





# FOR Pursuing Justice **SEXUAL and GENDER BASED** Violence in Kenya

Options for protecting and compensating survivors of sexual and gender-based violence



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*ACORD is a Pan African organisation working for social justice and development. Our mission is to work in common cause with people who are poor and those who have been denied their rights to obtain social justice and development and be part of locally rooted citizen movements. We are present in 17 countries in Africa, working with communities on livelihoods and food sovereignty, women’s rights, conflict and HIV/AIDS. We also advocate and campaign at Pan Africa level.*

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# Pursuing Justice for Sexual and Gender Based Violence in Kenya

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Options for protecting and compensating survivors of sexual and gender-based violence

## Preface

*A The Agency for Cooperation and Research in Development (ACORD) is a pan-African organisation working for social justice and development. With its headquarters in Nairobi, Kenya, ACORD has for the last three decades undertaken development initiatives in 18 countries in Africa with a focus on the poorest and marginalised areas. ACORD's interventions comprise relief, rehabilitation, and sustainable capacity building programmes for local and national organisations, as well as government institutions. ACORD has moved from addressing the consequences of poverty and exclusion, to more fundamental issues. The organisation focuses on four thematic areas, namely, Gender, Conflict, Livelihoods as well as Human Immuno Deficiency Virus/Acquired Immune Deficiency Syndrome (HIV/AIDS).*

ACORD's research history in the area of gender and conflict dates back many years. ACORD has made several notable contributions in these areas through publications and research documents such as *Gender Sensitive Programme Design and Planning in Conflict-affected situations<sup>1</sup> Research Report; Cycles of Violence; Gender Relations and Armed Conflict<sup>2</sup>* and *A lost Generation: Young People and Conflict in Africa<sup>3</sup>*. From 2006, ACORD has given priority to sexual and gender based violence in conflict and post-conflict societies as the focus for its gender theme. The goal of this emphasis was to facilitate the development of a culture of effective and efficient gender justice in the states that are in, or have emerged from, conflict. ACORD aims to do this by challenging impunity and bringing perpetrators of sexual and gender based crimes to justice while restoring the health and livelihoods of the survivors.

This study is therefore a continuation of ACORD's focus on sexual and gender based violence and builds upon a foundation that we have laid in alliance with other organisations. This study recognises that much work has been done in the general area of advocacy and service delivery for survivors of sexual and gender based violence. We recognise that across the continent multiple layers of activism exist to address sexual and gender based violence, whether in situations that are deemed to be overtly in conflict or otherwise.

The research and writing process has been informed by regional and international frameworks or protocols that have either investigated or supported women's involvement in post-conflict recovery initiatives.

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1 Judy El-Bushra, Asha El-Karib and Angela Hadjipateras, ACORD, January 2002

2 Judy El Bushra & Ibrahim Sahl, 2005

3 ACORD, May 2007.



Reference to the UN Resolution 1325, AU Protocol, ICGLR Declaration, the UN's Responsibility to Protect Convention, the Guiding Principles on Internal Displacement, the Arusha Tribunal and the Sierra Leone experience, among others, will be important. Even though this study is based on the Kenyan context, its ability to inform and be informed by other processes is critical.

We hope to contribute to Kenya's engagement on the question of protection and compensation for survivors of SGBV through this study. Practical law reforms and processes necessary to develop and implement a national strategy linked to regional and global instruments on sexual and gender based violence are emphasised by this publication. We hope to address the question of protection and compensation by providing information on what a truth commission would entail and facilitate the appreciation of the options, limitations and possibilities for women within this framework. The practicability of reparation trust funds, their management and efficacy for Kenya by drawing on other comparative experiences will also be explored.

Primarily this work is based on the premise that the state is accountable to its citizens, particularly when the breakdown of security is occasioned by the inability of the state and its instruments to provide security and protection, a fundamental principle of the social contract between people and government.

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## Abbreviations & Acronyms

|            |   |  |
|------------|---|--|
| ACORD      | - | Agency for Cooperation and Research in Development                         |
| ACPHR      | - | African Charter on Human and Peoples Rights                                |
| AG         | - | Attorney General   |
| AU         | - | African Union  |
| AIDS       | - | Acquired Immune Deficiency Syndrome  |
| BPFA       | - | Beijing Declaration and Platform for Action                                |
| CRC        | - | Convention on the Rights of the Child                                      |
| CEDAW      | - | Convention on the Elimination of All Forms of Discrimination against Women |
| DEVAW      | - | Declaration on the Elimination of Violence Against Women                   |
| DRC        | - | Democratic Republic of Congo   |
| FGDs       | - | Focus Group Discussions  |
| FGM        | - | Female Genital Mutilation  |
| FIDA-Kenya | - | Federation of Women Lawyers-Kenya  |
| GT         | - | Grounded Theory  |
| HIV        | - | Human Immunodeficiency Virus   |
| ICC        | - | International Criminal Court   |
| ICCPR      | - | International Covenant of Civil and Political Rights                       |
| ICTR       | - | International Criminal Tribunal for Rwanda                                 |
| ICTY       | - | International Criminal Tribunal for the former Yugoslavia                  |
| IDP        | - | Internally Displaced Persons   |
| ILC        | - | International Law Commission   |

|         |   |                                       |
|---------|---|---------------------------------------|
| INSTRAW | - | Institute for Research and Training   |
| KANU    | - | Kenya African National Union          |
| MSF     | - | Medicins Sans Frontiers               |
| NaCSA   | - | National Commission for Social Action |
| NFD     | - | Northern Frontier District            |
| NGOs    | - | Non-Governmental Organisations        |
| NTV     | - | Nation Television                     |
| OAU     | - | Organisation of African Unity         |
| PEP     | - | Post-Exposure Prophylaxis             |
| SADC    | - | South African Development Corporation |
| SASFS   | - | Semi-autonomous Social Fields         |
| SGBV    | - | Sexual and Gender-Based Violence      |
| SOA     | - | Sexual Offences Act                   |
| SOAWAR  | - | Society for African Women's Rights    |
| STI     | - | Sexually Transmitted Infections       |
| UDHR    | - | Universal Declaration on Human Rights |
| UN      | - | United Nations                        |
| UNGA    | - | United Nations General Assembly       |

## Glossary of Terms

|                                 |  |
|---------------------------------|--|
| <i>Accession</i>                | - A method by which a nation that did not originally sign a treaty's becomes party to it   |
| <i>Convention</i>               | - Internationally binding agreement between two or more states.  |
| <i>Declaration</i>              | - Formal statement, especially one embodied in an instrument   |
| <i>Domestication</i>            | - Passing laws that allow a country to use international agreements locally  |
| <i>Impunity</i>                 | - Exemption or protection of a person from punishment in blatant disregard of the law  |
| <i>In absentia trial</i>        | - Trial in the absence of a party to the trial   |
| <i>International instrument</i> | - A law that is applied beyond national boundaries.  |
| <i>Jurisdiction</i>             | - A court's power to decide a case or issue a decree   |
| <i>Juristic Person</i>          | - An entity, such as a corporation, created by law and given the legal rights and duties of a human being.   |
| <i>Locus Crimini</i>            | - The place where the crime was committed  |
| <i>Locus standi</i>             | - The right to bring an action or to be heard in a given forum   |
| <i>Massacre</i>                 | - Mass execution   |
| <i>Patriarchy</i>               | - Psychology of male domination in society and the subjugation of women to men   |
| <i>Ratification</i>             | - Adoption of an international instrument by a state   |
| <i>Ratione Materiae</i>         | - Jurisdiction by reason of the subject matter   |
| <i>Ratione Personae</i>         | - Jurisdiction by reason of the person concerned   |
| <i>Ratione temporae</i>         | - Temporary jurisdiction   |
| <i>Reparation</i>               | - The act of making amends for a wrong. Also means compensation for an injury or wrong, especially for wartime damages or breach of an international obligation. |
| <i>Rule of Law</i>              | - The doctrine that every person is subject to the ordinary law within a jurisdiction  |
| <i>Strict Liability Offence</i> | - Liability that does not depend on actual negligence or intent to harm, but that is based on the breach of absolute duty to make something safe.                |

## Executive Summary

Over time, women and children have borne the brunt of offensive cultural practices that perpetuate sexual and gender-based violence. Recurrent trends of violence before and after general elections in Kenya, and most notably after the 2007 General Election, have resulted in the rape, gang rape and defilement of many women and children.

This study exposes the lapses in responding to survivors of sexual and gender-based violence as well as effective remedies available to them in the 2007 post-election crisis. Law enforcement agencies arrived either too late to rescue survivors from the violence they faced during the crisis or never arrived at all. In almost all instances, the perpetrators went scot-free.

The government was complacent, indifferent or inept in dealing with the cases highlighted. In fact, serious cases of violence preceding elections in Kenya have never been addressed conclusively. The criminal justice system has failed to address the plight of the survivors of sexual and gender-based violence. There are relatively few convictions compared to the number of reported cases.

Poor police training on investigating sexual and gender-based violence cases frustrates the ability of prosecution agencies to secure convictions. The courts remain insensitive to the plight of the survivors of sexual and gender-based violence, medical officers insist on monetary considerations rather than humanitarian concerns before filling statutory reporting documents such as the P-3 forms --which are critical to sustaining a case in court. In the end, justice remains elusive for the survivors.

In addition, the government appears to have neglected its role as the guardian of the fundamental rights and freedoms of Kenyans by failing to accelerate legislative, administrative and policy measures that can alleviate the pain and suffering of the survivors of sexual and gender-based violence. Parliament has not amended existing laws to empower judges and magistrates to award compensation to survivors of sexual and gender-based violence. Further, there is no official policy or other legal measures that would guarantee reparation to the survivors of sexual and gender-based violence. The criminal justice system has, so far, been strictly centred on the accused person, notwithstanding the consequences of the assailant's acts, which may include infection with HIV, unwanted pregnancy, death, maiming and other health complications. While the traditional criminal justice system engenders a paradigm shift in dealing with sexual and gender-based violence cases by affording direct compensation to the survivor, such awards are nowhere near sufficient. The notion in such systems was that the award was more a 'benefit' to the survivor's family rather than a means of alleviating the survivor's conditions.

Whereas Kenya is party to a number of international instruments that have further and better provisions on the elimination of sexual and gender-based violence, it has not been quick to turn them into domestic law. The courts have also been reluctant to use already ratified international instruments in interpreting cases before them.

It is against this backdrop that this study analyses the prevalence of sexual and gender-based violence in Kenya. Because of the reluctance of various actors in the Kenyan criminal justice system, sexual and gender-based violence has found a safe breeding ground in the country.

The study questions the role of the police, prosecutors, courts, international community, government, human rights groups as well as culture in eliminating sexual and gender-based violence. It also identifies legislative, administrative and policy decisions needed to eliminate sexual and gender-based violence as part of restorative justice. Other measures include public education and awareness campaigns, empowering women and re-orienting culture in Kenya. There is also need to set up a Special Fund for the compensation of survivors of sexual and gender-based violence, as well as to sensitise the courts, the police, prosecuting agencies and Gender Desks. Working in consultation and coordination with the government, human rights groups and the international community can work to eliminate sexual and gender-based violence, while also establishing a credible Truth, Justice and Reconciliation Commission.



# Chapter 1

## WHAT IS SEXUAL AND GENDER-BASED VIOLENCE?

### 1.1 Key Definitions

Sexual violence is “any contact, gesture or act of exploitation of a sexual nature that is unwanted, or carried out without the consent of a person, which is imposed by physical force, threats, trickery, intimidation or duress.”<sup>4</sup>

From Bosnia’s rape camps, the horrors of Rwanda’s genocide to the atrocities in Northern Congo and Sudan’s Darfur region, the tally of body bags is only rivalled by another grim statistic: the number of women and girls raped and subjected to other forms of sexual violence<sup>5</sup>. In Bosnia, up to 50,000 women were subjected to sexual violence. Over a period of 14 years, 40 per cent of Liberia’s population suffered similar abuse. Just under half of those interviewed in a random study in Sierra Leone in 2000 had been raped -- in fact more than a quarter had been gang-raped.

Violence against women is a weapon of war, a tool used to achieve military objectives. Many forms of violence that women suffer during armed conflict are gender-specific in result and nature.<sup>6</sup>

The United Nations’ Institute for Research and Training (INSTRAW)<sup>7</sup> suggests that gender-based violence is rooted in prescribed behaviour, norms and attitudes on the basis of gender and sexuality. The prescribed norms and definitions of what it means to be a woman or a man, and how men and women are positioned vis-à-vis one another and other groups of men and women define this violence. These norms and definitions allow and even encourage violent behaviour within environments that assign privilege and hierarchical power to certain groups of men. Gender-based violence, therefore, is the enforcement of power hierarchies and structural inequalities created and sustained by belief systems, cultural norms and socialisation processes.

Understanding gender is critical to finding ways to end violence against women at the personal level as well as the community level, as well as to achieve wider development goals.

The Beijing Declaration and Platform for Action (BPFA) defines violence against women as any acts of gender-based violence that result in or could result in physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty -- whether occurring in public or private life.

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4 The Rome Statute of the International Criminal Court, 1998 (entered into force 1<sup>st</sup> January 2002)

5 Amy Goodman, ‘Sexual Violence and Conflict Wars on Other Survivors: The Scale of an Unspeakable Horror’, *The Economist* Print Edition, page 11.

6 See Amnesty International Report, 2004.

7 INSTRAW (2001) ‘Men’s Role in Gender-based Violence’, <http://www.un-instraw.org>

The Plan for Action has broadened the definition of sexual and gender-based violence to cover dowry-related death, sexual abuse of female children, marital rape, female genital mutilation (FGM) and other traditional practices harmful to women, spousal violence, and violence related to exploitation. It also encompasses physical, psychological or sexual violence occurring within the general community -- including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and trafficking in women as well as forced prostitution, and violence perpetrated or condoned by the State, wherever it occurs.

Kenya's Constitution guarantees protection from inhumane treatment. For instance, section 74 of the Constitution prohibits torture, inhuman and any degrading treatment. The constitution conforms to the definition of violence in the Beijing Declaration and Platform for Action. Female genital cutting, rape, domestic violence and widow disinheritance constitute torture and inhuman treatment.

Violence against women and girls persists in every country of the world as a violation of their human rights and impedes the achievement of gender equality, development and peace.<sup>8</sup> Economic and political crises as well as armed conflict worsen the vulnerability of women. They become prime targets during spells of these difficulties because aggressors often take them hostage, rape, sexually harass and exploit, kill or capture them as sex slaves. In many cases, the aggressors get off scot-free, leaving the women without remedy. It is important for governments to strongly condemn violence against women and put in place measures to eliminate it. It is their responsibility, and it is in the interest of the state to focus national policies and legislation to promote and safeguard the rights of women.

## 1.2 Why Sexual and Gender-based Violence Thrives

### 1.2.1 Culture and Tradition

Since the violation of women is normalised in pre-conflict situations. Sexual and gender-based violence does not only occur during war; it is rampant even where legal systems and institutions are working. Communities uphold, practise and normalise various forms of abuse against women that include female genital mutilation, early or forced marriage as well as virginity testing. The value attached to female chastity is so high that even where a woman is a survivor of sexual abuse, the typical community response is to isolate and stigmatise her. The shame and stigma attached to sexual violence, and the lenient penalties meted out on offenders in formal and traditional judicial systems, silence survivors.

### 1.2.2 Failed Institutions

The collapse of the rule of law in conflict situations encourages sexual crimes on a massive scale. In conflict situations, the protector turns into the perpetrator. Perpetrators and perpetrators of sexual crimes in conflict and post-conflict settings fall into three categories. The first consists of the armed and uniformed men fighting as government soldiers, rebel groups or external forces present in the conflict environment to restore peace. The second consists of the family and community members.

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<sup>8</sup> UN General Assembly Resolution: Resolution adopted by the GA on the Report of the Third Committee (A/61/438) 61/143. Intensification of efforts to eliminate all forms of violence against women

Last are the structures and institutions of protection (the government and its organs, the intervening agencies such as peacekeeping missions and their peace programmes, UN, AU, regional peace missions, humanitarian agencies, family and community structures). Because normal life is halted, government mechanisms have stalled and social services are no longer available, law and order frameworks, institutions and systems do not work at all, or if they do they are inefficient. .

It is often difficult to tackle impunity for sexual crimes committed during conflict because perpetrators and perpetrators often take up powerful positions in post-conflict governments. They can obstruct justice and use their power to intimidate survivors. Forces from the UN and regional institutions' such as the AU are normally deployed to help contain conflicts in the Great Lakes and other regions. Some of the peacekeeping troops, however, commit sexual violations. The UN and similar institutions refuse to take responsibility for these crimes. Their correction policy often entails forwarding offenders together with reports on them to their respective countries' judicial systems. This bureaucratic process, which often entails governments shifting responsibility back to the UN as crimes were committed while on UN contracts and missions, only frustrates justice for survivors. Armed troops are no exception. The governments they serve usually decline to take responsibility for their actions, thus winking on impunity for sexual violence in war and post-conflict situations.

### 1.2.3 State Accountability

Traditional, national or regional conflict resolution negotiations occur when civilians and parties to a conflict become weary of the war and desire resolution at all costs. Often, women are not properly represented in these discussions and processes. Issues fundamental to them, which relate to the war and require redress in the post-conflict dispensation tend to be ignored. Sexual crimes, justice and restitution mechanisms are, therefore, not primary issues in most peace protocols. There is, therefore, no national, formal, follow-up process established for the post-conflict dispensation.

Traditional reconciliation processes like the informal *Gacaca* courts in Rwanda, and the Northern Uganda Community Peace mechanisms, *Mat-o-put*, also choose to pardon and re-integrate perpetrators of sexual and gender-based violence into the society once they confess. The fact that sexual and gender-based violations do not receive their rightful attention in peace processes, coupled with the absolution of perpetrators from judicial processes in post-conflict societies perpetuates and escalates sexual and gender-based violence. States' disregard for accountability in safeguarding and protecting women and girls continues to encourage impunity.

Many governments have committed themselves to prevent and end gender-based violence by ratifying international conventions and declarations, thus acknowledging the seriousness of the problem. Despite these efforts, violence against women is still rampant, hence the need to continuously research in order to expose the hidden problem and suggest strategies that not only stop sexual and gender-based violence, but also prescribe how the survivors can be compensated and supported. States have an obligation to promote and protect all human rights and fundamental freedoms of all citizens, and they must exercise due diligence

to prevent, investigate and punish acts of violence against women and children. The state also has a duty to protect survivors of any form of violence, a responsibility for which it ought to be held to account.

### 1.3 How the Study was conducted

This study is grounded upon a feminist<sup>9</sup> understanding of gender and development. It is not only conducted to produce knowledge but it is also geared at producing knowledge for action<sup>10</sup>.

This study uses the definition of sexual and gender-based violence provided in the Beijing Declaration and Platform for Action. Since no single method can deliver the results without being complemented by others, this study adopted a many-sided approach in order to capture the complexity and details of sexual and gender-based violence. It used the following approaches: grounded theory approach, the legal centralist approach, legal pluralism and the semi autonomous social fields. For more details on how these approaches informed the study please check the full report on [www.acordinternational.org](http://www.acordinternational.org) these approaches:

### 1.4 Methods of Gathering Information

The researchers conducted the study using the following data collection tools: methods:

- Literature and law review
- Key informant interviews
- In-depth interviews
- Group discussions
- Records

---

9 Feminism is a discourse that involves various movements, theories, and philosophies which are concerned with the issue of gender difference, advocating equality for women, and campaigning for women's rights

10 Reinharz, S. 1992. *Feminist Methods in Social Research*. Oxford: Oxford University Press

## Chapter 2:

# SEXUAL AND GENDER-BASED VIOLENCE IN KENYA

*Sexual and Gender Based Violence...*

*It is the individual Man, raising his fist against his Wife.*

*It is the gang of boys, cheering on the fight in the middle of a tight circle*

*It is the young man on a date, acting without regard for the desires of the young woman he is with.*

*It is the man pushed by rage and fear, driving his car to his death.*

*It is the physical or verbal attack, on another man, because of his sexual orientation.*

*It is the gangs of men- we call them armies- who have been commanded to view each other as less human, and to view citizens as something even less.*

*It is men's violence in a myriad of forms.<sup>11</sup>*

## 2.1 Common Forms of Sexual and Gender-based Violence

Kenya's history is replete with human rights violations in general and sexual and gender--based violence in particular. Immediately after Kenya gained independence, a violent conflict broke out between secessionist Somalis in Kenya and the army. Although the skirmishes, which lasted three years, did not deteriorate into outright war, they resulted in mutual and long-lasting suspicion between the residents of the then Northern Frontier District (NFD) and the central government.<sup>12</sup> The government decreed that *Shifita* (liberation front) sympathisers would face life imprisonment, and their property confiscated. Moreover, the government imposed martial law in the region in 1963 and did not lift it until 1993.

These exceptional measures continued long after the threat of insurrection had ended, and were accompanied by gross human rights abuses carried out by Kenyan security forces. The most notable of these human rights abuses was the Wagalla massacre of 1984, in which Kenyan security forces killed more than 6,000 Somalis on the outskirts of Wajir.<sup>13</sup> The Kenyan security forces, under the control and direction of the then North Eastern Provincial Commissioner, Mr Benson Kaaria, rounded up 5,000 men from the Degodia clan and forced them into the Wagalla Airstrip.<sup>14</sup> The Degodia clan was then systematically slaughtered in what was believed to be a well-planned and orchestrated ethnic cleansing operation. The dead and the injured were allegedly collected and put into lorries and then scattered all over the northern Kenya districts.<sup>15</sup> As a survivor of the massacre recounted, many families were rendered destitute:

11 Kaufman, Michael, *Masculinity and Sexual and Gender Based Violence*, UNIFEM GENDER FACT SHEET No. 5, available at <http://www.unifem.org/genger/programmes/men/men.ge.html>, accessed last on 15 June 2008.

12 See Morarji, Maitri, *Arid Lands Development Focus*, June-July 2004, available at <http://www.cbs.go.ke>, accessed on 25 June 2008.

13 Maitri Morarji, *Stop the Massacre*, available at <http://www.kenyasomalis.org/index.htm>, accessed last on 25 June 2008.

14 'Wagalla Massacre: Families Demand Payments' *The Standard*, 26 February 2005.

15 Ibid.

*“To date I cannot comprehend. The person with whom my siblings and I were dependent upon for education and livelihood had been killed. All members of the family stopped attending school. The married one had four children and his wife was expectant. I now provide for the [youngest’s] education that is now in Form Three.”<sup>16</sup>*

Government forces raped, gang raped and defiled women and children left without any form of immediate protection from their male family members.<sup>17</sup>

For over 26 years, British soldiers raped and gang-raped Kenyan women at Samburu without a protest from the government. According to Martyn Day, the survivors’ lawyer:

*“The British soldiers would specifically ambush the women; they would pounce on them with a clear and coordinated understanding of what they were going to do. I was totally amazed and shocked when I first heard about it, and that amazement has not reduced, but I am now absolutely convinced it is true.”<sup>18</sup>*

The consequences of the rapes and the gang rapes had been catastrophic for the women and the many mixed-race children they bore. The community shunned the children, thereby leaving the survivors to fend for the children solely from without. Mr Day stated:

*“The women and children born allegedly as a result of these attacks have been suffering in silence for over 30 years stigmatised, discriminated and outcast within their own community... They have suffered a double injustice -- not only were they sexually abused, but the crimes against them have never been properly acknowledged let alone thoroughly investigated...”<sup>19</sup>*

The Kenya government has made no effort to seek compensation from the British Government for the violation of its citizens’ rights.

The years 1991, 1992, 1997 and 2002 saw a wave of politically instigated violence in Kenya that resulted in unimaginable displacement, rapes and defilement perpetrated by gangs. By and large, the then ruling party, the Kenya National African Union (KANU) is widely associated with instigating violence targeting sections of the population affiliated to or suspected of supporting opposition parties.<sup>20</sup> KANU politicians stated their intention to push through a balkanised system of government that would see communities not originally settled in the Rift Valley forced out and back to their ‘homelands’.<sup>21</sup> Groups associated with KANU perpetuated a cycle of violence, which resulted in the forced evictions, rape and defilement of individuals from communities perceived as ‘alien’ in the Rift Valley.<sup>22</sup> Moreover, and as an analogy to the Rwanda Genocide where politicians accused a group of

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16 Murungi, Betty Kaari (July 2003), ‘Kenyan Women Speak on the Proposed Truth, Justice and Reconciliation Commission’, available at [http://www.urgentactionfund.org/new\\_site/assets/files/uaf-africa-pubs/KenyanWomenSpeak.pdf](http://www.urgentactionfund.org/new_site/assets/files/uaf-africa-pubs/KenyanWomenSpeak.pdf), accessed last on 25 June 2008.

17 Ibid.

18 Hoge, Warren, ‘Kenyan Women Accuse British Troops of Rape’, July 3 2003, available at [http://www.pagead2.googleadsyndication.com/pagead/iclk?sa=l&ai=BxNwLPz5iSJ\\_wPJTSzQWtn6yUB6nGyUBZ2Gz1QJABABGAEg1suGBjgAUie726r7\\_.htm](http://www.pagead2.googleadsyndication.com/pagead/iclk?sa=l&ai=BxNwLPz5iSJ_wPJTSzQWtn6yUB6nGyUBZ2Gz1QJABABGAEg1suGBjgAUie726r7_.htm), accessed last on 25 June 2008.

19 Ibid.

20 See Kenya Human Rights Commission Report, 1998, Art. 19. See also Human Rights Watch Report, 1997, page 22

21 See Kiliku Commission Report, 1992, p. 8-9.

22 Ibid.



'foreigners' of supporting the political opposition on the basis merely of similar ethnic identification, politicians in the Coast Province instigated a wave of violence, the Likoni massacre, from August 13, 1997, targeting people from 'upcountry', who were perceived to be opposition sympathisers.<sup>23</sup> One of the participants in the violence recounted:

*"At Mzee Swaleh's house, there were about 170 men. We were put into groups according to where we were from .... Then we were all administered with an oath. Cuts were made on our tongue, our temple, the left hand at the edge of the little finger. Medicine was applied to our skin. We were given nothing to eat. There was a line of people and there were two people (Swaleh's assistants) administering the oaths one by one. Mzee Swaleh was watching, seated. We were told that the up-country people had taken everything and that it was time to rise up against this unfairness. After taking the oath, we felt agitated and strong. We wanted to take action immediately, but we were told to wait."<sup>24</sup>*

The 'local' youths went on the rampage in Coast Province, burning market kiosks and office buildings, killing and maiming men they identified to be not originally from the area. Women and children were raped, defiled and sexually assaulted.<sup>25</sup> The generational human rights violations in Kenya extended to the immediate aftermath of the 2007 elections in which nearly 1,500 people were killed, more than 500,000 forcibly evicted from their homes, thousands maimed, their property destroyed, and an unknown number sexually abused. These violations have occurred with little or no intervention from the government. Most common forms of these violations are:

### 2.1.1 Domestic Violence

Domestic violence is the use of force or threats by a husband or boyfriend to coerce or intimidate a woman into submission. The violence can come in the form of pushing, hitting, choking, slapping, kicking, burning or stabbing".<sup>26</sup> It refers to violence between members of a household, usually spouses. Bryan Garner calls it a situation where a member of a household commits assault or other violent acts against another.<sup>27</sup>

There are no strict laws against domestic violence in Kenya but it is no different from assault in terms of effect. What sets it apart is that the violence occurs within a family setting, usually dictated by gender relations. Under the Penal Code, assault is recognised as a crime that can be committed by a stranger, without any gender considerations. The defence for official reluctance to identify domestic violence as an offence under the law relies on the argument of recognising that there is a continuing relationship between the survivor and the assailant. It is thus argued that the law should not interfere in or break up a family.<sup>28</sup>

23 Human Rights Watch, *Armed Political Violence at the Coast*,

24 Ibid.

25 Elizabeth Mwalwala, 'Intolerance in Kenya', available at <http://www.learns.org/hgp/student-magazine.html>, accessed last on 25 June 2008.

26 United Nations Centre for Social Development and Humanitarian Affairs: *Strategies for Confronting Domestic Violence: A Resource Manual* at 7, U.N. DOC. ST/CSDHA/20 (1993).

27 Garner, Bryan A., (8<sup>th</sup> Edition. 2004), *Black's Law Dictionary*, 1600.

28 Charles Morrison, *Offending or Chastising? Towards Codifying Domestic Violence* (2007) 13.

The lacuna in legislation has encouraged men to mete out violence against their wives, claiming that they were 'disciplining' them. Children, too, have been exposed to aggression under the guise of legitimate punishment – even where the law expressly forbids corporal punishment.

Survivors of domestic violence, many of whom are women, take the violence as their fate, and fear to disclose the cause of their suffering even to the doctors, as a respondent at the Nairobi Women's Hospital recounted:

*"Most women request that we do not tell their husbands that they disclosed to us that they were battered. So we assure them that privacy and confidence is guaranteed."<sup>29</sup>*

Domestic violence was notably rampant in the camps for the displaced, although the women affected did not report the incidents to the police. Many female respondents at the camps said that their husbands were selling whatever meagre food rations the family received, as well as blankets and other necessities. Questioning a husband's actions could earn a wife a thorough beating. Some respondents also said that their husbands did not provide for their families, resulting in loss of respect for the men:

*"The Red Cross has become a husband to many women. They provide food, clothing, soap and other necessities that husbands have been unable to give their families. As a result, women have no respect for their husbands and do not take orders from them. This has brought rifts in many families and consequently husbands are beating their wives at the camps."<sup>30</sup>*

It was also evident that families were disintegrating at the camps. Many women found themselves alone in the camps because the fighting scattered families in different directions. Some wives said their husbands moved in with other women but they could not question them without provoking a beating. An elderly respondent said:

*"Look at me. How can my husband take on a young girl and be cruel to me this much? He told me that he is not interested in me because I am old and that he has found a young woman. When I asked him to stop the relationship, he became so cross that he beat me up. He has since moved in with her to the tent and says he has married her. He has abandoned me despite our children intervening to make him come back home"<sup>31</sup>*

In times of conflict, instability in families creates a fertile ground for domestic violence. Women are generally more vulnerable, and conflicts exacerbate their vulnerability. The family is a comfort zone but when there is violence at home coupled with insecurity, women face a double jeopardy. Domestic violence is a manifestation of power imbalance between a wife and a husband. Most men want to be in control of the surroundings in their family and perceive opposition from their wives as a challenge to their authority. Many men believe that the best way to regain their power and to make their wives submit to them is through force. This perhaps explains why men beat their wives at camps for the displaced despite the fact that both are facing difficulties brought about by the clashes.

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29 Interview at the Nairobi Women Hospital, 6 June 2008.

30 Interview at the Eldoret IDP Camp, 28 May 2008.

31 Ibid.

## 2.1.2 Rape and Gang Rape

Rape is sexual intercourse with someone without his or her consent. Under Kenyan law, rape includes both the forceful and unlawful penetration of another person's genital without consent as well as the fraudulent acquisition of consent.<sup>32</sup> Rape occurs when the survivor's resistance is overwhelmed by force, intimidation or other coercive

means. The element of force before rape need not be a requirement for charging the perpetrator. Ronald Boyce states that the requirement of force is simply a means of demonstrating that the sexual and gender-based violence was without consent and against one's will.<sup>33</sup> Where more than one person commits rape, it is termed as gang rape.

Perpetrators of sexual and gender-based violence are often motivated by a desire for power and domination. Rape and gang rape are mostly common in situations of armed conflict and internal strife. In such circumstances, rape and gang rape are meant to injure, control and humiliate, while violating the survivor's physical and mental integrity, as illustrated by the following respondent:

*"On 31 December 2008, eight assailants came to my house and pounced on me. They dragged me from the house and gang raped me a few metres from the house, until I lost consciousness. I was with my husband and children, but the assailants caught up with me during the melee for safety. Since the incident, I have not seen my husband and he does not know about the ordeal. I want to be assisted so that I can know my HIV status."<sup>34</sup>*

Another survivor said:

*"The attackers killed my husband and as if that was not enough they turned on me and gang raped me in turns. I can remember seeing 10 of them that are known to me. The elderly started then he invited the youngsters to follow suit. When they finished, they inserted a bottle in my vagina, cut my stomach, ejecting the intestines. They left me for dead but I survived. I was rescued by a Good Samaritan who took me to hospital where I was treated and operated on. I also contracted gonorrhoea for which am still being treated. I have not healed from the surgery."<sup>35</sup>*

In armed conflict, the perpetrators may include fellow victims of violence such as Internally Displaced Persons, members of other clans or religious groups, or even family members.

In many cases of rape and gang rape, the survivor knows the perpetrator(s). A respondent at the Eldoret IDP Camp recounted this incident:

*"When violence started at Kuresoi, men took advantage of women's vulnerability to rape, gang rape them and defile children before the tents were brought. Many women who conceived did so through rape. Attackers were not identified as the rape happened in turns, and the assailants disappeared in the mixed groups"<sup>36</sup>*

32 *Sexual Offences Act, 2006, section 3(1)*

33 Ronald Boyce, *Criminal Law* (1982) 211-212

34 Interview at Kericho, Bondet Tea Estate.

35 Interview at Ekerenyo Camp, Kisii 24 May 2008

36 Interview at Eldoret IDP Camp, 20 May 2008.

Another respondent said:

*“Many women were raped during the crisis and some cannot identify their attackers because it happened in the night. Some who could identify the attackers are afraid and do not want to talk about it. So it will only be a few cases of women you will be dealing with that are willing to open up. Women are afraid that they will be abandoned by their husbands if they talk”<sup>37</sup>*

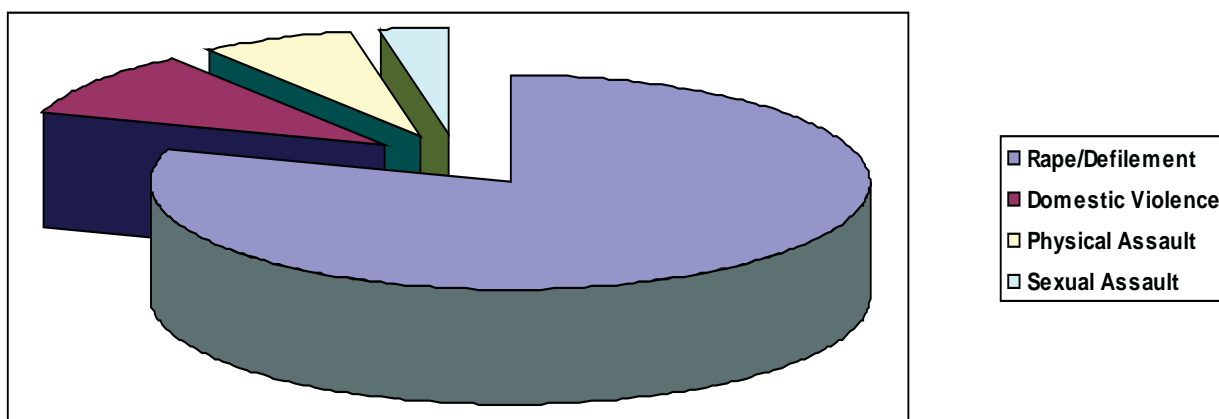
The Nairobi Women’s Hospital alone received 2,500 cases of sexual and gender-based violence during post-election crisis period. Out of these, 536 were rape cases as the doctor-in-charge of sexual and gender-based violence at the hospital recalls:

*“Between 27 December and 31 March 2008, we received 635 survivors, 229 of whom were children.”<sup>38</sup>*

Rape and defilement cases were the most common during the crisis period, as shown in Figure 2.

**Figure 2: Prevalence of SGBV cases in Nairobi Province**

| <i>Nature of SGBV</i> | <i>Total number</i> | <i>% Prevalence</i> |
|-----------------------|---------------------|---------------------|
| Rape/defilement       | 524                 | 80                  |
| Domestic violence     | 65                  | 10                  |
| Physical assault      | 42                  | 7                   |
| Sexual assault        | 22                  | 3                   |
| Total                 | 653                 | 100                 |



37 Ibid note 207

38 Interview with Teresa Omondi, Programmes Manager Gender Violence Recovery Centre at the Nairobi Women’s Hospital on 6 June 2008.

**Source:** Nairobi Women's Hospital, 6 June 2008.

Court records in Kisumu and Nakuru showed that survivors of sexual and gender-based violence do attempt to have the perpetrators prosecuted. For instance, in Kisumu, there were 10 rape cases referred for prosecution. In Nakuru, 13 rape cases were referred for prosecution between July 2006 and May 2008. A doctor at the Nairobi Women's Hospital said that many women do not report rape cases. For those raped during the post-election violence, no immediate reports were made to the authorities or the hospitals. Thus, as at the time of the interview, survivors of rape were trickling into hospital to seek treatment for ailments related to sexual and gender-based violence arising from crisis period.

### 2.1.3 Defilement

Unlike rape where the survivor is an adult, defilement involves the penetration of a child's genital organs. Concepts such as 'consensual'; 'unlawful'; 'forceful penetration' or 'fraudulent acquisition of consent' are immaterial in this regard, because the child has no capacity to form the necessary consent to carnal knowledge.

Defilement is also worsened in conflict situations. A respondent at the Eldoret IDP Camp recounted her experience thus:

*"I have handled a case of defilement of a 14-year-old girl by her 40-year-old father. The ordeal started when the girl was 9 years old and was left to stay at home with her father. The girl's uncles also took advantage of the father's conduct and started to defile the girl."*<sup>39</sup>

A judicial officer in Eldoret said that defilement was rampant at the camp but the families of the minors usually make deals to hush up the crime:

*"The survivor's family is sometimes, paid by the accused to drop the cases. If such cases reach the court, then there is another weakness, witnesses do not attend court or they just disappear. At times the police file is never traceable making it difficult for hearings to proceed."*<sup>40</sup>

At the time of the study, three minors had been defiled in turns by one assailant at the Eldoret Showground camp. Because he had negotiated with the minors' family and they were unwilling to cooperate with the police, he could not be arrested. In light of the conditions at the camp, where families are faced with difficulties obtaining sustenance and physical comfort, well-to-do assailants often get their way by paying off the survivor's family without due regard to the survivors dignity or bodily integrity. Defilement was also reported in other camps such as Nakuru Showground, Afraha Stadium as well as Kedong in Naivasha.

The court records in Kisumu and Nakuru reveal that survivors of sexual and gender-based violence do attempt to get the perpetrators of violence prosecuted by the courts. In, Kisumu 57 defilement cases were referred for prosecution while in Nakuru 140 cases were referred for prosecution between July 2006 and May 2008. This is just a tip of the iceberg as many incidents of defilement go unreported.

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39 *Supra* note 14.

40 *Interview with a magistrate Eldoret Law Courts 20<sup>th</sup> May 2008*

### 2.1.4 Abduction

As a form of sexual and gender-based violence, abduction involves the taking away or detaining of a woman in order to have sex with her.<sup>41</sup> Abduction involves leading someone away by force or fraudulent persuasion.<sup>42</sup> This form of violence is prevalent in the Kenyan traditional societies, where girls perceived to have reached marriageable age were abducted by their suitors -- as long as their parents had consented to the marriage. A respondent at the Kenya National Human Rights Commission, Nairobi, told researchers:

*"I intervened in cases in Kisumu and Budalang'i in which Standard Six girls were forcefully married off to their teachers who had impregnated them. The court system did not help much because the accused persons were acquitted for lack of evidence. Apparently, money had changed hands."<sup>43</sup>*

Such repugnant cultural practices flout the Constitution and other written laws of Kenya, which state that traditional and cultural practices apply only when they do not undermine justice and morality.<sup>44</sup> The practice of marrying off underage girls to teachers is repugnant to justice and morality as marriage can only be contracted between two consenting adults.

In some camps, men abducted girls to have sex with them. This happened in Afraha Stadium before the Red Cross brought tents. A respondent recounted:

*"There were young girls that were taken forcefully by the officers that were manning the camp at night for sexual purposes to rich men in town then they would be returned in the morning. Some individuals took advantage of the situation and also took away the young girls who were vulnerable at that time. This was reported and some officers were transferred and no other action was taken."<sup>45</sup>*

### 2.1.5 Sexual Exploitation

Most survivors of sexual and gender-based violence are forced into prostitution in order to survive. Those who obtain sexual favours from these women 'pay' meagre material benefits that cannot compensate for the survivor's lost dignity. The perpetrators of this form of violence are quite often persons in authority who use their positions to intimidate those seeking services or favours into exploitative sexual relations. A respondent at the Eldoret IDP Camp said:

*"Armed officers took advantage of the women's desperate situation at the camp and exploited them sexually. Tinned food was used to lure young girls into sex."<sup>46</sup>*

Another respondent at the Busia IDP Camp spoke of sexual exploitation by security personnel:

*"There was sexual violence visited upon young girls by security personnel. One lady who was raped by a police officer was transferred to Nakuru, and the concerned officer transferred to Sio Port. No legal or disciplinary action was taken against the officer."<sup>47</sup>*

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41 *Penal Code, (Cap 63) Laws of Kenya, s. 142 states:*

*"Any person who, with intent to marry or carnally know a woman of any age, or to cause her to be married or carnally known by any other person, takes her away, or detains her, against her will, is guilty of a felony..."*

42 Bryan A. Garner, *Black's Law Dictionary*, (8<sup>th</sup> Edition. 2004) 4.

43 Interview with a Commissioner at the Kenya National Commission on Human Rights, Nairobi, 6 June 2008.

44 See *Judicature Act, (Cap 8), Laws of Kenya, s. 3(2)*

45 Interview with a respondent at Afraha Stadium

46 Interview at Eldoret IDP Camp, 20 May 2008.

47 Interview at Busia IDP Camp



At the Eldoret camp, respondents said there was a growing concern about their morality. The townspeople believed that women at the camps were available for sex for as little as Ksh20<sup>48</sup>. One respondent could neither deny nor confirm this, but said that they were worried about the goings-on of “sex for Ksh20” because it had made some husbands to believe their wives, who were living at the camps alone, were prostituting themselves. Interviewees said some husbands had rejected their wives because they believed they were prostituting with the men in the town.

In some camps, people posing as benefactors took advantage of women and girls by promising to provide for them but instead took and held them hostage as sex slaves, as one respondent said:

*“There was a man who would pick up a set of young girls from the showground camp. He would take them to the salon and make them look smart but in turn, he would take the girls to give sexual services to his friends in Nakuru Town. The matter was reported to the police and the man was barred from entering any of the camps. He was advised that any future help he wanted to give had to pass through Red Cross.”<sup>49</sup>*

Another respondent said that the youth were unable to contain their sexual passions and thus solicited sex in return for favours. Some women and girls found themselves in difficult conditions and were forced into transactional sex to obtain supplies<sup>50</sup>. Some men took advantage of the confusion in the camps to pose as relief ‘officials’, luring unsuspecting girls and women into sexual liaisons with promises to offer assistance.

### 2.1.6 Abandonment

Rejection by communities and families carries enormous economic consequences for the survivors of sexual and gender-based violence when they excluded from their homes and cut off from their sources of livelihood. Survivors abandoned by their husbands are unlikely to remarry, leaving them as sole caregivers and supporters of their children. Many respondents said their husbands had abandoned them at the camps for the displaced to move in with younger women. Some husbands had secretly sold family land while at the camps, leaving their families destitute. Women in such situations had nowhere to go back to even if the government guaranteed security because the land had passed into the hands of parties unknown to them.<sup>51</sup> Such actions only made the situation worse for women who suffered double jeopardy in that apart from being displaced, they were also abandoned by their husbands.

### 2.1.7 Disinheritance

Wife disinheritance is common in many Kenyan societies. Such societies view property ownership as virtually patri-lineal. Upon the death of a husband, his family disinherit the widow in the guise of ensuring that the property devolves to a male adult dependent of the deceased. Such practices disregard constitutional guarantees of property rights, and the law of succession, which clearly provide for how property in succession should pass on – whether or not there is a will.

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48 Interview at Eldoret IDP Camp 20 May 2008

49 Interview with Red Cross officials at the camp, see also interview with Programme Officer, Rift Valley Juvenile Project

50 Interview with a Red Cross official in Nakuru.

51 Interview at Eldoret IDP Camp, 20 May 2008

In peacetime, a man's relatives routinely grab his property upon his death, but during conflict, women suffer more than one misfortune. Women widowed in conflicts find that their husbands' families disown them and secretly sell off their men's property to unsuspecting parties, as one survivor found out:

*"My husband was killed by the attackers at night in my full view. Thereafter, my sister-in-law also committed suicide. I am a total orphan. I was raised at an orphanage in Nairobi since I was three. The only relative I knew was my husband. I was saddened when his parents came and disowned me and proceeded to sell the only property we owned in Nandi Hills and went back to their rural home. I was expecting then. Unfortunately, I also lost the pregnancy when I fell down at the camp. My uterus had to be removed through surgery. I would like the government to assist me get back the land. I have nowhere to go back to."*<sup>52</sup>

## 2.2 Factors that Give Rise to Sexual and Gender-Based Violence

Although men can also be survivors of sexual and gender-based violence, this phenomenon affects women disproportionately. For instance, both males and females report sexual coercion, but the majority of the survivors are females, and the vast majority of the perpetrators are male.<sup>53</sup> The World Report on Violence and Health shows that between 40 per cent and 70 per cent of all women who are murdered or killed die at the hands of a male intimate partner. In contrast, between 4 per cent and 8.6 per cent of men who are murdered die at the hands of a female intimate partner.<sup>54</sup> Even in instances of male survivors of sexual and gender-based violence, the women commit the aggression in self-defence -- either in response to an attack or in a situation of long-term, chronic abuse by her partner.<sup>55</sup> While men are much more likely to be attacked by a stranger, women -- apart from being attacked by strangers and acquaintances -- are much more likely to be attacked by someone close to them, such as a husband or male partner.

Sexual and gender-based violence is an ancient and universal problem occurring in every culture and social group, due to six factors.

### 2.2.1 Power

Power inequality between women and men is a prime cause of sexual and gender-based violence. Women's perceived subordinate social, economic and legal status in different settings often makes it difficult for them to get help once violence occurs. According to Jewkes, sexual and gender-based violence has its roots in gender inequality:

*"Sexual and gender-based violence is the violence involving men and women, in which the female is usually the survivor and which arises from the unequal power relationships between men and women"*<sup>56</sup>

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52 Interview with a survivor at Eldoret Camp on 20 May 2008

53 World Health Organisation (WHO), *Putting Women First: Ethical and Safety Recommendations for Research on Domestic Violence against Women*. (2001). Geneva: World Health Organisation.

54 See Krug, E.G. *World Report on Violence and Health*. (2002). Geneva: World Health Organisation, Available at [www.who.int/violence\\_injury\\_prevention/violence/world\\_report/wrvh1/en/](http://www.who.int/violence_injury_prevention/violence/world_report/wrvh1/en/), accessed last on 15 June 2008.

55 Ibid.

56 57 Jewkes, R, 'Intimate Partner Violence: Causes and Prevention', (2002) 359, available at <http://www.thelancet.com/journals/lancet/article/PIIS0140673602083575/abstract.htm>, accessed last on 15 June 2008.

Thus, sexual and gender-based violence against women and girls evolves in part from women's subordinate status in society. In blaming men's violence for the impoverishment of women, Andrea Cornwall states:

*"Men's violence is a key determinant of the inequities and the inequalities of gender relations that both disempower and impoverish women. Violence is a fundamental dimension of human poverty. Yet, men's natural aggression is often invoked as a defining characteristic of an essential gender difference and as an explanation for gendered hierarchical arrangements in the political and economic contexts of richer and poorer countries alike."*<sup>57</sup>

The mental orientation that women are subservient to men, coupled with the impoverished status of women, implies that men stand out as breadwinners in most families. Men use this advantage to commit sexual and gender-based violence against women. A respondent at Kisumu FIDA offices said:

*"Men lay strict rules in the marital house, akin to, the Ten Commandments for Christian faithful that must be obeyed and observed. If you are late coming home even for 30 minutes, he complains; he dictates the wife's mode of dressing and he tears or burns an attire he perceives to be lacking in sophistication; a wife has no freedom to visit her family relations; he directs what is to be cooked, and constantly insults the wife; the husband does not protect the wife from his relatives; he persistently quarrels at the end of the month over the wife's salary."*<sup>58</sup>

Marital property, regardless of the owner, is deemed the husband's. Upon his death, his family lays claim to their "son's" property, thereby disinheriting the widow. A respondent in Lokichoggio, Turkana North District, said:

*"I am a widow; my husband died in 1971. I have had to bring up my six children on my own. When my husband, who was a soldier, died, my in-laws threw me out with my children. They took my husband's property, including all his benefits. I was chased from Muhoroni; my husband was a Luo and I am a Turkana. So I was told to go back to my Turkana homeland with the children. I did not seek any help about this because I did not know where to go..."*<sup>59</sup>

Men also take advantage of the underprivileged economic status of women to make unreasonable demands, which, if unmet, can result in battery.

### **2.2.2 Lack of Economic Empowerment for Women**

Most women depend on men for their sustenance and, therefore, become vulnerable to male aggression. Men use their considerably higher economic status to impose unreasonable demands on women and enforce these demands through sexual and gender-based violence on them. Paradoxically, most women have taken it as their fate to remain dependent on men. They loathe fellow women who attempt to make a living of their own in an attempt to extricate themselves from abusive relationships. A respondent at Kisumu FIDA offices said:

*"When I reported the violence (SGBV) against me by my husband to my mother, she told me to persevere for the sake of the children; she told me that if I rose up against my husband, he would divorce me and stop paying our children's school fees. The female police officer from whom I sought assistance aliniambia*

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57 Cornwall, Andrea, 'Men, Masculinity and Gender in Development' (2001) 5.2 *Gender and Development* 12.

58 Interview at Kisumu FIDA Offices, 21 May 2008.

59 Interview at Lokichoggio Location, Turkana North District, 29 June 2008.

kuwa nilitaka kusaliti mpenzi wangu (*told me that I wanted to betray my husband*). Another police officer wondered why I wanted to take my 'source of livelihood and the very existence' to court."<sup>60</sup>

Poverty contributes to sexual and gender-based violence. According to Fleishman, a self-perpetuating cycle of poverty makes girls in the conditions of economic dependency to enter into risky and exploitative relationships in order to ensure access to food, shelter and schooling.<sup>61</sup> Even where cases of sexual and gender-based violence have been filed against perpetrators, the survivors sometimes have to choose between withdrawing the charges to secure a means of livelihood and having the perpetrators incarcerated and bringing economic ruin upon themselves. A respondent at the Gender Focal Point, Complaints Department, Nairobi, said:

*"Economic Power relations affect women survivors of sexual and gender-based violence. For instance, in divorce cases, women survivors of sexual and gender-based violence withdraw cases because they need economic support from the perpetrators of the violence."*<sup>62</sup>

### 2.2.3 Culture

Sexual and gender-based violence particularly cannot be understood in isolation from the gender norms and social structures that influence women's vulnerability to violence. In most cultures, traditional beliefs, norms and social institutions legitimise and, therefore, perpetuate violence against women. The subordination of women to men in most societies results from the generational gender stereotypes entrenched in these societies. Culture has propagated most of the sexual and gender-based violence as 'ordinary' and 'permissible'. A respondent at Kisumu law courts said:

*"Cultural underpinnings that make 'ordinary' and 'permissible' certain forms of sexual and gender-based violence such as wife beating are an escapist statement. Such cultures have no respect for children, and therefore lack seriousness in dealing with cases of defilement"*<sup>63</sup>

### 2.2.4 Redefining Masculinity

Owing to the expectation that men should be breadwinners in the family, men turn to aggression in an attempt to suppress their status and continue dominating their wives or their close female relations when they perceive an economic rise by them. A respondent at the Kisumu FIDA offices, recounted:

*"Even after I had filed a divorce against my ex-husband, he kept beating me whenever and wherever we met, including at Kibuye Market where I did business. He contended that FIDA had spoilt me and I was no longer subservient to him. Men are just jealous, greedy and selfish. If they know they have a hardworking wife, they feel bad and employ violence to suppress the wife"*<sup>64</sup>

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60 Interview conducted at the Kisumu FIDA Offices, 20 May 2008.

61 Fleishman, J. *Fatal Vulnerabilities: Reducing the Acute Risk of HIV/AIDS among Women and Girls*, (2003), 14.

62 Interview at Gender Focal Point, Complaints Department, Nairobi, 20 May 2008.

63 Interview at Kisumu Law Courts, 21 May 2008.

64 Ibid.

During the post-election crisis, men felt powerless when they had to live in camps for the displaced alongside women. They were also deprived of their livelihoods and could not go to work because of insecurity. As most provisions were provided by the Red Cross, the organisation took over the traditional and primary role of men -- that of provider, and this took away some powers men wield that are linked to this role. Some interviewees said that since Red Cross was providing food and other necessities, some women had lost respect for their husbands.<sup>65</sup> It was perceived that they did not owe allegiance to their husbands and to enforce obedience, some husbands resorted to beating their wives. Some husbands sold some of the provisions to reassert their authority and prove that they were still in control of their families. They would not take it kindly if their wives questioned them about it, as one respondent said:

*“Women are being beaten by their husbands because of conflicts over food. Men are selling whatever little is given by Red Cross officials and if challenged, the beating starts in full view of the children and the security men at the camp. The men are adamant and say that they cannot be controlled or ruled by a woman in their house and therefore a woman asking the husband the whereabouts of the sold items is challenging authority and inviting trouble for herself.”<sup>66</sup>*

### 2.2.5 Inadequate Legal Framework for Protection

Although there are laws that deal with sexual and gender-based violence in Kenya, domestic violence, coercive widow inheritance and disinheritance are yet to receive legal recognition as offences with stipulated minimum sentences in order to take away courts’ discretionary powers to be lenient. A respondent at the Kisumu FIDA offices stated:

*“If you go to the police station, you are put off and they refer the matter to the area chief to deal with. The chiefs are always biased, easily bribed by men and support men (chauvinists). They ask women to persevere because even their mothers (Chiefs’ mothers) persevered.”<sup>67</sup>*

### 2.2.6 State of Insecurity

During times of conflict, the lack of police protection and lawlessness contribute to an increase in sexual and gender-based violence. Police officers, military personnel, relief workers, camp administrators (for instance in IDP camps) or other government officers may themselves perpetrate acts of sexual and gender-based violence.

Some members of the armed forces receive orders from their seniors to commit sexual and gender-based violence against the opponents’ women. For instance, during the Rwanda genocide, Sylvestre Gacumbitsi reportedly ordered his juniors to rape Tutsi women without sparing any of them as his indictment said:

*“Sylvestre Gacumbitsi circulated about Rusumo commune in a vehicle announcing by megaphone that Tutsi women should be raped and sexually degraded. For example, on or about 17 April 1994, Sylvestre Gacumbitsi exhorted the population along Nyarubuye Road to “rape Tutsi girls that had always refused*

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65 See interview at Afraha IDP Camp Nakuru on and also interview with a respondent at Eldoret Showground IDP Camp on 20 May 2008

66 Interview at the Eldoret Showground IDP Camp on 20 May 2008

67 Ibid.



*to sleep with Hutu...” and to “search in the bushes, do not save a single snake...” attacks and rapes of Tutsi women immediately followed...By virtue of his positions of leadership of the MRND and the Interahamwe, particularly as derived from his status as bourgmestre burgomaster of Rusumo, Sylvestre Gacumbitsi ordered or directed or otherwise authorized government armed forces, civilian militias and civilians to persecute, rape and kill or facilitate the killing of civilian Tutsi. By virtue of that same authority, Sylvestre Gacumbitsi had the ability and duty to halt, prevent, discourage or sanction persons that committed, or were about to commit, such acts, and did not do so, or only did so selectively.”<sup>68</sup>*

Perpetrators take advantage of armed conflict or the state of insecurity to commit sexual and gender-based violence knowing that the risk of identification is low. During the post-election violence in Kenya, unimaginable sexual and gender-based violence occurred in the camps for the displaced as a respondent recounted at the Nairobi Women’s Hospital:

*“During the post-election violence, there were immeasurable sexual and gender-based violence cases in the camp. A child wandering around the camp would suddenly disappear and when she would be discovered where the men reside, she would automatically be defiled. Women not attached to any man were constantly raped at the camps. A child detached from her parents would be picked up by ‘Good Samaritans’, only to be defiled. There were gang rapes on those who could not identify where their people were at the camps.”<sup>69</sup>*

### **2.3 Effects of Sexual and Gender-Based Violence**

Sexual and gender-based violence has acute physical, psychological and social consequences. Survivors often experience psychological trauma such as depression, terror, guilt, shame and loss of self-esteem. Spouses and families may reject them, ostracise them or subject them to further exploitation or punishment. They may suffer unwanted pregnancy, unsafe abortion, infection with sexually transmitted diseases (including HIV and Aids), sexual dysfunction and trauma to the reproductive tract, as well as chronic infections leading to pelvic inflammatory diseases and infertility. According to Heise, sexual and gender-based violence has implications for aspects of health policy and programming, from primary care to reproductive health programmes. Not only do women carry a substantial burden of illness and likelihood of death because of physical and sexual violence, but violence also worsens other health conditions, including increasing the opportunity for HIV transmission.<sup>70</sup> The effects of sexual and gender-based violence can be summarised as trauma, stigma and eroded self-esteem, and disease and death.

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68 See the Indictment, *The Prosecutor V. Sylvestre Gacumbitsi*, International Criminal Tribunal for Rwanda, Case No. ICTR-2001-64, paragraphs 20 & 24.

69 Interview at Nairobi Women’s Hospital, 6 June 2008.

70 Heise, L., ‘Ending Violence against Women’ (1999) 4 *Population Series* 6, available at [http://www.inforforhealth.org/pr/\\_111/violence.pdf](http://www.inforforhealth.org/pr/_111/violence.pdf) accessed last on 15 June 2008.

### 2.3.1 Trauma

This refers to the mental distress suffered by a survivor of sexual and gender-based violence. Survivors have higher levels of anxiety, depression and psychosomatic complaints than persons who have not suffered such violence. Defilement, child molestation and wife battery retards the emotional development of the woman and the child.<sup>71</sup>

Most doctors at the Nairobi Women's Hospital recounted how they follow up survivors of sexual and gender-based violence in an attempt to alleviate the trauma they undergo. Monetary compensation cannot palliate the pain suffered and the dignity lost through sexual and gender-based violence, as a counsellor noted:

*"During post-election violence, psychological damage was far-reaching. Many survivors were traumatised, and some had even internal conflicts within themselves; they were unable to cope with the trauma. Survivors of sexual and gender-based violence who visit our facility have to undergo at least six sessions of therapy, to enable them to cope."*<sup>72</sup>

Whereas monetary compensation may not be commensurate with the pain survivors of sexual and gender-based violence suffer, it is important to make provision for it to alleviate some of the problems they have to live with, sometimes for life. Monetary compensation would be necessary, for example, in offsetting fees for counselling therapy, medical bills and other related support for the survivor may need.

### 2.3.2 Stigma and Erosion of Self-esteem

Stigma refers to the feeling of dishonour, shame and disgrace suffered by survivors of sexual and gender-based violence. Black's Law Dictionary defines stigma as embarrassment suffered by the survivor because of an act or omission.<sup>73</sup> Most national laws and international legal conventions on sexual and gender-based violence provide for protection from the loss of dignity and inhumane treatment in an attempt to protect humankind from stigma and preserve self-esteem.

The shame, stigma, discrimination and rejection associated with rape and sexual violence significantly influences the choices and decisions of survivors. It also severely limits the opportunities open to them. Feelings of shame after rape affect the physical and mental health of women and girls, and influence whether or not they seek the medical care they need. The stigma of sexual violence also determines where survivors live: many may be too ashamed to return home for fear of rejection. Persons who experience sexual and gender-based violence suffer prolonged stigma and lose self-respect and esteem. They perpetually view themselves as underdogs, inferior and unworthy. This retards their overall growth and psychological development, as they spend a lot of time on self-pity and sometimes blame themselves for the violence.

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71 See Okot, Akumu, *Suffering in Silence: A Study of Sexual and Gender Based Violence in Pabbo Camp, Gulu District, Northern Uganda*, (2004).

72 Interview with Ruth Kimaathi, counsellor at Nairobi Women's Hospital, 6 June 2008.

73 Supra note 14 at 1454.



### 2.3.3 Diseases and Death

Sexual and gender-based violence results in physical injuries ranging from bruising to death. Assault can create wounds and damage sexual organs, both of which may eventually lead to death. Miscarriages and abortion, especially among young girls, is common. According to Guedes, gender-based violence and HIV/Aids are linked inextricably.<sup>74</sup> The experience of violence affects the risk of HIV and other sexually transmitted infections directly when it interferes with women's ability to negotiate condom use. Guedes further indicates that gender-based violence can result in many negative consequences for women's health and well-being as it has become a public health and human rights problem throughout the world. It can affect women and their children and undermine the economic well-being of their societies. A study by Karanja on the intersection between domestic violence and HIV/Aids found that women who experience rape, attacks and violence from their spouses refuse to access HIV/Aids information, HIV testing and counselling as well as treatment for fear of reprisal from their husbands.<sup>75</sup> Survivors of sexual and gender-based violence during the armed conflict in Sierra Leone recounted the health complications they experienced:

*"After spending six years with rebels, I decided to stay in Kono. I began to have problems with my water running when I returned to the village. It was not continuous but when I had my first child, it got worse. I then had another child and then it began to run all the time and became continuous. As there was no service in Kono, I came to Magburaka. It cost 16000 le (US\$45), which took the family three months of farming to accumulate. By the time they saved this money, I was unconscious. My mother and the men in the village carried me on a stretcher for two days and then I was brought a truck, which took another two days. I have now had the operation but my water continues to run. I have no money to return to the hospital."*<sup>76</sup>

Another survivor spoke of her ordeal thus:

*"When I was shot in the vagina, I had problems; I had no control over my bowels or my urine. I went to the hospital and so now I have no problems with my bowels but I still do with my urine. I have had no follow-up since this happened. I was told to go to Mercy Ships and I tried twice, but both times I was told that I could not enter because I did not have a paper."*<sup>77</sup>

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74 Guedes, A. 'Addressing Gender-based Violence from the Reproductive Health/HIV Sector: A literature Review and Analysis' (2004), *USAID Interagency Gender Working Group*.

75 Karanja, L. 'Just Die Quietly: Domestic Violence and Women's Vulnerability to HIV in Uganda' (2003), *Human Rights Watch*.

76 Supra note 49.

77 Ibid.

## Conclusion

Sexual and gender-based violence is prevalent in Kenya, and the persons most affected are women and children. Efforts to eliminate it have been ineffective, considering that the sexual and gender-based violence is most prevalent in situations of conflict, in which the government is a major player. Certain forms of the violence are perpetrated by the patriarchal nature of the society, which makes women subservient to men. Because the legislative, administrative and policy decisions are in most cases made by male-dominated structures, the pace at which measures targeting elimination of sexual and gender-based violence have been half-hearted. Deeply entrenched cultural practices in Kenya perpetuate sexual and gender-based violence.

Certain cultural practices have made the men in the society to perceive women as second-class citizens of the society, without the capacity to sustain themselves. Accordingly, efforts to effectively address sexual and gender-based violence must tackle the economy of violence, deal with the cultural dynamics that relegate women to the periphery of creating and enforcing policy and hold perpetrators of sexual and gender-based violence to account.

## Chapter 3:

### GETTING JUSTICE FOR SEXUAL VIOLENCE IN KENYA

Kenya resolves criminal cases through the traditional justice system as well as the formal legal system. These systems have tensions, weaknesses and concomitant opportunities for strengthening based on the understanding of sexual and gender-based violence within the Kenyan context.

#### 3.1 Traditional Justice Systems

When Kenya became independent in 1963, the majority of its citizenry was resolving disputes using traditional and informal justice forums.<sup>78</sup> Despite their popularity, these forums were regarded as obstacles to development and it was thought that as Kenya developed, they would eventually die out. This did not happen and instead, informal and traditional modes of settling disputes have survived.<sup>79</sup>

The failure of formal structures inherited from the colonial state around Africa has perpetuated their survival and provoked renewed interest in indigenous knowledge and institutions in recent years.<sup>80</sup> This renaissance is fuelled by an attempt to understand the resilience of these institutions,<sup>81</sup> and to explore how they can be more effectively institutionalised and used to serve the citizenry in the face of failure by the formal, colonial-based structures.<sup>82</sup>

Traditional and informal justice mechanisms continue to be useful in Kenya for a number of reasons. They overcome the principal obstacles that deny many people access to the formal justice systems.<sup>83</sup> Traditional justice systems are quick, accessible, use the local language, follow procedures that are understood by all and are enforced by people who are socially important to litigants.<sup>84</sup> In addition, they avoid the high costs to individuals and governments that come with formal state systems. The end goal of traditional justice in Kenya is primarily the restoration of peace by reconciling the parties to disputes and the wider community. Therefore, justice is more restorative than retributive. This is important, especially in communities where formal law apparatus are not always available when needed, where vast areas remain ungoverned in the conventional sense, and where the formal government machinery is thin and stretches over vast territories. Research among the Mijikenda and Turkana communities in Kenya provide a view of vista into the traditional methods that were adopted by these communities to address sexual and gender-based violence.

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78 Penal Reform International, *Access to Justice in Sub-Sahara Africa: The Role of Traditional and Informal Justice Systems* (2000), 19.

79 Ibid, 22.

80 Osaghae E. 'Applying Traditional Methods of Modern Conflicts: Possibilities and Limits' in Zartman, W. (Ed) *Traditional Cures for Modern Conflicts* (2000) 3.

81 Nyang'oro J., *Greater Horn of Africa Peace Building Project* (2001) 17.

82 Reno, W. 'Clandestine Economies, Violence and States in Africa' (2000) 3.1 *Journal of International Affairs* 53.

83 Saikal A., "Dimensions of State Disruption and International Responses", (2000) 3.1 *Third World Quarterly* 27.

84 Ibid. See also Smock, D.R. *Building on Locally Based and Traditional Peace Processes* (1997) 11.

### 3.1.1 The Kaya Elders

An interview conducted on 14 May 2008 among Kaya elders provides insights into how the Mijikenda community addresses sexual and gender-based violence. A male elder heads the Kaya court, which sits at Rabai, as it is *athari* (an omen) for a female to head it.<sup>85</sup> This in itself manifests the community's patriarchal worldview of justice. When a report on sexual and gender-based violence is made, and once the complainant or survivor has paid the court Ksh80 in administration fees, the Kaya elder issues a notice for the accused to appear in court. If found guilty the assailant is ordered to pay a fine imposed by the elders. In all circumstances, the fine does not exceed Ksh 4,000.<sup>86</sup> The maximum fine the Kaya elders can impose often does not match the harm suffered by the survivor. Instances such as gang rape leading to the death, or infection with HIV are not adequately compensated under the Mijikenda traditional justice system.

Sexual and gender-based violence takes various forms among the Mijikenda, and each is dealt with in a distinct way. Traditionally, a person found guilty of rape would be castrated, with the survivor allowed to hold the man's organ and 'break'<sup>87</sup> it. However, in the contemporary criminal justice system, culprits are no longer castrated, and the formal court system is preferred.<sup>88</sup> Noteworthy, though, is that even under the traditional justice system, the financial benefit that would be paid to a rape survivor, other than giving her opportunity to direct vengeance on the assailant's organ, was insufficient to atone for the crime. Extramarital sex earned the accused excommunication from the community.<sup>89</sup>

In cases of defilement, the child survivor would be asked if the man should marry her, in addition to receiving a maximum of Ksh4,000. The assailant could also be taken uphill and thrown down a cliff to die. Where the age difference between the survivor and the assailant is big, the matter is forwarded to the formal court, lest the Kaya kill the assailant.<sup>90</sup> The defiled child is returned to school, and the Kaya ritually cleanse her by administering herbs to reduce stigmatisation. If the regular court acquits the defiler when the Kaya elders are convinced of his guilt, the elders slaughter a black chicken and a black sheep on a hill where they conduct prayers, with the expectation that within two months, the assailant would die.

The Mijikenda sanction the remarrying of widows only after the Kaya elders ascertain that her husband did not die of HIV/Aids-related causes, as one respondent stated:

*"Wife inheritance is there, but only after we have confirmed that the husband did not die of HIV/Aids..."<sup>91</sup>*

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85 Interview conducted on 14 May 2008 among the Kaya elders, one of the respondents stated:

"...we do not have women in the court chair..."

86 Ibid, a respondent stated: "...there is no defined fine, but usually, the fine should not exceed Ksh4,000..."

87 Euphemism for castration

88 Ibid, a respondent stated: "...in coast we dialogue; we do not kill as we do not have guns."

89 Ibid: "...if I am found with someone's wife, I am taken to the *milima* (mountain) and thrown out"

90 Ibid: "...if the child is under 14 years and the man is over 52 years, we forward this to court because if we deal with it, we will kill the accused person

91 Interview of the Kaya elders, 14 May 2008.

The traditional criminal justice system can be noted for providing some compensation to survivors of sexual and gender-based violence. Nevertheless, it has deficiencies because the compensation awards do not match the offence, and the system appears to discriminate against women, for they are not allowed to sit in the Kaya court. This means that reporting sexual and gender-based violence to the elders is heavily hindered, as there could be information that survivors might only feel free to share with female elders.

### 3.1.2 Turkana Elders

Among the Turkana, sexual and gender-based violence is understood as violence waged on persons based on their sex, and encompasses wife battery, rape, defilement and divorce.<sup>92</sup> A respondent at Kaptirio Location in Turkana South District said:

*“The acts we consider to constitute sexual and gender-based violence include wife battery, confiscation of property, early marriages, that is, terminating girl-child education to be married off so that the father acquires bride wealth, defilement, and forced marriages, especially where the widow is left with a lot of property.”<sup>93</sup>*

The Chief adjudicates over the cases with the help of a council of elders, using both formal and traditional law. Where the adjudicators cannot find the applicable law, they refer the case to the Children’s Office.<sup>94</sup>

Rape cases are categorised into two classes -- rape or defilement of a girl, and rape of a married woman. Where a man rapes or defiles a girl, her family is allowed to severely beat him. The offender slaughters two oxen for the girl’s family. Where the girl’s family conceals the defilement or rape, the daughters in that family or clan are never to be married and are regarded as outcasts. Raping a married woman is considered more serious than defilement and the entire clan is allowed to kill the assailant as punishment.<sup>95</sup> The accused, though, can plead guilty and the entire clan would get collective justice if his life were spared. His clan will be required to pay compensation in the form of cattle to the affected clan. In any case, the plea does not confer a financial benefit to the survivor.

However, it is important to note that the Turkana traditional criminal system of dealing with sexual and gender-based violence has a special compensation mechanism for survivors. Where a man makes a woman pregnant out of wedlock, he is fined 30 animals -- 10 head of cattle, and 20 goats and sheep – which are given to the girl’s family as compensation. Defilement is considered less harmful than rape to married women, because more focus is paid to protecting existing family institutions than to alleviating the adverse conditions of the survivors of sexual and gender-based violence. In Kaptirio Location, rape is not considered a crime.<sup>96</sup>

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92 Interview at Turkana North District, Lokichoggio Location, 29 May 2008. said one of the respondents: “...I understand SGBV; it is violence that some face because of their sex. It encompasses domestic violence, i.e., wife battery, husbands beating their wives. It also refers to raping of women and children. It also refers to divorces...”

93 Interview at Kalomwaye sub-location, Kaptirio Location, Kainuk Division, Turkana South District, 20 April 2008

94 Supra, interview at Lokichoggio. A respondent stated: “...I look at both formal law and customary law. If I cannot manage the case, I refer to the children’s office...” See also the interview at Kaptirio Location

95 Ibid, the respondent stated thus: “...this is because he (assailant) has ‘killed the husband’....amevunja nyumba ya mtu (he has broken someone’s family)...”

96 Supra, interview at Kaptirio Location.

Among the Turkana, lack of adequate and accessible formal courts -- even where the council of elders see the case as warranting formal justice mechanisms -- frustrates the ability to address sexual and gender-based violence through the formal court system. This usually forces the elders to resort to the traditional system to resolve these cases, notwithstanding the injustice it may occasion to the survivor.<sup>97</sup> Also, due to poverty in the area, convicts under the traditional system cannot be 'jailed' for long. Thus, the options considered by the council of elders in punishing the offender are those convenient to the elders. They are not necessarily those that are just to the survivors. A respondent at Kaptirio Location said:

*"The major problems we experience particularly with regard to sexual and gender-based violence include means of transporting the suspect to the police stations, which are very far; unavailability of health facilities in cases of rape, because when a survivor walks for a long distance, evidence is tampered with; poverty, which prohibits many survivors of sexual and gender-based violence from accessing justice in the formal courts; ignorance among the survivors, who fear even to relay information to the police on how they had been subjected to violence"*<sup>98</sup>

Very few cases of sexual and gender-based violence are reported to the council of elders or the police. Even where survivors intend to report, the assailants often intercept them and rush to pay 'compensation' in order to silence them, as a respondent noted:

*"I receive a maximum of two cases on sexual and gender-based violence per month, as most of the cases are not reported. Such cases are usually not reported because the assailants usually run away and it takes a long time to arrest them. Quite often, the assailant would expeditiously create rapport with the survivor's parents and negotiate a punishment rather than wait for a formal court process. Most assailants prefer the cultural punishment because it is more lenient as compared to the court process."*<sup>99</sup>

Overall, traditional justice systems discriminate on the basis of age, gender, social status and family circumstances.<sup>100</sup> They have weak linkages with the judiciary and other relevant formal institutions.<sup>101</sup> They equally lack uniformity because they are as varied as there are ethnic groups, and sometimes even variations within the same ethnic group exist. Hence, they lack codification and are,<sup>102</sup> therefore, open to varied interpretations.

### 3.2 The Formal Criminal Justice System

The state administration of justice involves various actors such as the police, prosecutors, medical doctors, who collect scientific evidence in cases of assault and sexual violence, and the courts. The efficiency and shortcomings of these actors reflect how effectively the system works.

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97 Ibid, the respondent stated: "...we don't have courts in Lokichoggio. Because of distance, we try to solve (the SGBV case) traditionally. The nearest court is in Lodwar. The next is only a mobile court that goes to Kakuma, nearly 100 kilometres from Lokichoggio..."

98 Supra.

99 Supra, Interview at Kaptirio.

100 Zartman W.I. (Ed) *Collapsed States: The Disintegration and Restoration of Legitimate Authority* (1995) 15.

101 Leonard D. and Strauss S, *Africa's Stalled Development: International Causes and Cures* (2003) 10.

102 Ibid.



### 3.2.1 Health Providers

Health providers must follow clear procedures when they encounter rape or defilement cases.

A female survivor must be examined only in the presence of a female nurse, and must entail physical examination, documentation of clothes, examination of private parts and collecting specimen. Children survivors should be examined in theatre under anaesthesia, given Post-Expo Prophylaxes (PEP) and tested for HIV.<sup>103</sup>

Health providers are not under any obligation to carry out DNA testing on the survivor when filling the police assault report forms (P-3 forms). Without the DNA report, the prosecution case is often weak because of lack of corroborating evidence. A respondent at the Nakuru Provincial General Hospital noted:

*“Viability of the sperms has to be confirmed through DNA testing which we do not do. Neither is it done in Nairobi. It is DNA which serves to confirm which donor owns the blood samples.”<sup>104</sup>*

Survivors of sexual and gender-based violence also tamper with evidence that would have corroborated their claims out of ignorance, as a respondent at the Nakuru Provincial General Hospital noted:

*“Awareness creation is lacking. Some survivors of SGBV bathe; some throw away their clothes. Our hands are tied.”<sup>105</sup>*

Health providers do not particularly give priority to sexual and gender-based violence in terms of funding. The government finances public health in general, without giving attention to the peculiar circumstances surrounding sexual and gender-based violence, as a respondent at the Nakuru Provincial General Hospital noted:

*“Allocation of resources does not emphasise SGBV over and above other public health concerns. Needs like ‘what is more urgent for the active work at the hospital’ take precedence. For instance, it is more economical to put nurses in the wards than assigning a nurse to wait for a survivor of rape. It would be wise to have a separate programme for this and have someone to fund it. Family Planning is one such programme that is fully functional because of funding from donors as the government does not have money for it.”<sup>106</sup>*

Notwithstanding the economic difficulties survivors of sexual violence are already in, health officers demand payment before they can fill in the P-3 forms, a government document issued at the police station for recording information on assaults and sexual violence. It is a requirement that a medical practitioner fills this form since it is a key piece of documentary evidence to sustain a conviction in assault or sexual violence cases. Quite surprising, though, such payment is not demanded if the survivors are taken to hospital by the police for examination as a respondent at the Rift Valley Juvenile Project recounted:

*“Due to poverty, most sexual and gender-based violence survivors cannot afford the Ksh500 fee charged at the hospital for examination. However, where the survivor is accompanied by the police, no such fee is charged by the health officers... We talked with the medical superintendent at the Provincial General Hospital to waive the fee for sexual violence survivors but there is no commitment from him yet.”<sup>107</sup>*

103 Interview at Nakuru Provincial General Hospital, 4 June 2008.

104 Ibid.

105 ibid

106 Ibid.

107 Infra note 25, Interview at the Rift Valley Juvenile Project.



Thus, most survivors despair from reporting cases because of the anticipated fee charged by the health providers before they can have their P-3 forms filled. The doctors sometimes disregard, and are not always attentive to, the testimony of the survivors when filling the P-3 forms, as a respondent at Nairobi Women's Hospital noted:

*"Doctors filling the P-3 forms do not pay much attention to details on SGBV and this may lead to the acquittal of the accused person for lack of evidence."<sup>108</sup>*

Some doctors, owing to their cultural orientation, are indifferent to the plight of survivors and fail to appreciate the harm suffered. A respondent at the Kisumu FIDA offices claimed that a doctor responded to her request for examination for the purposes of filling of the P-3 form as follows:

*"Kupigwa tu! Haujarushiwa mshale! (Merely battered! You have not even been shot with an arrow!) Persevere. I have seen worse."*

The doctor did not fill her P-3 form.

### 3.2.2 The Police

Investigations into sexual and gender-based violence cases are often dubious, shoddy and careless, which eventually results in very few convictions. A respondent at the Rift Valley Juvenile Project of Rift Valley Law Society recounted this:

*"We have a problem with cases we take up for follow-up. The investigating officers are a letdown. The police are doing a bad job of the investigations."<sup>109</sup>*

Some police officers, who perceive their collective interests to be jeopardised by an intended institution of a sexual and gender-based violence case against a fellow police officer, go to the extent of denying the survivor P-3 forms. A respondent at the Gender Focal Point, Nairobi, recalled:

*"We received a report from a complainant who was assaulted by her husband, an Administration Police Officer. The police were not ready to issue her with a P-3 form. It was only after the intervention of the Kenya National Commission on Human Rights that the survivor was issued with the P-3 form. The arrest of the assailant is yet to be effected."<sup>110</sup>*

Worse still, the police do not retain stained clothes, crucial for DNA tests that would buttress the case in the absence of P-3 forms. A respondent said:

*"When blood-stained clothes are taken to the police station, the police never retain them for evidence. This is crucial for DNA where there is no P-3 forms for buttressing the case...the survivors are at times directed by the police to wash the blood-stained clothes."<sup>111</sup>*

Further, the police are slow in taking sexual and gender-based violence files to court, and the prosecution quite often withdraws the case because the law allows it. A respondent at the Rift Valley Juvenile Project

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108 Interview at Nairobi Women's Hospital, 6 June 2008.

109 *ibid*

110 *ibid*

111 *ibid*

recalled:

*“A 16-year-old girl whose mother had died was defiled in Elburgon by her father. Apart from impregnating her, he also else infected her with HIV. The child was eventually born because a lack of recovery centres in the area made it impossible to terminate the pregnancy. The father was arrested and arraigned in court, but the case was withdrawn by the prosecution under section 87A of the Criminal Procedure Code for lack of a police file and lack of witnesses. Our efforts to have the father re-arrested have not been fruitful.”*

Some police officers are indifferent to the plight of the survivors due to their cultural orientation. They put off the survivors and question why they intend to take ‘their source of livelihood’ to court. Women police officers are no better, and often term the assailant’s prosecution as spousal betrayal on the part of the survivors.

Considering that most investigating and prosecuting personnel are male, survivors are uncomfortable making reports to them as they already have a negative attitude toward men and may not be willing to speak openly on the case, as a respondent at the Kisumu law courts noted:

*“The police are almost all male. This affects the children who have been defiled by men.”<sup>112</sup>*

The police force blames the health officers for delays in the prosecution of sexual and gender-based violence cases. They say doctors fill the P-3 forms at their convenience, and this delays the forwarding of related files for prosecution. A police officer at Bondeni Police Station stated:

*“Doctors have no time limit to fill the P-3 forms. They thus fill the forms at their convenience and this delays our work.”<sup>113</sup>*

In order to guarantee the witnesses’ court attendance to give testimony, the witnesses are bonded. The respondent at the Bondeni Police Station stated:

*“Our work is to push the files to court after investigations. Once the case is in court, we don’t have problems; witnesses are bonded and are always willing to attend.”<sup>114</sup>*

Inadequate funds to run remand facilities also undermine police performance as an investigative agency as the respondent at the Bondeni Police Station noted:

*“We receive many children over the weekends. Due to financial constraints, we have to make personal sacrifices and buy them food. Means of transport from the police station to hospital or the court is equally a problem. We used to be financed by the Children’s Office but it is no longer there.”<sup>115</sup>*

Cases of sexual and gender-based violence are often dismissed for lack of evidence or witnesses. In some instances, the cases are compromised at the police station.<sup>116</sup> For instance, the police rarely take the survivor to hospital for examination if she cannot afford the fee charged by the health providers. A respondent at the Rift Valley Juvenile Project stated thus:

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112 Infra, interview at the Kisumu Law Courts.

113 Interview at Bondeni Police Station, on 4 May 2008.

114 Ibid, Interview at Bondeni.

115 Ibid.

116 Supra, Interview at the Rift Valley Juvenile Project; the respondent stated:

*“...Sometimes, SGBV cases are compromised at Police station level, but now they are cautious because they know I am following up”*

*“A case in point is that of the 14-year-old girl who was defiled by a married man familiar to her during an overnight prayer meeting. When the survivor’s mother discovered the matter, she reported.*

*The police gave her a P-3 form to take to the hospital. Health officers charged her Ksh 500 to fill the form. When she went back to the police, she realised that her husband (the survivor’s father), the police and the accused had conspired to compromise the case. The police demanded that she gives back the P-3 form. She did.”<sup>117</sup>*

A respondent at Bondeni Police Station admitted that oftentimes, the police are moved by the ‘remorse’ of the accused persons, and order that the chief mediate the case:

*“When the accused men are brought to the station, we find them very remorseful and opt to refer the matter to the chief for mediation.”<sup>118</sup>*

The objective of referring the matter for mediation to the chief is to seek cultural punishment, which is by far more lenient than what is imposed by regular courts. Such police actions have no legal basis and the eventual penalty declared by the chief lacks a regular means of enforcement. The acts only put into disrepute the disparaged dignity of the survivors.

Moreover, the manner in which police investigate cases eventually compromises them. The investigations are conducted in the office without the police visiting the crime scene. This practice largely leaves potential evidence in sexual and gender-based violence cases undiscovered, thereby weakening them, as a respondent at Kisumu FIDA offices noted:

*“Police investigations are usually shoddy -- the charge sheet is usually faulty and once the case reaches the prosecution stage, it is dismissed. Some police officers do not use the Sexual Offences Act, claiming that the sentences are very harsh. The officers are coerced before they can forward the cases for prosecution. They claim they do not have money or fuel and ask the [survivor] to arrest the perpetrator survivor and bring him to the station. The police officers turn themselves into judges and magistrates in determining what deserves prosecution. The prosecution does not have any pre-trial briefing with the clients.”<sup>119</sup>*

### 3.2.3 The Courts

The Sexual Offences Act obliges the court to impose a specific minimum sentence for sexual and gender-based violence. For instance, rape attracts a minimum sentence of 10 years, which can be enhanced to life imprisonment. Attempted rape attracts a minimum five-year sentence, which can be enhanced to life imprisonment and sexual assault attracts a minimum 10-year sentence, capable of being enhanced to life imprisonment. Compelled or induced indecent acts attract a minimum five-year sentence; while indecent acts on the mentally disabled attract a minimum 10-year sentence. Defilement attracts varying minimum sentences depending on the age of the child survivor; and gang rape attracts a minimum 15-year sentence, which can be enhanced to life imprisonment. This requirement for mandatory minimum sentencing in sexual and gender-based violence cases has ended the courts’ discretion, which was initially exercised

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117 Ibid, interview at the Rift Valley Juvenile Project.

118 Supra, interview at Bondeni Police Station.

119 Ibid, interview conducted at Kisumu FIDA offices.

leniently.

Whereas the court may want to try the sexual and gender-based violence cases as required by the law, such efforts are thwarted by the conduct of either the prosecution or the survivor as a respondent at Kisumu law courts noted:

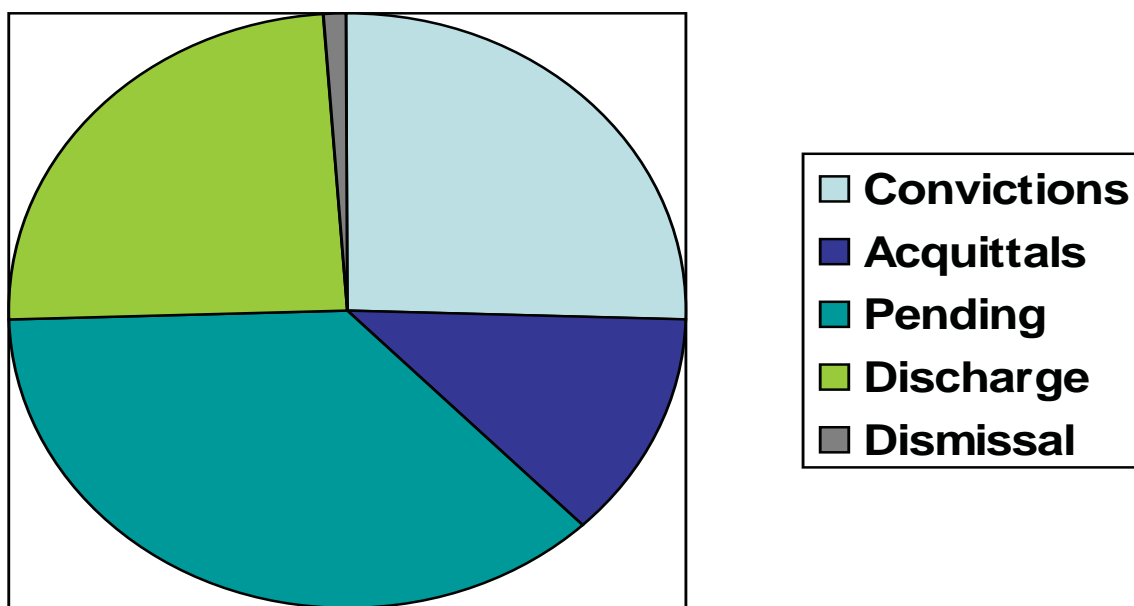
*"We take time with the survivors (of SGBV) when testifying. We do all sexual offences in chambers, as the Act so provides. We do not refer cases for mediation by the local leaders; in fact, according to Sexual Offences Act, we cannot. Survivors just disappear, including the witnesses."<sup>120</sup>*

Where the prosecution's investigation into a sexual and gender-based violence case is shoddy, the courts uphold the constitutional right of the accused and dismiss the case.

**Figure 3: Outcome of Prosecuted Cases of SGBV in Nakuru and Kisumu Law Courts between March 2006 and June 2008.**

| ACT         | NUMBER OF INSTITUTED CASES | % RATE |
|-------------|----------------------------|--------|
| Convictions | 23                         | 25.56  |
| Acquittals  | 11                         | 12.22  |
| Pending     | 33                         | 36.67  |
| Discharge   | 22                         | 24.44  |
| Dismissal   | 1                          | 1.11   |

120 Interview Conducted at Kisumu Law Courts, 21 May 2008.



Source: Kisumu and Nakuru Law Courts, 6 June 2008.

It is worth noting, though, that courts have been reluctant to hand down life sentences, even in cases of rape that led to the infection of the survivor with HIV. A respondent at the Nairobi Women’s Hospital made this observation:

*“Certain forms of sexual and gender-based violence such as deliberate infection of the survivor with HIV or rape leading to the infection of the survivor with HIV are only comparable to killing the survivor from inside. This notwithstanding, courts have not taken even such extreme forms of sexual and gender-based violence as warranting life sentences; the courts have not necessarily strictly adhered to the provisions of the Sexual Offences Act.”<sup>121</sup>*

The courts have been reluctant to intervene even in instances where advocates pose malicious questions to a child defilement survivor or witness during cross-examination because of the adversarial nature of Kenya’s justice system, as a respondent at Nairobi Women’s Hospital said:

*“Magistrates do not protect children from questions raised by advocates which are tainted with malice.”<sup>122</sup>*

The complainants are also to blame for the leniency in sentencing of the convicts of sexual and gender-based violence. Sometimes, once the accused persons have been convicted, the complainants intervene by pleading with the court to refer the matter for cultural settlement by the local leaders, as a respondent at the Gender Focal Point in Nairobi, said:

*“We had many convictions of the accused persons of sexual and gender-based violence, but the complainants withdrew the cases and preferred to settle the matter customarily.”<sup>123</sup>*

Cases take too long to finalise because of numerous adjournment requests that the courts allowed. The distance to court and the expenses associated with the travel are prohibitive for survivors and witnesses.

121 Interview at the Nairobi Women’s Hospital, 6 June 2008.

122 Ibid.

123 Interview at Gender Focal Point, Complaints Department, Nairobi, 20 May 2008.

For survivors who sometimes have to pay their witnesses to get to court, it becomes expensive to conclude the case. This may result in witnesses not attending to give evidence, thus contributing to cases being dismissed.

## **Witness Protection**

Out of fear of exposing the perpetrators of sexual and gender-based violence, most survivors and witnesses suffer in silence. Intra-family violence is common place. Survivors of incest, marital rape, domestic violence, and corporal punishment, out of fear of loss of means of sustenance, and in order to avoid further violence, choose to abet it. The Witness Protection Act, enacted recently, seeks to put in place mechanisms to guarantee protection for witnesses who give evidence on behalf of the state in criminal proceedings.

The protection measures to be accorded the witness include the ability to establish a new identity; relocation; provision of accommodation; means of transporting the witness' property; financial assistance; counselling and vocational training services; and such other measures that the Attorney General may deem fit to ensure the safety and welfare of the society. It is at the discretion of the Attorney General to approve payments to the witness under the law.

It is, though, an obvious weakness for the law to vest too much power in the Attorney General. For instance, the Attorney General alone can decide on who should or should not be included in the programme as a witness, notwithstanding the advice of other actors in the criminal process, such as the police. The Attorney General can also determine the amount of money to be paid under the witness protection arrangement.

There is urgent need to institute policies to protect all people who cooperate with the investigating and prosecution agencies in bringing the perpetrators of sexual and gender-based violence to justice. There needs to be public and visible contact between witnesses and the investigators to instil public confidence in the conduct of sexual and gender-based violence cases and to sensitise the society on them. Further, there is need for trauma counsellors to survivors, proper and sufficient funding to cater for the security of the witnesses as well as independent representation of the witnesses by legal counsel appropriately trained.<sup>124</sup>

The management of the funds payable under the witness protection mechanism should be managed by the Attorney General, in consultation with all the actors in the criminal process, such as the investigative agency, and non-governmental organisations that advocate for the rights of survivors.

## **Conclusion**

The various criminal justice systems assessed here are inadequate in addressing the plight of survivors of sexual and gender-based violence. The traditional systems' criterion for distinguishing the various forms of sexual and gender-based violence ranks some cases as more serious than others, such as rape and defilement, is defective. In most systems, defilement cases present an opportunity for material gain for the survivor's family. Other forms of sexual and gender-based violence such as wife battery, marital

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124 See also NGO Coalition on Women's Human Rights, *Rights and Democracy*, available at [www.dd-rd.ca.htm](http://www.dd-rd.ca.htm), accessed last on 12 June 2008.

rape, wife disinheritance and forceful wife inheritance, female genital cutting remain alien to traditional justice systems. Whereas the traditional systems envisage compensation for the survivors of violence, the reparation is so low that it fails to alleviate conditions for the survivor. Even where an award in the form of material compensation is ordered, it is more of a 'benefit' to the survivor's family than a means of alleviating the survivor's plight situation. Certain considerations, such as the social status of the assailant in determining whether or not to proceed with the disclosure of the sexual and gender-based violence committed, greatly hamper the delivery of justice to the survivor.

The formal criminal justice system, largely considers the survivor of sexual and gender-based violence as an 'alien' to the system. Focus is virtually on the accused. The investigating agencies do not consider the survivor's testimonies or condition and the survivor has a minimal, if any, role in the investigation and prosecution. The Gender Desk at police stations is equally insensitive to the plight of the survivor and officers ridicule, intimidate and scare away survivors of sexual and gender-based violence who seek to report to them. The prosecution of sexual and gender-based violence cases is indifferent to the conditions of the survivors and does not necessarily have the conviction, vigilance and the commitment to ensure that the accused is brought to justice. This explains the numerous cases of sexual and gender-based violence the courts have dismissed for lack of sufficient evidence or witnesses.

Medical officers are indolent and have pegged their examination of the survivor on the payment of fees, notwithstanding the financial difficulties of the survivor. Thus, monetary considerations have surpassed the humanitarian concerns of the medical officers whenever they are approached to fill P-3 forms. The courts have remained aloof and indifferent to the intimidation of prosecution witnesses by the defence counsel. Most sexual and gender-based violence cases are heard in open chambers, irrespective of their unique characteristics, and this has grossly inhibited reporting by survivors. Further, the courts have been reluctant to apply international instruments, even in cases where Kenya has ratified, if not yet domesticated, them ostensibly because such instruments do not form part of the country's regime of laws.

While there are opportunities to pursue justice for sexual and gender-based violence in traditional justice and classical judicial mechanisms, they both have loopholes that are reinforced by the frameworks within which they have developed.



## Chapter 4:

### TRUTH, JUSTICE AND RECONCILIATION COMMISSIONS

This chapter examines quasi-judicial mechanisms of getting justice for sexual and gender-based violence, and assesses if they can mitigate the gaps within existing structures.

Truth, Justice and Reconciliation Commissions research and report the truth about human rights within a particular country context, usually following a period of repression, violence, dictatorship or military rule. These commissions record human rights violations by collecting documents on the atrocities and hearing survivors as well as perpetrators.

As a rule, truth commissions are based on a peace agreement, on governmental decrees or laws of Parliament. Truth commissions' mandates are limited to a specific time, and they are required to produce and publish a report containing recommendations on what to do to avoid a repeat of the violations under investigation. A truth commission is one of several useful mechanisms of transitional justice. This type of body is useful in helping a nation to deal with a painful past and to reconcile perpetrators and survivors.

One of the common objectives of truth commissions is to grant amnesty to the perpetrators of the heinous acts under inquiry. In Kenya, subsequent to the 2007 General Election, various actors called for a blanket amnesty for the perpetrators of sexual and gender-based violence. These calls for amnesty have been largely opposed by survivors. During the field study, a respondent at Nairobi Women's Hospital said:

*"Most survivors do not think of compensation for damages, but only think of punishment. For domestic violence, the survivors can ask for reconciliation, but for rape cases, the gravity is so traumatising that reconciliation is not an option"*<sup>125</sup>

Another respondent, the Executive Director of Federation of Women Lawyers Kenya (FIDA-K), argued that a truth commission should only complement other mechanisms of legal redress:

*"The offender, other than accepting that he committed the crime before the Truth Commission, should be condemned to serve at least some sentence"*<sup>126</sup>

The opposition to truth commissions can be understood against the background of the various legal issues around amnesty. Amnesty denies the survivors of the violence the right to obtain a judicial investigation in a court of law. The effect of amnesty is that cases against the perpetrators of sexual and gender-based violence are thrown out, trials already in progress are closed, and no judicial avenue is left to present or continue cases. Amnesty thus violates the survivors' right to judicial protection and to a fair trial as recognised under the Constitution.

Other countries, though, have established truth commissions to unearth the social ills that destabilised their societies at particular times. In Latin America, truth commissions were officially endorsed bodies set up to examine and inquire into the past. In Chile and Argentina, the issue arose in the context of new governments making a transition from dictatorship to civilian rule. In El Salvador and Guatemala, truth commissions emerged as the existing governments negotiated a transition from civil war to peace.

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125 Interview at Nairobi Women's Hospital, 6 June 2008

126 Interview with Executive Director of FIDA-K on 6 June 2008

In such countries, despite their differences in mandate, scope and approach, truth commissions are seen as a starting point for national reconciliation and reparative measures.

## 4.1 Case Studies of Truth Commissions

### 4.1.1 Chile

The Chilean Commission on Truth and Reconciliation was established through decree Number 355 of 1990 to comprehensively expose the serious human rights violations were committed between September 11, 1973 and March 11, 1990 in Chile.

The provision of the decree is emphatic in demonstrating the government's recognition of the plight of the survivors of sexual and gender-based violence, and demonstrating the willingness to alleviate their conditions. In keeping with the spirit of the decree, in 1990, Chilean President Patricio Aylwin established the National Commission for Truth and Reconciliation, comprising eight distinguished Chileans.<sup>127</sup> The Commission sought to provide an officially sanctioned forum in which the survivors of violations and relatives of victims could give their testimony. Although seeking to gain government acknowledgment of its responsibility for the violations, the commission faced significant obstacles to the complete exposure of "truth", primarily because of the continued presence of Augusto Pinochet as Commander-in-Chief of the Chilean Army.<sup>128</sup>

The Chilean Commission recommended specific measures to compensate the relatives of the victims and survivors of the violence. The legislature enacted Law No. 19.123 to establish a "National Corporation for Reparation and Reconciliation", a temporary, decentralised state organ under the Ministry of the Interior with a two-year mandate to compensate survivors' families and develop programmes to foster a "culture of respect for human rights" in Chile.<sup>129</sup>

The corporation has two core purposes: to examine over 600 cases that the commission had been unable to resolve<sup>130</sup> and to administer reparations to the survivors as identified by the Commission on Truth and Reconciliation and by the corporation itself. Reparations included monthly pensions, fixed-sum payments, health benefits, and educational benefits. Specifically, the law fixes a monthly pension of 140,000 Chilean pesos for the relatives of the victims. The pension is paid out by giving 40 per cent to the surviving spouse, 30 per cent to the decedent's mother (or father in the mother's absence), 15 per cent to the mother or father of the natural children of the survivor, and 15 per cent to each child of the survivor under the age of 25 and to disabled children of any age.<sup>131</sup>

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127 Weissbrodt, David and Fraser, Paul, 'Book Review: Report of the Chilean National Commission on Truth and Reconciliation' (1992) 14 *Human Rights Quarterly* 601.

128 Zalaquett, Jose, 'Balancing the Ethical Imperatives and Political Constraints: The Dilemma of New Democracies and Confronting Past Human Rights Violations' (1992) 43 *Hastings Law Journal* 1425.

129 Hayner, Priscilla B., "Fifteen Truth Commissions-1974 to 1994: A Comparative Study" (1994) 16 *Human Rights Quarterly* 600.

130 *Supra* note 318.

131 *Ibid.*

Each beneficiary is also entitled to collect a one-time annuity equivalent to 12 monthly pensions, which is not taxed.

The law also confers the right to free services in the national health care system to survivors' relatives whose income is below the poverty line.<sup>132</sup> In addition, the Ministry of Health established a "Programme of Reparation and Integral Health Care" to cover individuals affected by human rights violations. The programme includes general medical care, social services, psychological counselling, and other services free of charge. The survivors' parents, children or siblings are eligible for this assistance.

The children of survivors are entitled to special educational benefits until they reach the age of 35. The law provides that children studying in secondary schools, universities, professional institutes or technical institutes receive scholarships to pay for registration and tuition fees, plus a monthly allowance to cover living expenses. Finally, the law exempts children of survivors from mandatory military service.

Claims for reparations are tied to the work of the Commission and the corporation. If a survivor's name is included in the report, it is sufficient evidence to obtain benefits under the law.<sup>133</sup> A "Higher Council" was also established to manage the corporation and establish its internal regulations and procedural rules.

In addition to the financial compensation administered by law, symbolic measures have also been undertaken by the President and the legislature. In particular, former President Patricio Aylwin gave a formal apology to the survivors and their families on behalf of the state, and asked the army to acknowledge its role in the violence.

The Chilean Corporation is often regarded as a milestone in human rights protection. However, the law has also been criticised for not providing fair compensation compared to the civil remedies that would have been available under Chilean law had they not been excluded by a 1978 amnesty decree.

A second source of concern is that many survivors of torture were not covered under the law. Since the Chilean truth commission's mandate was to investigate cases of disappearance of detainees, execution and torture resulting in death, reparative measures did not apply to individuals who were tortured but did not die<sup>134</sup> because their cases were excluded from the commission's report. Further, the Chilean amnesty decree made it difficult -- if not impossible -- for survivors of torture to bring civil suits against the state.<sup>135</sup> Despite these shortcomings, the Chilean law is a successful undertaking of great historical and legal significance.

*For more examples on various truth commissions see full report on [www.acrodinternational.org](http://www.acrodinternational.org)*

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132 Fitzpatrick, Joan, 'Nothing but the Truth: Transitional Regimes Confront the Past' (1995) *Michigan Journal of International Law* 713.

133 Hayner, Priscilla B., "Fifteen Truth Commissions-1974 to 1994: A Comparative Study" (1994) 16 *Human Rights Quarterly* 612.

134 Ibid.

135 See also *supra* note 317.

## 4.1.2 Kenya's Truth Commission: A Case for Reparations

*The right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination...is not necessarily secured solely by the punishment of the perpetrator...the courts and other competent authorities should consider awarding financial compensation for damage, material or moral, suffered by a survivor, whenever appropriate.*<sup>136</sup>

In modern criminal justice systems, survivors of crime, particularly survivors of sexual and gender-based violence, can rightfully be called forgotten persons. A great deal of attention goes to ensuring due process for the defendant who, it is argued, is threatened with state-imposed punishment and therefore allowed all possibilities to prove his innocence. Corresponding attention has not been placed on the rights and interests of the survivors of sexual and gender-based violence as the state purports to represent the best interests of society, including survivors of sexual and gender-based violence. Under the Kenyan legal system, there seems to be no special provision for the survivor of sexual and gender-based violence to play a role in the proceedings or obtain financial benefit. The courts and the Attorney General have exclusive rights whether a prosecution on sexual and gender-based violence continues or ends, without regard to the survivor: The Attorney General is not under the direction of any authority or person, including the survivor of sexual and gender-based violence, in deciding whether or not to institute or terminate criminal proceedings against the perpetrators. This explains why most survivors of sexual and gender-based violence and their families opt for non-state mechanisms such as traditional justice systems in an attempt to access a forum that would incorporate their interests in addressing violations against them.

Even in instances where a criminal case involving sexual and gender-based violence is successfully prosecuted and fines imposed against the accused, it is the state that receives all the fines, without any consideration of the pain and suffering the survivor underwent. Failure to compensate the survivor in criminal proceedings in Kenya is based on the English conventional adage that a crime, notwithstanding its nature, is an offence against society as a whole and can only be directed to the person who has the care of the whole society.

Survivors of sexual and gender-based violence continue to experience unimaginable adverse effects because of the atrocious crimes committed against them. Most survivors who contract HIV or other sexually transmitted infections from violence die prematurely due to their inability to pay medical bills, whereas the 'state' carries out its day-to-day functions out of fines recovered from crimes against these survivors.

A reparations scheme/program regime is urgently needed as a form of restorative justice to the survivors of sexual violence. Survivors of sexual and gender-based violence have special concerns and needs that should not be overlooked. Some of SGBV's survivors rights include the right to life, right to non-discrimination and right to dignity.

*For more details on rights of survivors disguised by the Kenyan criminal justice system check at [www.acordinternational.org](http://www.acordinternational.org)*

It is necessary to create a Trust Fund for the survivors of sexual and gender-based violence and their families to address their plight.

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136 Committee on the Elimination of Racial Discrimination, General Comment 26 on Article 6.

### 4.1.2.1 Reparation Funds for Survivors of SGBV

Sexual and gender-based violence has been a generational ordeal. The Wagalla Massacre of 1984 saw the rape, defilement and other forms of sexual assault on the wives, daughters, sisters and children of the butchered men of the Degodia clan at the Wagalla Airstrip by government armed forces.<sup>137</sup> With the complicity of the Kenya government, British soldiers sexually assaulted and forcibly impregnated Samburu women and girls for over 26 six years, occasioning their rejection by their communities for breeding with foreigners.<sup>138</sup>

From the early 1990s to late 2002, the KANU government instigated, orchestrated, and perpetuated violence against 'opposition friendly communities, forcibly evicting them from the KANU 'zones', particularly in the Rift Valley and Coast provinces. Most of those affected by the violence were women and children, who were raped, gang raped and defiled.<sup>139</sup> In Coast, from 13 August 1997 to early 1998, the KANU government-funded youths to forcibly evict residents not originally from the area in the infamous 'Likoni clashes' because the latter were perceived to support to the opposition.

This wave of violence spilled over to the December 2007 elections in whose aftermath thousands of Kenyans were killed or maimed, and hundreds of thousands displaced and sexually assaulted.<sup>140</sup> A respondent at Eldoret IDP camp said many survivors of sexual and gender-based violence had contracted HIV from their assailants, leading to their rejection by spouses.<sup>141</sup> Due to lack of proper structures for channelling complaints from HIV positive IDPs at the camps and the lack of support systems, such survivors were left at the mercy of fate.<sup>142</sup>

In all this violence, the government was either an accomplice or indifferent. Politicians, most of whom are currently in government, incited their supporters to harass, intimidate and taunt their opponents' supporters, in the course of which the attackers committed sexual assaults on survivors.

Despite the fact that the Kenya government has been quick to ratify most of the international instruments that prohibit sexual and gender-based violence, it has been reluctant to domesticate them. Regressive cultural practices that hold women as subservient to men have been nurtured and fostered, thus perpetuating sexual and gender-based violence. The conventional criminal justice system, which Kenya embraces, is not responsive to the plight of the survivors of sexual and gender-based violence and generalises even the particular pain suffered by the survivor, such as infection with HIV and Aids, as a pain of the state.

In order to make the government acknowledge the pain and suffering of the survivors of sexual and gender-based violence, there is need for a compensation scheme that helps to alleviate the situation such survivors find themselves in. Compensation is not a way of 'assisting' the survivor because she is 'financially unable', but as a state response to its failure to protect lives, property, dignity, privacy and equality for its citizens as provided for under the Bill of Rights.

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137 Morarji, Maitri, 'Stop the Massacre', available at <http://www.kenyasomalis.org/index.htm>, accessed last on 25 June 2008.

138 Hoge, Warren, 'Kenyan Women accuse British Troops of Rape', July 3 2003, available at [http://www.pagead2.google\\_syndication.com/pagead/iclk?sa=l&ai=BxNwLPz5iSJ\\_wPJTSzQWtn6yUB6nGyUBZ2Gz1QJABABGAEg1suGBj\\_gAUle726r7\\_.htm](http://www.pagead2.google_syndication.com/pagead/iclk?sa=l&ai=BxNwLPz5iSJ_wPJTSzQWtn6yUB6nGyUBZ2Gz1QJABABGAEg1suGBj_gAUle726r7_.htm), accessed last on 25 June 2008.

139 Kenya Human Rights Commission Report, 1998, Art. 19.

140 Elizabeth Mwalwala, 'Intolerance in Kenya', available at <http://www.iearn.org/hgp/student-magazine.html>, accessed last on 25 June 2008.

141 Interview at Eldoret IDP Camp, 28 May 2008.

142 Interview at Eldoret IDP Camp, 28 May 2008.



Further, that the government -- as the protector of the fundamental rights and freedoms of the Kenyan people -- has over generations been aloof as its citizens were killed, raped, gang raped, defiled, battered, discriminated against and dishonoured, breaches its responsibilities that define the need for its existence of the government. Thus, the government should pay for its inertia through reparations for survivors of sexual and gender-based violence.

#### 4.1.2.2 How to Effectively Manage Reparation Trust Funds

Deriving from the word 'repair', the concept of reparation has both judicial and political meanings. Common to each are elements of justice, dignity and restoration for survivors following conflict or some other harm-inducing event. The meaning of 'reparation' and the goals of legitimate reparation programmes are not settled in theory or practice.<sup>143</sup> The precise meanings and practical applications of the term are influenced by the particular economic, political, and social context, and the values of relevant stakeholders.

The established judicial definition of reparation under international law includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>144</sup> Thus, various jurisdictions and scholars define reparation in the context of effective reparation. Principle 7 of the 'Theo Van Boven's Principles and Directives on the Right of the Survivors of Serious Violations to the Human Rights and the Right to obtain Repair' provides that an effective reparation is that which is proportionate to the gravity of the violations and the resulting damage, and includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>145</sup>

In the *Chorzow Factory* case, it was demonstrated that effective reparation, as far as possible, wipes out all the consequences of the illegal act and re-establishes the situation that would, in all probability, have existed if that act had not been committed.<sup>146</sup> In the *Mentes* case, the European Court of Human Rights ruled that:

*"The notion of an effective remedy entails, in addition to the payment of compensation which is appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective accesses for the complainant to the investigation procedure."*<sup>147</sup>

The Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, adopted in March 2007 at a meeting of civil society and women's organisations, offers specific and comprehensive measures recognising the gender-based experiences of women and girls in conflict situations. Article 3 of the Declaration states:

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143 De Greiff, P. 'Repairing the Past: Compensation for Survivors of Human Rights Violations' (2006) 13, *The Handbook of Reparations*.

144 'United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Survivors of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', GA Res. 60/147 of 16 December 2005, Art 18.

145 See 'Theo Van Boven's Principles and Directives on the Right of the Survivors of Serious Violations to the Human Rights and the Right to Obtain Repair,' available at <http://www.unhcr.org/refworld/docid/3a6d8d11.html> (accessed last on 8 June 2008).

146 *Chorzow Factory Case*, Merits (1928) PCIJ, Series A, No. 17, p47.

147 *Mentes V. Turkey* (1998) 37 ILM 858, 882.

*“That reparation must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that shape the lives of women and girls; that reintegration and restitution by themselves are not sufficient goals of reparation, since the origins of violations of women’s and girls’ human rights predate the conflict situation.”<sup>148</sup>*

Reparation encompasses any economically assessable damage resulting from violations of human rights and humanitarian law. Whereas the Kenya criminal justice system does not provide for compensation of survivors of sexual and gender-based violence, various national and international legal regimes provide for it.

## 4.2 International Legal Regime

International law requires that persons responsible for rape, sexual slavery and sexual violence amounting to crimes against humanity, war crimes and torture should be brought to justice and the survivors receive full and effective reparations. For instance, the 2005 ‘Basic Principles and Guidelines on the Right to a Remedy and Reparations for Survivors of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’ codify the obligation of states under international law to respond to serious crimes when they are committed by implementing the rights of the survivors.<sup>149</sup>

The right to reparation is well established in international human rights law as a central element of the right to a remedy. The right to, and the forms of, reparation for violations is stated in a number of instruments and jurisprudence by international and regional human rights courts and bodies. Article 9(5) of the International Covenant on Civil and Political Rights gives any survivor of unlawful arrest and detention the right to compensation. Article 14 of the Convention against Torture and All Forms of Cruel, Inhuman or Degrading Treatment or Punishment obliges state parties to ensure that in their legal systems, the survivors of acts of torture obtain redress and have enforceable right to fair and adequate compensation, including the means for as full a rehabilitation as possible. In the event of death of the survivor as a result of torture, his/her dependants are entitled to compensation.

The International Criminal Court introduces financial restoration as a punishment for individuals as a practice of international justice. The survivor’s reparations are guaranteed in the context of state responsibility, such that a state that did not comply with established human rights norms might be required to pay reparations to the survivors of violations. Under the Rome Statute, liability is not necessarily assessed towards a state, but rather it is assessed against the individual that committed the crime.

The concept of individual responsibility, however, does not undermine state responsibility under international law. The statute establishes the Trust Fund in Article 79 by the Assembly of State Parties for the benefit of survivors of crimes within the jurisdiction of the court and of their families. The Fund is managed according to criteria determined by the Assembly of State Parties. Thus, the Trust Fund performs two functions. Under Article 75 of the Statute, the fund is a vehicle through which the court grants reparations to survivors. Under Article 79, the fund is a body that collects punitive damages and voluntary contributions.

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148 ‘Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation’, available at <http://www.womensright-coalition.org/site/reparation/signature/en.php>, accessed last on 19 June 2008.

149 General Assembly Resolution A/RES/60/147, 16 December 2005



Money received by the Trust Fund as punitive damages or as voluntary contributions may be used for the benefit of survivors of crimes within the jurisdiction of the court, at the discretion of the Trust Fund.

From the foregoing, it is apparent that voluntary contributions are likely to be the largest portion of the Trust Fund's money. This may be seen as a weakness in the Rome Statute because the state parties are under no obligation to support the Trust Fund. In cases where punitive damages become impossible to enforce, for instance, due to the assailant being bankrupt, there is a risk of stalling the operations of the Trust Fund. Global politics is another factor that could easily stall the operation of the Trust Fund.

Ideally, state parties to the Rome Statute should be obliged to make proportionate contributions to the Trust Fund to guarantee perpetuity of the compensation scheme. Overall, however, the provision for reparation under the Rome Statute can be a great improvement if adopted by the Kenyan criminal justice system, which does not contemplate compensation for criminal injuries.

Individuals, armed groups and states whose forces commit crimes are responsible for providing reparations.<sup>150</sup> Where, for instance, the government has precluded survivors from obtaining reparations from offenders by way of amnesty, as was the case in Sierra Leone,<sup>151</sup> it must provide reparations for all crimes.

### 4.3 National Legal Regimes

Various states have incorporated criminal justice compensation schemes into their criminal justice system. Below are two examples, see more on [www.acordinternational.org](http://www.acordinternational.org)

#### 4.3.1 Sierra Leone

A large number of sexual and gender-based violence cases occurred between 1991 and 2002 in Sierra Leone. The government security forces, civilian militia and opposing armed factions perpetrated rape, sexual slavery and other forms of sexual and gender-based violence against women and girls.<sup>152</sup> Women and girls of all ages and across all districts in Sierra Leone suffered a multiplicity of abuses and violations, including rape, sexual slavery, forced pregnancy, abduction, enslavement, torture, forced labour, deaths, dismembering of body parts and horrendous acts committed against children, husbands and other members of their families and communities. The psychological, physical, social and economic impact on women and girls is immeasurable. Shame has prevented many of them from returning to their communities.<sup>153</sup> Others live in silence, unable to share their painful memories out of fear of rejection by family members and loss of future economic security. Women who have borne children as a result of the violations committed against them are not only weighed down by stigma, but have to also care for their children within limited means.

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150 *The Final Report of the Truth & Reconciliation Commission of Sierra Leone, Volume 2, Chapter 4, para 21.*

151 *Amnesty International Report on Getting Reparations Right for Survivors of Sexual Violence, AFR 51/005/2007, page 18.*

152 *See The Final Report of the Truth and Reconciliation Commission of Sierra Leone, Vol. III B, Chapter 3. The Truth and Reconciliation Commission stated in part: "It is clear that there were deliberate policies systematically to target women and girls and systematically to rape and sexually violate them."*

153 *Sylverstein Adebayor, 'We Will Kill You If You Cry: Sexual Violence in the Sierra Leone Conflict' (2003) 15.1 Human Rights Watch, 12.*

These women and children are denied work, home, family and community, and are condemned to exist on the margins of society. In some cases, prostitution is their only means of securing a livelihood, but this often results in further marginalisation. As a result, reintegration has been very difficult -- often impossible -- for many raped and sexually abused women and girls.

The Truth and Reconciliation Commission established to investigate the consequences of the armed conflict in Sierra Leone recommended that the state provide reparations for violations committed by both its forces and private actors in the violence.<sup>154</sup> On 8 September 2006, the Government of Sierra Leone approved the National Commission for Social Action (NaCSA) as the implementing body of the reparations programme. The government appointed a task force comprising representatives of NaCSA, Human Rights and the Rule of Law section of the United Nations Integrated Office in Sierra Leone, National Civil Societies, Forum for Conscience, and a survivor representative from the Amputee Association of Sierra Leone to determine what it entails to offer reparation to the survivors of the violence.<sup>155</sup> The reparation is paid from a special fund created under the Lome Peace Agreement.<sup>156</sup> However, the Special Fund has not been established and reparation has been only limited to the recovery of the property lost during the conflict by the survivor of sexual and gender-based violence from the person convicted of taking the property for himself or herself. The Special Court is created by law<sup>157</sup> and has power to order the forfeiture of property taken from survivors of sexual and gender-based violence, which is returned to its rightful owner.<sup>158</sup> A survivor of can claim compensation from a person convicted by the Special Court through the national courts.<sup>159</sup> The inefficiency of compensation under the Sierra Leone system is that the Special Court is restricted to only order the forfeiture of property taken from the survivor. General and special injury suffered by the survivors, such as stigma, loss of dignity and honour, diseases and other injuries are not contemplated. The Sierra Leonean system is far from sufficient to alleviate the pain and suffering of the survivor of sexual and gender-based violence. Further, the requirement that the survivor can only apply for compensation through the courts raises the concern for efficiency in effecting the compensation. Considering that the greater population of Africa is illiterate and semi-literate, few survivors of sexual and gender-based violence will be vigilant to pursue compensation as provided by the law.

### 4.3.2 Chile

In response to the many deaths and disappearances under the Augusto Pinochet regime in Chile between 11 September 1973 and 11 March 1990, the government set up a National Commission on Truth and Reconciliation in 1990 to investigate the causes, effects and magnitude of the deaths and disappearances.<sup>160</sup>

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154 *The Final Report of the Truth and Reconciliation Commission of Sierra Leone*, Vol. III B, Chapter 4 para 21

155 *Amnesty International Report on Sierra Leone Conflict*, 1 November 2007.

156 See *Lome Peace Agreement*, 7 July 1999, available at <http://www.redress.org/publications/Drafts%20Options%Report%2030%20Jan%202007.pdf>, accessed last on 19 June 2008. Art. XXIX

157 See *The Special Court Ratification Act*, 2002.

158 *Rules of Procedure and Evidence of the Special Court for Sierra Leone*, Rule 104- Forfeiture and Property.

159 *The Special Court Ratification Act*, 2002, s 45

160 Hayner, Priscilla, *Unspeakable Truths* (2001), 293.

The deaths and the disappearances were attended by violent rapes, gang rapes, defilement and forcible abductions of women and children by both government and militia forces. As one of its recommendations, the commission proposed a three-in-one reparation scheme, envisaging revealing the truth about the deaths and the disappearances, recognising the dignity of the survivors and the pain suffered by their relatives, and taking measures to improve the quality of the lives of the survivors.<sup>161</sup> Thus, according to the commission, reparation was more than just the material compensation for the survivor. It also included such measures as to recognise the unquantifiable honour, dignity and decorum lost by a survivor. The commission succeeded in disclosing the truth about the deaths and the disappearances, and the government succeeded in sensitising the society to acknowledge the indignity of the violence and the pain suffered by their relatives. Significantly, former Chilean President Patricio Aylwin made a formal apology to the survivors and their families on behalf of the state and requested the army to acknowledge its role in the violence.<sup>162</sup>

The Chilean government, in 1992, established the National Corporation for Reparation and Reconciliation to coordinate measures to improve the quality of the lives of the survivors of the violence as a form of reparation.<sup>163</sup> The measures were essentially the financial compensation to the survivors of the violence, and sexual and gender-based violence in particular. The compensation scheme included monthly pensions for the relatives of those killed or disappeared, fixed sum payments for prison time and lost income of the dependents of those who died or disappeared, as well as health and educational benefits.<sup>164</sup> However, the Chilean commission's mandate was confined to investigation of cases of deaths and disappearances, and did not include survivors of imprisonment and torture.

The only notable weaknesses of the Chilean reparation system were its failure to repeal the self-imposed amnesty by General Augusto Pinochet for criminal offences during the violence. In 1978, the former military regime headed by General Pinochet promulgated an amnesty that had the effect of awarding itself unconditional immunity for criminal offences committed between 1973 and 1978. The amnesty lasted 20 years.<sup>165</sup>

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161 Ibid

162 Ibid.

163 Ibid page 314-315.

164 See *National Corporation for Reparation and Reconciliation*, Law No. 19, 123, Chile, 31 January 1992. See also Kritz N.J. (ed) *Transitional Justice* (1995), 683-95

165 Ibid.

## Conclusion

The establishment of a reparation scheme would be a bold step that would go a long way in alleviating the conditions of the survivors of sexual and gender-based violence. The cost burden could be shared between the assailants (through award of punitive damages by the courts) and the government (through coordination of voluntary contributions). It can reduce cases of sexual and gender-based violence because of the mandatory punitive damages the convicted assailant must pay. Concerns as to whether the establishment of the fund can result in artificial cases of sexual and gender-based violence can be mitigated through an investigative agency, which would determine genuine cases that warrant compensation. The management of the scheme should be consultative and involve stakeholders in an effort to eliminate sexual and gender-based violence in Kenya. To guarantee perpetuity of the scheme, the government should establish a fund into which local and international donors can put money. Mechanisms should also be developed to identify legitimate beneficiaries of the fund.

## Chapter 5:

### CONCLUSION AND RECOMMENDATIONS

This study has revealed that the psychological, physical, social and economic impact of sexual and gender-based violence on survivors is immeasurable. The shame, stigma, discrimination and rejection associated with sexual and gender-based violence that affects the physical and mental health of women and girls -- and to a lesser extent men and boys -- determine whether or not they seek medical care. Rejection of survivors of sexual and gender-based violence by communities and families carries enormous economic consequences for them, because they are excluded from their homes and cut off from their livelihoods.

The nature of sexual and gender-based violence and the stigma associated with it make it important to establish safe and effective systems of identifying survivors that merit reparations. The field study revealed that many cases of sexual and gender-based violence during the post-election violence went unreported due to the anticipation by the survivors that making known their ordeals to their family or the public would only attract further discrimination in the society. Those who reported their cases at the Gender Desk faced ridicule and scorn from the officers, who taunted them and asked why they wanted to 'betray their husbands'. Some officers slighted the pain and suffering of the survivors by claiming that they had seen and heard of worse cases of violence. Such experiences deterred other women from going to the police.

The field study exposed the formal state justice system as weak. The investigation agencies, including the police, remain indifferent, incompetent and inept in dealing with sexual and gender-based violence cases. Where members of the police force perpetrated a sexual and gender-based violence act, the survivors were denied reporting documents -- P-3 forms. Some investigating agencies conducted armchair investigations and never bothered to visit the scenes of the violence to gather evidence. Some police officers destroyed, washed or caused the survivors of the violence to wash the clothes they had worn during rape, thus intentionally destroying evidence. Police officers turned themselves into judges and magistrates, dismissing potential cases of sexual and gender-based violence at the investigation level instead of establishing a case that could sustain a trial. Some police officers subjectively regarded the Sexual Offences Act, 2006 as inordinately harsh and declined to pass on sexual and gender-based violence files for prosecution. Instead, they opted to refer them to the local leaders for cultural punishment, notwithstanding the fact that most such leaders are corrupt and chauvinistic.

Some sexual and gender-based violence cases were instituted without the necessary documentation -- P-3 forms -- resulting in their dismissal and the acquittal of the accused. The prosecution did not seek the input of the survivors in an attempt to gather sufficient evidence before prosecuting cases. Most of the cases ended up in acquittals, dismissals or the discharge of the accused. Comprehensive reforms are needed if justice is to be demonstrably served.

This study has therefore identified the need for action to deliver on the following key recommendations: Public acknowledgement for survivors of sexual and gender-based violence, building movements, guaranteeing justice and domestication of international instruments.

## 5.1 Recommendations

### 5.1.1 Public Acknowledgement: The Role of a TJRC

Truth, Justice and Reconciliation Commissions, if properly utilised, are important forums for facilitating peace and reconciliation. The TJRC should have broad objectives, not restricted to mere confession of atrocities by the offenders. It should seek to achieve these goals:

- a) Disclosure of the perpetrators of sexual and gender-based violence in the aftermath of the 2007 General Election. This can occur in the form of voluntary confession before the Commission and a plea for forgiveness from the survivors of the violence.
- b) Minimum sentencing of the perpetrators of certain forms of sexual and gender-based violence -- such as rape and defilement -- who confess before the commission. In effect, it shall have been used to complement legal redress, which is vital to demonstrating fair trial of the recipients of justice. The space for minimum sentencing indicates the commission's response to the honest confession of sexual and gender-based violence.

Measures to improve the quality of the life of the survivors of sexual and gender-based violence in the form of reparations for the violence should include fixed-sum payments, health benefits, and educational benefits. Parliament should enact a law to specify the value of pension to the survivors of sexual and gender-based violence or the survivor's relatives in case of death. The law should specify how the pension should be paid every month. Each beneficiary should be entitled to collect a one-time payment equivalent to 12 monthly pensions, which is not taxable.

The law should also confer the right to free health care services in the national health care system to survivors' relatives whose income is below the poverty line. In addition, the Ministry of Health should establish programmes to provide general medical care, social services, psychological counselling, and other services free of charge to the survivors of sexual and gender-based violence.

Claims for reparations should be tied to the work of the commission such that as long as a survivor's name is included in the report as a survivor of sexual and gender-based violence, it should be sufficient evidence to obtain benefits under the law. The reparation scheme should be managed by an independent committee appointed by the legislature, and should be representative of the government, civil society, survivors of sexual and gender-based violence, the Truth, Justice and Reconciliation Commission, the international community and community leaders.

### 5.1.2 Building Movements

During fieldwork, it emerged that powerful traditions and cultural attitudes remain perpetuate the discrimination women continue to face in their homes and communities. Cultural practices such as



abduction, forced marriages and female genital cutting are still prevalent among various communities as a rite of passage. Due to consanguinity and kinship considerations, many communities refer sexual and gender-based violence cases for mediation by local leaders rather than seek formal court adjudication since the cultural punishments are more lenient. Court sentences are considered punitive and exaggerated. But, even in instances of cultural mediation, awards are divested to the use of the family as a 'benefit'.

In order to shift the cultural orientation and perception of not only sexual and gender-based violence, but also of the survivors and the perpetrators, there is need for intensive public education campaigns to cover the wider context that nurtures these cultural practices.

The media are the most useful and influential sources of information for many people and serve as an invaluable vehicle for education and awareness campaigns. National and local media should sensitise society to stand up against all forms of sexual and gender-based violence and to pride itself in playing a key role in bringing the perpetrators of violence to justice. Education should entail informing members of society about the relevant laws that prohibit all forms of sexual and gender-based violence. This can be facilitated by specific media programmes on sexual and gender-based violence, sensitisation of society to perceive women's rights and freedoms as human rights, and lobbying the government to give incentives to communities that best promote women's rights. The media should take advantage of their wide reach and large audience to educate the public about the organisations that assist survivors of sexual and gender-based violence, and avenues that survivors can use to enforce their rights. There is need, therefore, to equip women with information that empowers them socially, economically and psychologically to stand up for their rights and perceive themselves as people fully entitled to all inalienable human rights.

Public education and campaigns should be undertaken to sensitise communities not to provide safe havens for the perpetrators of sexual and gender-based violence. It would be prudent to co-opt community leaders, traditional healers, chiefs, and school authorities in educating communities about their responsibilities in the envisaged broad approach to eliminating sexual and gender-based violence and reducing the stigma that surrounds the survivors.

### **5.1.3 Guaranteeing Justice through Legal Reform**

The concept of law reform refers to formulation of new laws to address specific concerns in society. Laws are made for the people, and this justifies the incorporation of their views in lawmaking. That way, the law is not alien and easily gains acceptance as it represents the aspirations of the governed. In Kenya, this ideal is yet to gain currency and at times, law is unknown even to the people whose plight it is meant to address.

- a) Kenya has a legal framework on sexual and gender-based violence. In fact, the implementation of the Sexual Offences Act, 2006, guarantees stiffer sentencing by the courts in cases and sets minimum sentences for convictions that are not subject to judicial discretion. Field investigations confirmed that the contents of the law have not been fully disseminated to the public.
- b) Certain forms of sexual and gender-based violence are yet to be codified as offences. Intra-familial

sexual and gender-based violence such as marital rape, domestic violence, wife disinheritance and female genital cutting are not recognised as penal offences in Kenya. There is an urgent need to codify all forms of violence into offences, including those committed by a person with whom a woman has not yet severed a relationship.

- c) Section 38 of the Sexual Offences Act, 2006 is a *claw back legislation* that discourages survivors of sexual and gender-based violence from pursuing perpetrators through the courts. The police also use this provision to dissuade survivors from pursuing cases in the courts. Further, the Sexual Offences Act, 2006, does not have provisions for fines against the convicts of sexual and gender-based violence crimes that are directly awarded to the survivors as a remedial measure to alleviating their conditions.
- d) The Kenya criminal justice system only focuses on the punishment of the accused person, without any form of relief to the survivor. Even in instances where the accused acquired the survivor's property in the course of crime, the survivor cannot recover it. Parliament should review the Penal Code to empower the courts to order the forfeiture of both movable and immovable property taken from the survivors of sexual and gender-based violence and its return to their rightful owners.
- e) Courts should be vigilant while interpreting law so that the envisaged spirit of the international instruments on sexual and gender-based violence that Kenya has ratified, even where such instruments have not been domesticated, is apparent in their rulings. As a legal back-up to such decisions, the courts should rely on the cases of *Mary Rono vs. Jane Rono, William Rono*<sup>166</sup>; *Mburu Chuchu vs. Nungari Muiruri and two others*<sup>167</sup> and *The Estate of Njoroge Machokire*<sup>168</sup>, which stated that the ratification of a treaty by a state is the conclusive demonstration of the desire by that state to be bound by the treaty. In particular, the court should interpret such international instruments as being consistent with the Constitution of Kenya.

#### 5.1.4 Domestication of International Instruments

Kenya has ratified various international instruments that promote and guarantee protection of human rights of women such as CEDAW and DEVAW. However, their provisions have not translated into legal dividends for women in Kenya, as the treaties are not self-executing. The government must incorporate them into the domestic legal regime through an enabling Act of Parliament. The government's commitment to these instruments is telling, considering that not even CEDAW has been domesticated, yet it was ratified in 1984. There is need to lobby the government to domesticate these instruments so that women can invoke their provisions to vindicate their rights once violated, especially because national laws have not adequately provided for the protection of human rights for women.

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*Sarah Longwe v. Intercontinental Hotel Zambia*, (1993) 4 L.R. C

*Virginia Edith Wambui Otieno versus Joash Ochieng Ougo and Omolo Siranga Civil Appeal No 31 of 1987*<sup>169</sup>

“ That reparation must drive post-conflict transformation of socio - cultural injustices, and political and structural inequalities that shape the lives of women and girls; that reintegration and restitution by themselves are not sufficient goals of reparation, since the orgins of violations of women’s and girls’ human rights predate the conflict situation.”

