the Guidelines to include a provision precluding the court from accepting a plea agreement unless the following conditions are met:

- Prosecutor advises court that reasonable efforts were made to confer with the victim before entering into plea negotiations;
- Prosecutor advises court that reasonable efforts were made to give the victim notice of the plea hearing and inform the victim that s/he had a right to be present and heard; and
- Prosecutor advises the court of how the victim's interest and views have been taken into account in the plea agreement.⁶²

1.6 Establish Monitoring, Evaluation, Accountability, and Learning Systems.

Design and instate MEAL systems to ensure that victims' rights and interests are being protected in plea bargaining (See below).^{3,3}

2. Address Unique Challenges Faced by Victims of VAWG

In addition to obstacles faced generally by victims of crime, the research revealed that women and girls who have experienced GBV have unique and often insurmountable challenges in asserting their voice, rights and interest. To ensure justice and protect the rights of survivors of VAWG, JLOS institutions must address these unique needs.

2.1 Develop a Fast Tracking Mechanism for Cases of VAWG.

As noted above, women who have been victims of domestic violence or other gender-based crimes experience

significant pressure from family, community, cultural norms, and even the PJS to withdraw a complaint and/or to "forgive." They often also experience significantly more shame than victims of other forms of violence and a societal pressure to hide the abuse, particularly after significant time has passed and the girl is older or the women re-married. Given that these crimes are often in a domestic setting, there is also a considerable risk of ongoing or repeated violence, particularly if the victim appears to be cooperating with the prosecution. The longer a case sits, the more likely a woman is to succumb to the pressure to "lose interest," refuse to testify, or agree to "forgive" her assailant. This time lag was consistently identified in the KII as the key obstacle not only to victim participation in plea bargaining, but also to other forms of criminal accountability for VAWG. As such, we strongly recommend developing a fast tracking mechanism for cases of VAWG, both for plea bargaining and for full trials. A corollary recommendation is to create specialized courts to adjudicate cases of VAWG, which not only provides additional specialization and gender-training for judicial officers, but can also assist with fast-tracking all cases of VAWG.

2.2 Training.

To date, plea bargaining training has centered on the mechanics of the process itself. Essential gender training is needed, however, on the rights and role of the victim in plea bargaining, the impacts of trauma and domestic violence on victims, and sensitization on the power dynamics and pressures that would lead a victim to "agree" to forgive, refuse to testify, or request that her assailant be released.

2.3 Additional Means for Women and Girls to be Heard.

Women and girls who have been violated should be afforded a range of avenues through which to provide their input and express their views in the plea agreement. The options should maximize victims' agency, protection, and voice. This includes presenting victim impact statements in open court, over the telephone to the prosecutor, during in-person meetings with the prosecutor, via *in camera* meetings with the judicial officer, or in writing. Resources for reliable, confidential *in camera* communications are particularly critical in these cases given the power dynamics between victims and perpetrators, the sensitive nature of the crimes, and the risk of ongoing violence.

The ODPP should issue clear guidelines to prosecutors to protect the confidentiality of the victim's input during plea negotiations and to never use the victim as a negotiating tactic—for example stating that the State Attorney would accept a lesser sentence, but the victim is insisting on a higher sentence, or that the victim is pushing the prosecution to take action. Such statements expose women to re-victimization and risk violence from the accused, particularly in cases of intimate partner violence.

2.4 Provide Option for Female State Attorney in Cases of Sexual Violence.

Victims of VAWG intimated a preference for female officials in handling their cases. Given the sensitive nature of sexual violence, many women are more comfortable speaking with a female prosecutor rather than providing personal and intimate details to a male prosecutor. We recommend giving female victims of sexual violence the option of working with a female prosecutor and/or giving women the option to provide input and preferences to a female victim advocate or female para-social worker, rather than directly to the male prosecutor.

3. Improved Transparency, Consistency, and Appropriate Sentencing

Transparency is critical to avoid the pitfalls that other jurisdictions have experience in implementing plea bargaining, including to improve its legitimacy, public confidence, and to ensure protections for women and girls. Moreover, without effective sentencing ranges, clear guidelines on how to weigh specific aggravating and mitigating factors, and accountability measures, sentencing will continue to reflect the biases of the individual prosecutors and judicial officers. This leads to sentences that undermine the rights and protections for women and girls who have been victims of violence.

⁶² See Arizona Criminal Code §13-2234.

⁶³ A right without a remedy leads to ineffective realization of that right. For example, a 1997 study in the U.S. found that "approximately 50% of victims of violent crime had not been informed of plea bargainings, even where they had a legal right to be consulted by the prosecuting attorney" due to lack of enforcement. Verdun-Jones and Tijerino, *supra* note 36, at 10.

DPP Internal Guidelines

- Communication with Victims
- Rights and Protections for Victims
- Guidelines for Charge Negotiations
- Guidelines for Sentence Negotiations
- Procedures for Documenting Decisions and Accountability
- Sensitivity to Gender and Power Dynamics
- Guidelines for Balancing Victims' Interest, Victims' Stated Preferences, Public Interest, and the Goals of Sentencing

3.1 Develop published Prosecutor Guidelines that outline specific and detailed charge and sentence bargaining ranges and procedures.

These would not be able to cover every variation of facts, but, as demonstrated in other jurisdictions, can cover the majority of charges and fact scenarios. The guidelines should include accountability measures, including prohibiting prosecutors from deviating from the guidelines without supervisor approval. Prosecutors should always record the factual and legal basis for downward adjustments in charges or proposed sentences.

3.2 Revise Judicial Sentencing Guidelines to include sentencing ranges for plea bargaining, clear and transparent aggravating and mitigating factors, and mechanisms for enforcement.

- Revise Sentencing Ranges.* To be effectively adopted, sentencing ranges and minimums should more accurately reflect the sentencing gradation necessitated by diverse facts, provide sufficient incentive to plead guilty, while maintaining the goals of sentencing (i.e. punishment, deterrence, restraint, and rehabilitation).
- Application of Sentencing Guidelines to Plea Bargaining.* The revised Sentencing Guidelines, with new minimums and transparent factors, should be expressly applicable to plea bargaining. Meaning, that even in plea bargaining the minimum sentence should apply.
- Weight of Aggravating and Mitigating Factors.* The Sentencing Guidelines should provide guidance on the weight to afford specified aggravating and mitigating factors.
- Domestic Violence Victimization as a Mitigating Factor.* In considering a charge of murder or manslaughter, whether the accused was a victim of severe and repeated domestic violence by the deceased should be a mitigating factor in sentencing.
- Survivor Safety as Aggravating Factor.* The safety of a survivor of domestic violence should be a key factor in determining whether or not to impose or lengthen a custodial sentence.
- Intimate Partner Relationship as Aggravating Factor.* A "domestic" relationship between the victim and accused should be an aggravating factor at sentencing.
- Judicial Record.* Amend Plea Bargaining Guidelines to require the judicial officer to state on the record the aggravating and mitigating factors that justified the final plea bargained sentence and reasons, if any, for deviating from the Sentencing Guidelines.
- Time on Remand.* The Plea Bargaining Guidelines should be amended to clarify whether or not time spent on remand is deducted from the sentence proposed in the plea agreement.

3.3 Develop Monitoring, Evaluation, Accountability, and Learning systems to ensure appropriate plea bargaining sentencing (*See below*). This includes strengthening the data collection capabilities and the Plea Bargaining and Sentencing Task Forces. Additional research is needed regarding whether mandatory *sentencing minimums* are needed in Uganda to ensure consistency and accountability in sentencing of cases of VAWG.

4. Improve Support for Victims of Violence in the Criminal Justice System

4.1 Amendments to ODPP Client Charter. The ODPP is in the process of revising the existing Client Charter from 2014-15, which set forth specific victims' rights including opportunities to receive accurate information and offer feedback to the ODPP on points of (dis)satisfaction.

4.2 Sensitization on victims' rights and role and the services offered by the ODPP, *e.g.* through court open days, posters and radio shows.

4.3 Include strong victim support provisions in the proposed Witness Protection Bill.

4.4 Continue expansion of Complainants' Rights Office within the Directorate of Public Prosecutions.

Ensuring that victims' right to information and input are adequately provided for in plea bargaining takes additional prosecutor time. Some jurisdictions have adopted victim advocates or social workers within the ODPP to provide support for victims, keep them apprised of case progress, inform them of their rights and responsibilities, solicit their input into plea agreements, facilitate victim impact statements, and communicate with the prosecutor. The ODPP is already considering creating a Victims Unit and we recommend fully funding and utilizing this new mechanism to protect the rights of women and girls in plea bargaining.

4.5 Train prosecutors and defence counsel in gender-sensitive and victim-centered case management. This includes appropriately identifying domestic violence situations, as well as training in soft skills (*e.g.* courtesy, patience, diligence, integrity) and counseling and referring victims. But that alone is not enough. A prosecutor may try to make a phone call to the victim, but if s/he lacks information about the complainant's background or home situation, the investigation often stops there. Hence, the placement of court Social Workers should be expanded to the plea bargaining program to facilitate mandatory **victim impact assessments**. Social workers should be required to compile social inquiry reports to which State Attorneys can refer to bolster their cases.

5. Improve Justice Sector Data Quality, Collection, and MEAL Systems

5.1 Revise Plea Bargaining Form and Plea Bargaining Session. Reports to capture victim information, relationship between the accused person and victim, victim and accused gender, and victim participation (*see Annex VIII*).

5.2 Standardization and training for clerks and registrar staff in uniform data collection and reporting.

5.3 Improve Plea Bargaining Data Collection. Gender disaggregate all monitoring data. Modify tools to consistently collect (i) all plea bargaining cases, whether in Special Sessions or otherwise, (ii) the original and final charge, (iii) sentence issued, including applicable sentencing guidelines and aggravating and mitigating factors considered, (iv) extent of victim or complainant participation, (v) sex of victim and accused, and (vi) nature of the relationship between victim and accused person.

5.4 Appoint an overall monitoring, evaluation, and accountability manager to collect and analyze plea bargaining data.

5.5 Modify Court Case Administration System (CCAS) to capture plea bargaining and victim information.

5.6 Sentencing Committee evaluate plea bargaining sentencing at the conclusion of every session to determine consistency and deviation from Guidelines.

5.7 Develop internal ODPP review and accountability mechanisms.

6. General Plea Bargaining Recommendations

For additional recommendations on enhancing plea bargaining in general, see *Annex IX*.

7. Recommendations for Further Research

- 7.1 Comprehensive Case File Review and analysis of plea bargained charges and sentences in cases of VAWG.
- 7.2 Victim satisfaction surveys to ascertain overall levels of satisfaction with the plea bargaining process and outcomes, after conclusion of “their” case.
- 7.3 Victim surveys six months after plea bargaining session to evaluate her safety, recidivism, and relationship with accused and community.
- 7.4 Research and analysis on the propriety of mandatory minimums for VAWG cases in the Ugandan context.
- 7.5 Research on the propriety and efficacy of the “battered spouse defence” in Uganda.
- 7.6 Perspectives of female accused persons regarding the plea bargaining option (which was precluded from this research by institutional barriers).
- 7.7 Comparison of sentences for similarly-situated female and male accused persons.
- 7.8 Budget analysis of the exact cost-savings affected by the plea bargaining initiative.

Conclusion

Plea bargaining is a positive initiative that has the potential to improve overall access to justice and rule of law, including gender justice for women and girls in Uganda. Many jurisdictions have only more recently adopted victim-centered and gender-sensitive approaches to plea bargaining after years of neglecting, or worse, causing additional victimization to survivors of violence and abuse. Early in its plea bargaining program, the Ugandan Justice System is well-situated to learn from these jurisdictions. By capitalizing on the opportunity to integrate victims’ voices, protection mechanisms, and other gender concerns into processes and procedures from the program’s inception, rather than as an afterthought, Uganda can avoid dangerous systemic pitfalls that have characterized trial waiver mechanisms in similar developing contexts.

Given the prevalence of VAWG in Uganda, and the unique power dynamics, gendered social norms, and cyclical aspects perpetuating such structural violence, it is critical that the justice sector ensures all rule of law initiatives, including plea bargaining, are tailored to address the specific challenges in combating this rampant abuse. We hope that to refine, adapt, and implement plea bargaining in the Ugandan context will place appropriate priority on how the initiative can protect women and girls from violence, ensure proper justice for crimes against them, and enhance the opportunity to empower victims through honoring their voice and agency in the adjudication of “their” criminal cases. The JLOS actors are best positioned to accomplish this, especially given that a number of proposed reforms are cost-neutral and can be folded into existing initiatives. In addition, the research found that leadership within the ODPP and Judiciary clearly supports protecting the role of victims in plea bargaining, and will support the process in continuing to address the unique needs of women and girls across the country.

Annexes



Annex I: Data Collection Tools

Available upon request.

Annex II: Violence Against Women and Girls Background

International Law on VAWG

The United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1981) underlines that *gender-based violence* (GBV) does not occur randomly, but rather because of a victim's gender and associated normative roles. The CEDAW instantiates GBV as "acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty." Rooted in unequal power relations, GBV can affect both males and females. However, as the primary targets, women and adolescent girls "suffer exacerbated consequences" as compared to male victims.⁶⁴ UNFPA highlights how, as a result of gender discrimination and their lower socioeconomic status, women have relatively fewer options and resources at their disposal to avoid or escape abusive situations and to seek justice. Women's sexual and reproductive health is also disproportionately impacted by GBV, including such effects as forced and unwanted pregnancies, unsafe abortions, traumatic fistula, and higher risks of contracting sexually transmitted infections or HIV.

GBV perpetrated against females, also termed *violence against women and girls* (VAWG), is defined by the CEDAW as "violence that is directed against a woman because she is a woman or that affects women disproportionately." The subsequent UN Declaration on the Elimination of Violence Against Women (DEVAW, 1993) further stipulates VAW as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivations of liberty, whether occurring in public or in private life." With far-reaching effects on victims and their communities, VAWG is a human rights violation with gross consequences for men, women, children, and society at large.

Given its global prevalence, elimination of VAWG remains a key priority of international leaders. The CEDAW and DEVAW enshrined international commitments to protect women and girls, and have been followed by other such instruments as the Convention on the Rights of the Child (1990), International Conference on Population and Development (1994), Beijing Platform for Action (1995), UN Security Council Resolutions 1325 and 1820 (2000, 2008), Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol 2003), Great Lakes Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children (2006), and Kampala Declaration on Refugees, Returnees and Internally Displaced Persons in Africa (2009), and UN Resolution on GBV Zero tolerance (2012).

The UN's 2015 Sustainable Development Goals (SDGs) also recognize gender equality and women's empowerment as cross-cutting goals that are prerequisites for development. The main targets for the fifth SDG—Gender Equality—are to end all forms of discrimination against women and girls everywhere, as well as to eliminate all forms of violence against, and exploitation of, women and girls in the public and private spheres. **A corollary SDG, Goal Sixteen, recognizes the centrality of access to justice, rule of law, and accountable institutions in achieving sustainable development.**

64 GENDER, HUMAN RIGHTS AND CULTURE BRANCH UNFPA, UNFPA STRATEGY AND FRAMEWORK FOR ACTION TO ADDRESSING GENDER-BASED VIOLENCE 2008-2011, at 7 (2008) https://www.unfpa.org/sites/default/files/pub-pdf/2009_add_gen_vio.pdf.

The Government of Uganda is party to all these international protocols, and has made symbolic progress towards its commitments on gender equality and the prevention of and effective response to VAWG in the form of numerous laws, action plans, and institutional measures.

Violence Against Women and Girls in Uganda

Gender inequality is manifested throughout the life cycle in countless ways in Uganda. Most critically, *violence* is perpetrated against women and girls in both private and public spaces, including but not limited to: physical abuse and assault; sexual violence such as rape and defilement; female genital mutilation; early childhood marriage, which is forced on an astounding 40% of girls⁶⁵; abandonment; trafficking of women and girls; controlling behaviors; sexual harassment at work and school; denial of inheritance rights; and widow abuse, including illegal deprivation of women's assets such as land, livestock, and property.

In Uganda, VAWG manifestations expand to include emotional violence, such as threats, intimidation, isolation, or humiliation, and economic violence, including prohibitions on work, taking earnings, and exclusion from financial decision making. Much of this takes place at the household level. As in most countries, domestic violence predominantly affects Ugandan women, who are six times more likely to be victims than men.⁶⁶ This form of abuse occurs between intimate partners or other interrelating persons, often rendering profound physical and psychological trauma to survivors over the course of many years.

Uganda's protections for women and girls are enshrined in its Constitution and codified in the Penal Code,⁶⁷ as well as in several relatively new laws, including:

- The Prevention of Trafficking in Persons Act (2009);
- The Domestic Violence Act (2010);
- The Prohibition of Female Genital Mutilation Act (2010);
- The Land Act (2010); and
- The Employment Sexual Harassment Regulation (2012).

Much of this legislation is ground-breaking in terms of rights for Ugandan women and girls. For instance, the Domestic Violence Act broadly defines a "domestic relationship" to include any form of family relationship, relationship similar to a family relationship, or a relationship in a domestic setting. In addition to physical and sexual abuse, the scope of Domestic Violence encompasses any emotional, verbal, psychological and economic abuse or coercive conduct that unlawfully demands property (e.g. land grabbing).⁶⁸ In spite of these broad definitions, the Act classifies Domestic Violence as a *misdemeanor* with a maximum custodial sentence of just two years. With such low penalties for violators of women's and girls' rights, it is evident that while legal protections are enshrined, actual justice for rights-bearers is often less accessible.

In recent years, a number of Action Plans have been launched to tackle enduring injustices for women and girls, such as the National Action Plan On Women (2010); National Action Plan on Protecting Survivors of Domestic Violence (2011); National Development Plan for Gender Equality (2010); the National Strategy for Girls' Education in Uganda (2015) and of relevance, the National Action Plan on Elimination of Gender-Based Violence (2016). This newest Action Plan for 2016-2021 purported objectives to: (1) prevent GBV and foster a 'zero tolerance' environment; (2) establish and provide comprehensive response, care and support services to GBV survivors; and (3) improve accountability and eliminate impunity for GBV.⁶⁹ However the policy remains disputed and under revision, and as such is largely unimplemented as of May 2017.

65 UN Women, Global Database on Violence Against Women in Uganda (2017), <http://evaw-global-database.unwomen.org/en/countries/africa/uganda?pageNumber=1> (citing UNICEF Global Databases 2016)

66 UGANDA BUREAU OF STATISTICS AND ICF INTERNATIONAL INC., UGANDAN DEMOGRAPHIC AND HEALTH SURVEY 2011 (AUG 2012), <https://dhsprogram.com/Pubs/Pdf/Fr264/Fr264.Pdf>; See Also MINISTRY OF GENDER, LABOUR, AND SOCIAL DEVELOPMENT, NATIONAL ACTION PLAN ON ELIMINATION OF GENDER-BASED VIOLENCE 2016-2021 (2016) ("National Action Plan").

67 See, E.g., UG CONST., cap. IV, arts. 20(1), 21 (1 and 2), 24, 25, 33 (1-5), 34, 44 (1995); Penal Code Act, CAP 120, ART.123; The Land Act, Cap 227.

68 The Domestic Violence Act §§ 2-4 (2010).

69 Ministry of Gender, Labour, and Social Development, NATIONAL ACTION PLAN ON ELIMINATION OF GENDER-BASED VIOLENCE 2016-2021 (2016) ("National Action Plan").

Despite these many legal provisions, protectionary measures, and strong rhetoric, intimate partner violence (IPV) and VAWG remain rampant and widely tolerated in Uganda. Over 51% of women ages 15-49 experience physical and/or sexual IPV over their lifetime, and some 35% experienced it in the last year. An additional 4% of women in the same age bracket have experienced sexual violence perpetrated by someone who was not an intimate partner at least once.⁷⁰ What's more, survivors are often re-traumatized or even re-victimized if attempting to report and prosecute their assailant, and many times lack meaningful social and legal protection from local government or the Justice System.

Enforcement of laws remains a pervasive challenge due to low reporting; social acceptance of many harmful traditional practices and gender norms; victims' fear of repercussion for prosecuting a member of their own clan or community; absence of special investigation and prosecution units⁷¹; and social stigma associated with being a victim of sexual or domestic violence. In addition, there are critical gaps within the administration of justice itself in cases of VAWG, including the lack of clear procedures and accountability for law enforcement; limited knowledge and skills to handle VAWG cases; negative attitudes towards victims of VAWG and low regard for VAWG cases; victims withdrawing cases due to family pressure or economic dependency;⁷² systemic and societal pressure on victims and complainants to settle through mediation or other customary procedures; failure of the courts to protect victims and witnesses; low prosecution and conviction rates; prolonged and intimidating court processes and delays; and the overall attitudes towards and effectiveness of formal justice channels.

The World Justice Project identified some of the institutional weaknesses contributing to negative perceptions of the Justice System. In 2016, Uganda was ranked 105 out of 113 countries scored for rule of law, where performance was based on 44 indicators across eight primary rule of law domains: Constraints on Government Powers, Absence of Corruption, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, Civil Justice, and Criminal Justice.⁷³ Under the Criminal Justice domain, Uganda scored 0.34 (where 1.0 is highest), ranking 15 out of 18 in Sub-Saharan Africa, and 93 out of 113 globally. Problem areas such as "effective investigations" and "timely and effective adjudication" have a profound impact on VAWG victims' willingness to proceed with prosecuting their offenders; thus it comes as no surprise that of those women and girls who recognize the act perpetrated against them as criminal, many will drop the case or never report at all.



70 UGANDA DEMOGRAPHIC AND HEALTH SURVEY 2011, *supra* note 66.

71 Research shows that special units respond more effective to VAWG. See, e.g., *Due Diligence Project, Regional Report Africa: Due Diligence and State Responsibility to Eliminate Violence Against Women (2013)*, <http://www.duediligenceproject.org/resources.html>.

72 *Id.*

73 WORLD JUSTICE PROJECT, RULE OF LAW INDEX (2016), <http://data.worldjusticeproject.org/#/groups/UGN>.

Annex III: Procedural Safeguards

Jurisdictions have adopted a range of procedural safeguards to help protect the rights of accused persons. For example, in South Africa, a plea agreement is not valid if the accused was not represented by a lawyer; the judiciary is required to provide an independent scrutiny of the process, including ensuring that the accused entered into the agreement freely and voluntarily and that the complainant's interest have been considered; the court provides an independent review of whether the proposed sentence is just; and the DPP issues annual directives, procedures, and limitations on plea bargaining and available benefits.⁷⁴

Kenya's new procedures provide for judicial scrutiny not only of the process, as in South Africa, but also of the evidence itself - to ensure there is a factual basis for the plea and to enter the factual basis on the judicial record. Kenya also limits the types of cases eligible for plea bargaining - precluding sexual crimes, genocide, war crimes, and crimes against humanity.⁷⁵ Nigeria requires judicial scrutiny of the process; the judge must be "satisfied" that the defendant is guilty, although there is not a prescribed mechanism for this or a requirement that the justification be recorded; and be "satisfied" that the sentence is just and has authority to reduce a sentence or recommend a higher sentence.⁷⁶ In all three countries, the judicial officer is precluded from participating in plea negotiations, presumably to ensure prosecutorial and judicial independence.

	Lawyer Access	Judicial Scrutiny of the Process	Judicial Scrutiny of the Evidence	Limitations on Types of Offences	Limitations on Available Benefits	Judicial Review of Sentence
Uganda		Yes	Confirm factual basis for agreement and reject if "miscarriage of justice"	No	No	Judiciary set the sentence and participates in plea negotiations
South Africa	Not valid unless Accused was represented	Yes. Also review of whether complainant interests were considered	No	No	DPP issues directives, procedures, & limitations on available benefits	Yes
Nigeria		Yes	Must be "satisfied" that guilty	No, but only available if prosecution is unable to prove case	No	Yes
Kenya		Yes	Ensure factual basis for plea; enters factual basis on the judicial record	Precludes sexual crimes, genocide, war crimes, and crimes against humanity.		Yes

74 Criminal Procedure Act 51 of 1977, § 105A.

75 Criminal Procedure Code, Cap 75 §§ 137F, 137H(1)(a), 137N.

76 The Administration of Criminal Justice Act 2015, Part 28 §270.

Annex IV: Case File Review of Recent Plea Bargaining Sessions

CASE FILE REVIEW							
516 Cause Listed Accused Persons from Selected Plea Bargaining Sessions: Kampala and Soroti High Court Circuits, December 2016 - May 2017							
Judicial Officer, Date and Location	Total # Accused Persons Cause Listed	# Accused Persons Successfully Plea Bargained	# Cause Listed for SV; # Successful; Sentence Range	# Agg. Defilement Convictions; Avg. Sentence	# Rape Convictions; Avg Sentence	# Plea Bargains Unsuccessful	# Cases Adjourned to Later Session
Justice Kwesiga, March 2017, Kampala	86	8	17 listed 4 successful All given 7yrs	4/12 7 yrs	0/5	78	0
Justice Murangira, March 2017, Kampala	45	8	9 listed 4 successful 5-8 yrs	2/6 5 yrs	2/3 avg 7 yrs one with 500,000 compensation	37	0
Justice Nyanzi, April 2017, Kampala	44	20	36 listed 17 successful 1-13 yrs	15/30 7 yrs 11 mos	2/6 7 yrs 6 mos	20	4
Justice Nyanzi, 5 April 2017, Kampala	37	28	24 listed 20 successful 6 mos-13 yrs Highest 13 yrs	18/22 7 yrs 5 mos (but some juveniles) Highest 10yrs	2/2 7 yrs 7 mos Highest 10yrs	7	2
Justice Kabanda, 18 April 2017, Kampala	73	30	12 listed 4 successful 2- 8yrs 6mos	3/9 5 yrs 2 mos	1/3 8 yrs 6 mos	31	12
Justice Nahamya, April-May 2017, Kampala	64	10	5 listed 0 successful	0/3	0/ 2	45	9

Justice Nahamya, 23 & 29 Dec. 2016, Kampala	106	78	25 listed 18 successful	15/21 6 yrs 2 mos Highest 10 yrs	3/4 4 yrs 4 mos Highest 9 yrs	28	0
Batema, 5-14 Dec. 2016 in Soroti	58	51	39 listed 33 successful 1-21 years (attempted defilement vs. 3 cts agg. defilement)	21/24 9 yrs 3 mos Highest 21 yrs	12/15 8 yrs 2 mos Highest 15 yrs	7	0
Batema, Juvenile session in Soroti, Dec. 2016	3 juvenile offenders	3	3 listed 3 successful Caution-2 yrs	3/3 convicted as juveniles 2 cautioned; 1 sentenced to 2 yrs; "avg" is then 8 mos.	0/0	0	0

Aggregate Data: Select 2016-17 Plea Bargaining Sessions (above)

Total Numbers and Overall Ranges:	516 Accused Persons* Cause Listed for Plea Bargaining (*including a limited but unknown number of juveniles)	236 (46%) Plea Bargain Agreements Successful 103 were SV Offenders (44%)	103 of 173 (60%) Persons Cause Listed for Sexual Violence Successfully Plea Bargained Sentence Range: Caution-21 yrs	81 of 211 (38%) Persons Accused of Aggravated Defilement Were Convicted Average Sentence: 7 yr 4 mos	22 of 40 (55%) Persons Accused of Rape were Convicted Average Sentence: 7 yr 5 mos	253 of 516 (49%) Plea Bargain Agreements "Failed" in Session and Were Sent to Trial	27 of 516 (5%) Plea Bargain Agreements Were Adjourned to a Later Session
--	--	--	---	---	---	--	---

SUMMARY CASE FILE REVIEW						
516 Cause Listed Accused Persons from Selected Plea Bargaining Sessions: Kampala and Soroti High Court Circuits, December 2016 - May 2017						
Total # Accused Persons Cause Listed	# Accused Successfully Plea Bargained	# Cause Listed for SV; # Successful; Sentence Range	# Agg. Defilement Convictions; Avg Sentence	# Rape Convictions; Avg Sentence	# Plea Bargains Unsuccessful	# Cases Adjourned
516 Accused Persons* Cause Listed for Plea Bargaining (*including a limited but unknown number of juveniles)	236 (46%) Plea Bargain Agreements Successful 103 were SV Offenders (44%)	103/173 (60%) Persons Cause Listed for Sexual Violence Successfully Plea Bargained Sentence Range: Caution-21 yrs	81/211 (38%) Persons Accused of Aggravated Defilement Were Convicted Average Sentence: 7 yr 4 mos	22/40 (55%) Persons Accused of Rape were Convicted Average Sentence: 7 yr 5 mos	253/516 (49%) Plea Bargain Agreements "Failed" in Session and Were Sent to Trial	27/516 (5%) Plea Bargain Agreements Were Adjourned to a Later Session

Actual Sentencing Trends

Of 516 cases cause listed, 236 were successfully plea bargained, including 81 defilement and 22 rape offenders. Sexual violence crimes therefore constituted 44% of convictions in the sample. Aggravated defilement incurred an average sentence of seven years and four months, and rape an average sentence of seven years and five months.

However, the above statistics are not fully representative of all plea bargaining undertaken thus far because of limitations to this data set, for example:

- It is not a random sample, but based on a convenience sample of reports available;
- It does not allow for uniform comparison of sentences for a charge because some persons were accused of multiple counts, and of those some were serving concurrent sentences; and
- It includes a limited but unknown number of juvenile cases, which are judged by different standards and receive lower sentences with a maximum of 3 years.

Annex V: Media Coverage

A full review of public perceptions about plea bargaining in Uganda is outside the scope of this report; however, media coverage of plea bargaining provides some insight. Many of the identified articles about the overall plea bargaining process were neutral to positive about its adoption in Uganda, portraying plea bargaining as a joint venture of the justice system, civil society, and general public:

Legal Aid Service Providers Network (LASPNET)...has partnered with the Judiciary to carry out the training, [saying] the plea bargain process is also aimed at helping the public have an active participation in the legal process.⁷⁷

Plea bargaining is hailed by supporters for reducing average costs from 1,500,000 UGX to only 300,000 UGX per case handled, and has been promoted publically as the answer to what the Principal Judge Yorokamu Bamwine called an "alarming" situation for inmates⁷⁸:

My Lords, the situation on the ground as regards workload is alarming...something must be done and we are the people to do it. Inmates in prisons are yearning for justice and so are their relatives and friends. We must approach reforms with a purpose. The current initiative is mainly to decongest prisons and make it possible for suspects who want to plead guilty do so at the earliest possible opportunity.⁷⁹

Chief Justice Katureebe insists that plea bargaining has tremendously reduced case backlog, while at the same time promoting reconciliation. Ever since the programme was launched at Kigo prison a year ago, close to 3,000 inmates have benefited from plea bargaining.⁸⁰

However, articles about specific cases tended to highlight particularly lenient sentences, especially in VAWG cases. For example, a gang rape case that was plea bargained in Soroti attracted national attention in 2015 for justifying arguably low sentences for two offenders:

...the lawyer representing the two told Court that since the accused had pleaded guilty (of gang raping a woman), they deserved leniency as per the Plea Bargaining Agreement. Having been guided by the counsels, Judge Wolayo sentenced the two to nine years each in jail to deter others from committing such offences.⁸¹

As did a ruling in August 2016 by the Head of the Criminal Division of Kampala High Court:

He handed a married man 10 years in prison for raping a 60-year-old woman fit to be his grandmother. The sentence...seemed too lenient, given that a convicted rapist is liable to a maximum penalty of death by hanging in the strict interpretation of the law. But (this) case was different. He pleaded guilty instead of going through a trial, thus saving court's time. The case typifies the judiciary's new "plea bargain" initiative.⁸²

⁷⁷ Bamwine Calls for Plea Bargain Process Adoption, NEW VISION (JUNE 2016), http://www.newvision.co.ug/new_vision/news/1426270/bamwine-calls-plea-bargain-process-adoption.

⁷⁸ Anthony Wesaka, Plea Bargain: A Case System the Judiciary Says will Curb Backlog, THE MONITOR (21 April 2015), <http://www.monitor.co.ug/artsculture/Reviews/Plea-bargain--A-case-system-the-judiciary-says-will-curb-backlog/691232-2692650-k7pb7l/index.html>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Gang Rapists Sentenced to 9 Years in Jail, NEW VISION (18 November 2015), http://www.newvision.co.ug/new_vision/news/1411871/gang-rapists-sentenced-jail.

⁸² Derrick Kiyonga, Plea Bargain Innovation Helps Clear 1,500 Cases, THE OBSERVER (3 Oct 2016), <http://allafrica.com/stories/201610030348.html>.

Annex VI: Step-by-Step Through the Plea Bargaining Process

Step 1: Arrest, Investigation, and Sanctioning

A crime is reported to the police. The accused is arrested and held in custody nearby the incident. The investigating officer conducts an investigation, makes a report, and recommends charges. The file is sent to SA for sanctioning.

When victims are not protected: Charges will not reflect the situation, dangerous offenders will be released on bail, and victims and the crime are belittled by the officers.

If victims are protected: Victim or Complainant will be interviewed by an officer trained in trauma- and gender-based interviewing techniques. Survivor safety will be of the utmost concern in case progress. Victim is not pressured to drop or mediate the case or “forgive” the accused; she is not required to meet with him.

Step 2: Deciding to Plea Bargain

Decision to plea bargain generally starts with the accused. Inmates are sensitized at prisons and interested defendants register with Officer in Charge. Defence attorneys visits the accused in remand and interview him to thoroughly understand the case. DPP gets list from Officer in Charge of prisons and State Attorneys pull the needed files from police stations. RSA peruses the file to evaluate the evidence and proper plea offers.

When victims’ voices are not prioritized: State Attorney contacts accused person or defence counsel to ascertain their plea offer. Victim or complainant are not contacted and not advised of her rights or procedure.

If victims’ voices are prioritized: The victim is contacted by ODPP and can specify if she would prefer a female State Attorney to represent her sensitive case. The appointed State Attorney is given enough time and facilitation to adequately consult the victim by phone or in person and gather a victim impact statement. In best case scenario, a social worker provides a social inquiry report with information gathered in person from the family and LCs, enabling the State Attorney to thoroughly understand the victim’s perspective and circumstances. Police officers have sufficient time and resources to trace victims that are difficult to locate.

Step 3: Negotiating the Agreement

State Attorney and Defence Counsel negotiate a plea agreement, with input from the judicial officer on sentencing.

If the State Attorney negotiates with priority on securing a conviction: The State Attorney responds in the absence of the complainant at the last minute with priority on securing a conviction no matter how low the sentence, and limited evidence on the aggravating factors and circumstances of the case. Victim is not involved and her safety and interest are not expressly considered.

If the State Attorney negotiates including the interest and views of the victim: Utilizing DPP-issued plea negotiation guidelines, prosecution provides the defence a first offer (either charge or sentence reduction) based upon the law, strength of the evidence and “prosecutability” of the case, nature and circumstances of the offence, both the best interest of the victim and the stated views of the victim or representative (including desire for compensation and length of custodial sentence, willingness to testify and impact on victim of testifying, interest in plea bargaining, and safety), and the public interest. The defence offers mitigating evidence and a counter-offer.

Negotiations continue. The victim is consulted prior to finalizing the plea agreement. Victim’s confidentiality is maintained throughout plea negotiations and victim is never blamed as the reason for higher sentence or compensation demands. If the final plea agreement deviates from the victim’s stated views, the State Attorney informs the victim of the specific reasons for the deviation. The final agreement conforms to DPP-issued guidelines for charge or sentence reductions. The defence updates their client on the final decision and together the parties draft a plea agreement.

Step 4: The Plea Bargaining Session

When victims do not participate and exercise agency: Victim is not informed of plea date or, if informed, not provided with means of transport. If victim attends plea hearing, victim not provided with the opportunity to make an impact statement, object to the plea bargain, or make a statement outside the presence of the accused and his family.

If victim participation and agency are prioritized: The victim will be notified in advance of the date set for the plea bargaining session and be given an opportunity to participate. The judiciary provides sufficient resources to cover victim transportation costs, including for the guardian(s) in cases of minor victims. Prior to the session, the State Attorney and defence meet with the judicial officer to advise of the plea agreement and seek general input on an appropriate sentence. All parties, including the victim or a victim representative, attend the session with the victim given the option to speak if present, or participate through CCTV or be heard in chambers. The Judicial officer provides independent and objective review of the factual and legal basis for the plea agreement, ensuring that the rights and interests of the Accused and victims have been protected, and issues a sentence in-line with Judiciary-issued sentencing guidelines and the parties’ agreement. If there

is compensation involved in the negotiation, it is transferred to the victim in view of the court. Compensation is never used in lieu of an appropriate custodial sentence.

Annex VII: When Plea Bargaining Agreements “Fail”

Case review and KIs indicated a high rate of unsuccessful plea agreements. The judiciary’s official reports, however, actually inflate the “failure” rate because they compare the total number of defendants on the cause list (those who signed up at prison to participate in plea bargaining) with the final number of successful plea agreements entered in court. Many reasons, other than the party’s inability to agree on terms, impact this number, such as:

- Police file could not be located or the wrong file was brought to court⁸³
Accused person was not produced in the session (including if deceased)
- Accused person was issued a Writ of Nole and should not have been produced in the plea bargaining session in first place
- Accused person had already been convicted and should not have been produced in the plea bargaining session in first place
- Accused person appeared on multiple cause lists
- Accused person opted out during the session or never tried to plea
- Lack of sufficient evidence to support prosecution case, which results in dismissal of charges

The research also revealed obstacles to securing a plea agreement that is favorable to all parties (prosecution, defence, and judicial officer):

- Lenient sentences from judicial officers after full trials cause SA to lose bargaining position in plea bargaining.
- Accused-person’s “forum shopping” for more lenient judicial officers, particularly where one court or RSA is “known” for being more lenient or strict on certain types of offences (e.g. defilement).
- Accused persons and defence counsel lack understanding of the plea bargaining process, including belief that PB is a “get out of jail free” card or mistaking it for amnesty.
- Accused person’s awareness that victim is no longer willing to testify or “interested” in the case. Defence knows that if witnesses do not show up, the case will ultimately be dismissed. Thus, for example, a man accused of rape would rather take the risk that the victim will not show up in 3 years when it comes to trial, rather than accepting a 10 year sentence in plea bargaining.
- Accused persons insisting on “ridiculously low” sentences that are not based on the law or evidence.
- Prosecutors insisting on strong-deterrence sentences for specific types of offences and unwillingness to reduce sentence during plea bargaining.
- Victims insisting that case go to full trial and prosecutors abiding by this request.
- Judges issues sentences in excess of what the parties had agreed-to.

⁸³ A number of KIs revealed that inability to locate or access the police file was a key obstacle to plea bargaining. The police and DPP share one file, which is kept in police custody. Prior to trial, the court file is sparse, often only containing the initial charges and plea. One SA recommended having a DPP copy of every police file, which would, among other things, enhance SA’s ability to contact victims and witnesses and allow additional time for trial preparation and timely discovery of missing evidence.

Annex VIII: Recommended Revisions for the Plea Bargaining Form

Age and sex of accused:

Age and sex of victim:

Accused person’s relationship to victim:

Intimate partner
Teacher or school-related
Religious leader
Family member: How related?
Other:

In court, how did the victim(s) participate?

Present at PB session or hearing
Absent at PB session or hearing
Consulted: How did you contact the victim(s)?
Phone call
Home visit
Other:
Attach Victim Impact Assessment and/or Social Inquiry Report

Additional case designations:

Domestic Relationship between Victim and Accused
Accused was security personnel
Accused was law enforcement
Accused had disability or impairment
Victim had disability or impairment

Plea Agreement

Original Charge
Original Offer
Negotiation Status: Adjourned, Agreed (not signed), Completed (signed), Failed
Amended Charge
Final Agreement
Remainder (custodial sentence remaining after remand time deducted)

Conclusion by

Plea Agreement
Plea of guilt
Other

Annex IX: Additional Recommendations for Plea Bargaining Generally

1. **Budget Analysis.** A full budget analysis of plea bargaining is outside the scope of this report. However, specific resources will be necessary to scale up plea bargaining in an effective and gender-sensitive way, including additional staff such as trained State Briefs and prosecutors.
1. **Independence of the ODPP and Judicial Roles.** Strengthen role and ownership by ODPP over plea bargaining process, which is currently driven from the Judiciary. Gradually reduce Judiciary's role in plea negotiations ("consultations") to ensure an independent judicial scrutiny of the process and protection of rights.
2. **Full Disclosure of Evidence.** Plea Bargaining can only protect the rights of accused person if there is a full disclosure of evidence. Additional research is needed to determine the extent to which this right is being protected.
3. **Plea Bargaining Integration.** Plea bargaining will be more effective if it is integrated into standard court operating process, rather than through plea bargaining sessions. The Judiciary and DPP should examine whether there are procedural mechanisms that enhance plea bargaining early in the justice process.
4. **Right to an Advocate for the Accused.** This is a key concern to the overall legitimacy of plea bargaining.

Notes

Notes

Notes

