

April 2014

# The Accountability Gap on Sexual Violence in Kenya: Reforms and Initiatives Since the Post-Election Crisis

## Introduction

The 2007-2008 post-election violence in Kenya (PEV) was marked by widespread sexual and gender-based violence (SGBV). While reports indicate that women were the primary victims, some men and boys were also targeted. The state's response to SGBV during the crisis was limited: in most districts, the police force was either overwhelmed by the intensity of the violence or opted to remain passive during attacks. In some cases, police officers were the perpetrators and in others they dismissed the reporting victim.

In the wake of the PEV, a number of transitional justice initiatives were contemplated and implemented by the state, including: a Commission of Inquiry into the Post-Election Violence (CIPEV); a Truth, Justice and Reconciliation Commission (TJRC); police reform; a constitution passed in 2010; and criminal prosecutions. Detailed reports by the CIPEV, TJRC, and the Kenya National Human Rights and Equality Commission (KNCHR) all recognized the widespread incidence of SGBV during the PEV.

Despite the vast documentation of the SGBV, to date, no individual has been convicted of a sex crime related to the PEV, nor have victims been repaired for the harms they suffered. The government of Kenya's responsibility to ensure that SGBV is investigated and prosecuted derives from the Constitution of Kenya, international treaties to which Kenya is a party,<sup>1</sup> and customary international law.

The current study assesses the extent to which Kenyan authorities have attempted to identify and address SGBV during the PEV and pursue accountability for perpetrators. The study identifies gaps in the design and execution of these mechanisms with respect to SGBV and makes recommendations on how to address them.

The study is informed in part by the views of women from Nairobi's Kibera slums and parts of the Rift Valley (Nakuru and Nyandarua counties) who experienced SGBV during the crisis. These women recounted their experiences and recalled their perceptions of the justice system's ability to protect them and repair their harm as well as to prosecute those who had committed violations.

The study reveals a lack of commitment by law enforcement agencies to address SGBV during and after the violence. Unfortunately, even when measures were executed, they have neither effectively

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<sup>1</sup> The African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination Against Women, and Convention on the Rights of the Child, among others.

addressed the harm suffered by victims of SGBV,<sup>2</sup> nor ensured accountability for perpetrators of SGBV. Indeed, some post-crisis interventions have tended to further marginalize victims of SGBV.

The study also reviews the constitutional, institutional, and legal reforms initiated after the PEV for the purposes of identifying opportunities to secure justice for victims of SGBV. It finds that the 2010 Constitution, the resultant National Police Service Act 2011, the Independent Policing Oversight Authority (IPOA), and the National Police Commission introduced elements that, if fully implemented, could support the effective dispensation of justice for survivors of SGBV. Finally, it makes recommendations regarding how to improve and strengthen existing state efforts.

## Background

The 2007-2008 post-election crisis began when the Kenyan Electoral Commission declared President Mwai Kibaki the winner of the 2007 presidential election. Supporters of Kibaki's opponent, Raila Odinga, of the Orange Democratic Movement, suspected electoral manipulation. Both domestic and international observers confirmed the process was flawed. The CIPEV determined that following the announcement of the election results, during the PEV period, 1,133 people were killed, 3,561 injured, and 350,000 people displaced from their homes. There were also hundreds of rapes and over 100,000 properties destroyed. Crimes of murder, rape and other forms of sexual violence and deportation or forcible transfer of the population were particularly common.

Former UN Secretary General Kofi Annan arrived in the country nearly a month after the election and successfully brought the two sides to the negotiating table. On February 28, 2008, Kibaki and Odinga signed a power-sharing agreement, called the National Accord and Reconciliation Act, which established the office of Prime Minister and created a coalition government, with Kibaki as President of the Republic. The Cabinet, headed by Odinga as Prime Minister, was sworn in on April 17, 2008.

On May 23, 2008, the parties to the Annan-led mediation adopted "The Statement of Principles on Long Term Issues and Solutions," which provided for a range of transitional processes, including: constitutional, institutional, and legal reforms; land reforms; addressing poverty, inequalities, and regional imbalances; consolidating national unity and cohesion; enhancing transparency and accountability; and addressing impunity.

The mechanisms reviewed in this study were created to meet these goals: the CIPEV; the TJRC, which released its Final Report in May 2013; the 2010 Constitution of Kenya; police reform; and criminal prosecutions of individuals responsible for crimes against humanity.

## Sexual and Gender-based Violence in the Post-election Crisis

Incidents of SGBV were widespread and severe following the announcement of the 2007 election results and particularly prevalent in Nairobi, Nyanza, Rift Valley, and the Coast and Western provinces. During the PEV, women were gang raped, sometimes in front of their children and family, and experienced extreme physical injuries, as a result of physical or sexual violence.<sup>3</sup> Some men and boys were victims of forcible castration and circumcision.

*Gender-based violence* may be defined as violence that targets individuals or groups of individuals on the basis of their gender; it includes "acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty."<sup>4</sup>

<sup>2</sup> Although the term *victim* is used interchangeably with the term *survivor*, the controversy surrounding the use of the term *victim* should be noted. In this study, the term does not imply passivity or a lack of agency, but rather the experience of being the victim of a crime.

<sup>3</sup> Final Report of the Commission of Inquiry into the Post Election Violence (CIPEV Final Report), 94-95, 197, 244; and Kenya National Commission on Human Rights, "On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence" (2008), 41.

<sup>4</sup> Based on General Recommendation 19 of the Committee on the Elimination of Discrimination against Women, 1992, [www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19](http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19).

Service-delivery statistics from the Nairobi Women's Hospital and the Coast General Hospital give some indication of the scope of the problem. Both hospitals reported an upsurge in the number of women and children seeking treatment for rape after late December 2007. From December 27, 2007, to February 29, 2008, the Nairobi Women's Hospital's Gender Violence Recovery Centre, which offers free medical services to victims of sexual violence, treated a total of 443 survivors of SGBV, of which 80% were cases of rape/defilement.<sup>5</sup> The documentation from camps for internally displaced persons is equally disturbing: gang rapes appear to have been widespread and committed with impunity, and victims suffered from a lack of health and psychosocial support services.<sup>6</sup> Thus, a range of independent sources confirm both the prevalence of sexual violence and the institutional failures to adequately address them.

The long-term effects of the sexual violence are significant. Of the 48 women interviewed for this study,<sup>7</sup> 10 had been left by their spouses; all experienced difficulty in engaging in sex; 1 confirmed she was unable to conceive; and 42 suffered psychological disturbances, including lack of sleep, hatred of men, anger, ab sense of frustration, and hopelessness. The six exceptions were women who had undergone consistent counselling for at least three years to overcome their trauma.

None of the women interviewed for this study had received any form of reparation for the sexual violations they had suffered. All of the women interviewed singled out financial assistance as one way that the government could show a commitment to alleviate their suffering. Those infected with HIV as a result of rape expressed the need for extra financial support to obtain medication for opportunistic infections due to a compromised immune system.

### Police Violence

The disturbing impact of police attitudes towards SGBV was reflected in this study's survey results. Of the 48 women interviewed, only 9 had reported their sexual assault to the police. Those who did not report to the police attributed their inaction to the hostility they expected from police officers. For example, one woman reported:

The police in Molo were harsh and cruel. It was also shameful, being an old woman . . . I was embarrassed to tell my husband, and my daughters were also raped. They left for Nairobi and have never returned.

A 60-year-old man who was sodomized in the Molo area said that he had reported the matter to the police and returned to the police station three days in a row. He only gave up when it became clear that the police were unwilling to take action.

For others, the intensity of the crisis was such that it was impractical to reach any police station for help. At the same time, the police were overwhelmed trying to quell the general violence and sexual violence was not considered to be as important as other violent crimes, such as murder, robbery, or carjacking.<sup>8</sup>

One survivor said that the reason that the police in Molo seemed unwilling to help is because they were siding with perpetrators who were from their own ethnic communities—such impunity may have further emboldened aggressors. As a result, victims of sexual violence were too fearful to seek police intervention, not only because the police were otherwise occupied but also because of victims' uneasiness in filing complaints with institutions that they felt were associated with perpetrators of the violence.

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5 Center for Rights, Education and Awareness (CREAW), "Women Paid the Price!!! Sexual and Gender-based Violence in the 2007 Post-election Conflict in Kenya" (2008), 5.

6 Ibid. at 5.

7 The 48 respondents were aged 25 to 65, with very low levels of education. None had gone beyond primary school or held formal jobs, though some worked as casual laborers.

8 CIPEV Final Report, 245-260.

Of the 48 respondents, only 2 knew their perpetrator(s). The rest did not know who had committed the rape and saw no value in reporting the violation because they could not identify the perpetrator(s) in court. In sum, the victims had no confidence in the justice system's ability to find the perpetrators, but instead had fears about compromising their own dignity, security, and confidentiality if they were to report their experience to the police.

Nine of the forty-eight women interviewed were raped by police officers, including one woman who was raped by the police officer she had sought help from after being raped. Yet another survivor from Molo who had been raped by a police officer could identify the officer and even knew his name, but the only action taken against him was a transfer to another station.

### **Report by the Kenyan National Commission on Human Rights**

The 2008 study by the Kenyan National Commission on Human Rights (KNCHR) on the PEV found that although some men in Nairobi were raped, women and children were specifically targeted for rape on account of their ethnicity.<sup>9</sup> Its recommendations included the creation of special investigation and prosecution teams to deal with members of security forces who were involved in committing crimes against civilians. It further recommended that the Chief Justice administratively set up courts in areas where the violence was prevalent to expedite the determination of PEV-related crimes, including SGBV. It also recommended the establishment of a board to oversee the police force as a matter of urgency and that the International Criminal Court (ICC) to investigate crimes against humanity. This study was not able to establish the extent to which the KNCHR followed through with its recommendations, as this could change the course of the prosecution of SGBV in the country.

### **National Gender Equality Commission**

The National Gender Equality Commission (NGEC) was established in 2011 as the successor commission to the Kenya National Human Rights and Equality Commission. Its objectives are to promote gender equality and freedom from discrimination.

NGEC disseminated standards in regards to SGBV. The newly developed National Training Curriculum on SGBV, launched in April 2012, is expected to guide multisectoral trainings on reducing SGBV. The curriculum is also expected to contribute to quality assurance in handling SGBV cases and guarantee compliance with national and international standards.

### **International Criminal Court**

In relation to alleged crimes against humanity, the ICC is currently trying Kenyatta (who was the Deputy Prime Minister during the PEV); Deputy Prime Minister William Samoei Ruto; and Joshua Arap Sang, the head of Operations at Kass FM in Nairobi.<sup>10</sup> Walter Osapiri Barasa is charged with offenses against the administration of justice.

In relation to SGBV, 660 victims have been recognized by the ICC, 327 in Case One and 233 in Case Two.<sup>11</sup> These 660 victims are recognized only as participants in the cases and will not necessarily testify once hearings begin. Only Case Two includes charges relating to rape,

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<sup>9</sup> Kenya National Commission on Human Rights, "On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence" (2008), 8.

<sup>10</sup> The Prosecutor of the International Criminal Court initially sought to charge six people, three from both sides of the political divide. Charges against Major General Mohammed Hussein Ali and Henry Kiprono Kogsey were not confirmed. Charges were eventually dropped against Francis Muthaura, Head of the Public Service, Permanent Secretary to the Presidency, and Secretary to the Cabinet. The trial date for Kenyatta has now been provisionally set for October 7, 2014, to allow the Prosecutor to collect information she has been seeking from the government that was not forthcoming. The six-month postponement is to give more time to the Kenyan government to work with the prosecution to ensure all legal means are exhausted in getting the financial information that is pending.

<sup>11</sup> Case one involves William Ruto, Deputy President of Kenya, and Joshua Sang, a journalist; while Case Two involves Muthaura and Kenyatta.

even though it is widely alleged that sexual violence was present in the circumstances surrounding both cases.<sup>12</sup> From a gender perspective, the ICC Trial Chamber's characterization of forcible castration and circumcision as physical violence rather than sexual violence is a concern. Not only is this a more restrictive approach than that of other international criminal tribunals,<sup>13</sup> it also means that the sexual, and gendered, nature of the harm suffered by men and boy victims cannot be recognized by the ICC. If used as a precedent for national prosecutions, this finding may ultimately limit recognition and avenues for redress for male victims of SGBV.

## Evaluating Transitional Justice Responses

### Commission of Inquiry into the Post-Election Violence

The CIPEV, headed by Justice Philip Waki (hence, also known as the Waki Commission), was mandated to investigate the facts and circumstances surrounding the PEV and the conduct of state security agencies in handling the violence and to make appropriate recommendations regarding these matters.<sup>14</sup> Its mandate did not explicitly include SGBV or gender considerations; however, it noted that accounts of sexual violence consistently arose in the evidence presented before it.

Working under the auspices of the United Nations, a coalition of forty organizations assisting SGBV victims provided support to the CIPEV on issues relating to sexual violence.<sup>15</sup> Following consultations with this umbrella body, the CIPEV saw the need to have an official appointment to address gender concerns within the commission. While the position of a Gender Advisor was not funded in the original CIPEV budget, it was subsequently created with financial support from UNIFEM (now UN Women). The CIPEV also hired two female investigators specialized in sexual violence who participated in hearings, to help expose the full extent of the sexual violence committed, as well as a psychologist to assist victims during the testifying process.

According to the CIPEV, the worst cases of sexual abuse occurred in the Kibera and Mathare slums of Nairobi, where hundreds of women and girls were gang raped by marauding youths and law enforcers. These included many cases of rape, gang rape, defilement, genital mutilation, sodomy, forced circumcision and insertion of objects, and other forms of sexual exploitation. Yet only 31 victims were willing to share their experiences with the commission. To gain a better understanding of the extent of sexual violence committed beyond these testimonies, the commission heard from a number of experts who had assisted hundreds of sexual violence victims; they also confirmed that very few victims had reported their violations to authorities. The low rate of reporting was attributed to factors associated with fear of retaliation, fear of police, failure to identify their tormentors, and the belief that nothing would be done to address it.

The CIPEV's report noted several women had been turned away from ill-equipped hospitals or police stations. Ultimately, this meant that the commission lacked access to important evidence to uncover the pattern of SGBV during the PEV. The CIPEV recommended that, at the very least, citizens should be informed about the existence of Gender Violence Recovery

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12 Centre for Rights, Education and Awareness (CREAW), "Women Paid the Price!!! Sexual and Gender-based violence in the 2007 post-election conflict in Kenya" (2008).

13 Despite these acts not appearing in the statutes of the International Criminal Tribunal for the Former Yugoslavia or the International Criminal Tribunal for Rwanda, they were nevertheless characterized as sexual rather than physical. See, for example, The Prosecutor v. Eliézer Niyitegeka, Case No. ICTR-96-14-T, Judgement and Sentence, May 16, 2003, paras. 303, 312, 462, 467 (Niyitegeka Trial Judgement); Prosecutor v. Radovan Karadžić and Ratko Mladic, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, IT-95-5-R61 and IT-95-18-R61, para. 13; Prosecutor v. Duško Tadić, Opinion and Judgment, IT-94-1-T, para. 206.

14 The CIPEV was appointed under the Commissions of Inquiry Act (Cap 102) Laws of Kenya but consequent to the Kenya National Dialogue and Reconciliation agreement.

15 The Inter-Agency Gender Based Violence sub-cluster, co-chaired by the United Nations Population Fund (UNFPA) and the National Commission on Gender and Development (NCGD).

Centres (GVRCs) because it was clear that a majority of those appearing before the CIPEV were unaware that these centers existed.<sup>16</sup>

In addition, the CIPEV recommended the creation of gender units within every police station where victims of sexual violence could be treated with sensitivity and where their cases would be properly recorded and investigated. It added that the effectiveness of such units would require a complete change in attitude of the police as well as additional training.<sup>17</sup>

The CIPEV noted there was no pressure on law enforcement to either investigate sexual violence or take action against officers who had perpetrated such crimes.<sup>18</sup> It recommended the establishment by law of an office of a rapporteur on sexual violence to “highlight, on a continuous basis, the fact that sexual violence is a serious crime and needs an equally serious response on the part of law enforcement authorities.”<sup>19</sup> It further recommended that the rapporteur be required and empowered to work with existing government institutions that address sexual violence, including courts, the police, and the National Commission on Gender. Finally, the CIPEV recommended that the rapporteur be required to present an annual report to the National Assembly describing how cases of sexual violence had been handled throughout the year.

To date, the government has not appointed or made any efforts to appoint the special rapporteur and this study did not come across evidence of any civil society organization advocating for the appointment of this mechanism. There was evidence of work with organizations toward the establishment of gender units after FIDA Kenya conducted trainings on gender and human rights for police officers. The effectiveness of these units, where they exist, is yet to be established empirically.<sup>20</sup> Related to this was the CIPEV’s recommendation that nongovernmental organizations in the health sector partner with medical institutions and share information to ensure a swifter and improved response to sexual violence.

The CIPEV also made a number of key broader recommendations, including:

- ensuring individual criminal responsibility for perpetrators
- police reforms
- constitutional reforms
- establishing a special tribunal to investigate and prosecute perpetrators of the violence, failing which the matter would be referred to the ICC<sup>21</sup>

The gender dimensions of these other initiatives are reviewed below.

### Truth, Justice and Reconciliation Commission

The TJRC was established by the Truth, Justice and Reconciliation Commission Act (TJR Act) Act No.5 of 2008 to investigate gross violations of human rights, economic crimes, illegal acquisition of public land, marginalization of communities, and ethnic violence between 1963 and 2008.<sup>22</sup> Under the TJR Act, the commission could put in place special arrangements and adopt specific mechanisms and procedures to address the experiences of women, children, persons with disabilities, and other vulnerable groups.

The TJRC established the Special Support Services Unit within its organizational structure to

<sup>16</sup> CIPEV Final Report, 268.

<sup>17</sup> Ibid. at 269.

<sup>18</sup> Ibid. at 249.

<sup>19</sup> Ibid. at 269.

<sup>20</sup> According to Ruth Aura, the Chairperson of FIDA Kenya, her organization was involved in the training of police officers on human rights and gender, but owing to the challenges around poor financial capacity the training was inadequate as it consisted of a half day training for new recruits en masse. Further, on deployment there was no way of following up with those trained due to frequent transfers and the lack of coordination between the training school and those responsible for the allocation of duties.

<sup>21</sup> CIPEV Final Report, 269-70.

<sup>22</sup> The Truth, Justice and Reconciliation Act (2008), section 27, 31-32.

ensure that the experiences of vulnerable groups were consistently and adequately addressed in all commission processes. The unit, headed by a female director who had considerable experience in gender issues, operated with a team of four officers, two witness support officers, and two gender officers. In fulfilling its mandate, the unit developed gender-training materials for men and women statement takers to ensure that they could handle gender-related cases and vulnerable victims with sensitivity. Including men in the gender training was intended to prevent their segregation in the interviewing process and ensure they were also able to handle SGBV issues appropriately.<sup>23</sup> This inclusion is particularly commendable given documented PEV sexual violence committed against men and boys, such as forcible castration and circumcision.

In situations where women felt uncomfortable giving information to a male statement taker, the statement taker would request a female colleague to take over the statement taking. In cases where older women felt uncomfortable giving information to female statement takers they considered too young, women were accompanied by civil society organizations to help them gain the confidence needed to discuss their experiences. Women's groups were also useful in providing peer supports to help other women traumatized by rape to participate in the process.

Recognizing the historical biases and ethnic hostilities that exist among Kenyan communities, all statement takers had to swear an oath undertaking not to be biased against any respondent on the basis of gender or ethnicity. According to the former head of the unit, one of the shortcomings of the gender training was that, apart from developing the training material, training of trainers was not conducted. As a result, the training on statement taking was not uniformly delivered across the country, and some trainers did not have the skills required for adult learning.<sup>24</sup>

To reach as many women as possible, the TJRC conducted public hearings on a wide range of issues in all provinces and held national conferences and stakeholder meetings in which different interest groups were represented, including women rights' groups. Through its District Representatives, the commission was able to liaise with civil society organizations and women's groups to encourage women to come forward and tell their stories. This network allowed the TJRC to reach women from across the country, including those who had not been directly affected by the PEV. Some of the women who were reached made statements directly to the TJRC while others contributed to statements made by civil society.

The TJRC also held women-only sessions, including, when necessary, sessions in which women were invited to speak about their experiences in private, without the fear of exposure or resulting stigmatization. According to the commission, of the 29,000 statements taken from adults, only 1,104 related to sexual violence, of which 103 were male victims. The statements and memoranda relating to sexual violence before the TJRC represented a victim count of 2,646 women and 646 men. The TJRC acknowledged that the number of statements of sexual violence it had received represented "a minute fraction of the actual number that occurred."<sup>25</sup>

The TJRC ensured that all survivors were counseled before and after testifying. Apart from the one-on-one counseling sessions, group therapy sessions were also conducted as a follow-up process to help survivors deal with their trauma. The commission collaborated with the Nairobi Women's Hospital's Gender Violence Recovery Centre and agencies such as the Kenya Red Cross and the Gender Violence Centre of the Kenyatta National Hospital, which provided assistance and minimized the likelihood of retraumatization of survivors.

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<sup>23</sup> Interview with Nancy Kanyago, Former Head of the Special Support Services Unit at the TJRC.

<sup>24</sup> Ibid.

<sup>25</sup> Final Report of the Truth, Justice and Reconciliation Commission (2013), Volume IIA, 713.

The commission also received statements from men who had been sexually assaulted during the PEV. These men were violated either by police or civilian attackers. Some were sodomized and/or castrated during exercises to flush out militia from various regions in the country, others were forced to rape their own siblings or daughters in the presence of their family members. In one incident, a man's penis was cut off and stuffed into his wife's mouth. Men who had suffered sexual violence were also referred for counseling and medical services at health-providing agencies.

Beyond taking statements from victims and witnesses and holding public hearings, the TRJC did not conduct any specific research on SGBV. Although some victims considered the TJRC the preeminent opportunity to narrate their experiences, a variety of concerns have overshadowed the positive aspects of the commission.<sup>26</sup>

The TJRC's Final Report, issued in May 2013, called for new legislation and the establishment of an Office of the Special Rapporteur on Sexual Violence, as recommended by the CIPEV, within 12 months. The TJRC made a number of key recommendations with respect to sexual violence, including but not limited to: a Presidential apology for sexual violence committed by state security agents; creating Gender Violence Recovery Centres that provide medical and counseling services in every county; reparations for sexual violence victims; and adopting a new Code of Conduct for Police. It also made broader recommendations to address and prevent human rights violations against women.

### Constitutional Reform

The new Constitution provides an essential foundation from which to guarantee the non-repetition of human rights violations, including those based on gender. By challenging structural barriers that render women vulnerable to gender-based violence and mandating gender equality, the Constitution forms an integral part of the platform from which human rights can be better recognized and protected in Kenya. It contains some significant gender-related provisions, including a number granting women representation in each area of government.<sup>27</sup>

The immediate gender-related challenge is in realizing the one-third quota requirement at each level of government set by the Constitution, given that women now comprise about 20% of Kenyan parliamentarians (86 of 416 seats).<sup>28</sup> However, the broader concern is the failure to implement the new Constitution, including by Parliament itself. In December 2012, the Kenyan Supreme Court ruled that the mandatory quota would not apply to the 2013 general election, but would instead be progressively implemented by August 2015. Human rights groups openly criticized the decision by the four-member majority, which held that quotas could not resolve the historical marginalization of women in politics and that the quota needed to be implemented in stages, over time. The Supreme Court's rationale has some basis—enforcing quotas prematurely could lead to further political problems that ultimately jeopardize the competent representation of civilian interests. However, without explicit policies to improve women's capacity to represent electorates at all levels and substantive endorsement from the parliamentary body, the quota system is at risk of reinforcing the reasons why women historically have been prevented from entering politics.

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<sup>26</sup> Ibid. at Vol I, Chapter 4, 123-154.

<sup>27</sup> Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres (article 27(3)); no more than two-thirds of any appointed or elected body can be of the same gender (article 27(8)); a Kenyan National Human Rights and Equality Commission shall be established to promote gender equality, among other aims (article 59(b)); gender discrimination is to be eliminated in law, customs and practices related to land and property in land (article 60(f)); not more than two-thirds of elected public bodies shall be of the same gender (article 81(b)); each of Kenya's 47 counties shall elect a women's representative; 16 of the 47 Senate representatives are to be women (article 98(1)(b)).

<sup>28</sup> Women hold 67 seats of 350 in the National Assembly and 18 seats of 68 in the Senate. Inter-Parliamentary Union, "World Classification," [www.ipu.org/wmn-e/classif.htm](http://www.ipu.org/wmn-e/classif.htm)



## Police Reform

Former Police Commissioner Brigadier Hussein Ali stated to the CIPEV that the police force had no statistics on SGBV because the force had not deemed it necessary to document them. The Commission concluded:

the involvement of state security agents in the perpetration of sexual violence and the fear of incriminating themselves may partly explain why the police omitted data on sexual violence in the reports they presented to the commission.<sup>29</sup>

Following criticism by Lucy Kibaki, the president's wife, the police set up a task force to investigate alleged police misconduct in the PEV. Its investigation resulted in a list of 66 complaints, most involving rapes allegedly committed by members of the security forces, which, in turn, police submitted to the Office of the Director of Public Prosecutions (DPP).<sup>30</sup> In almost all cases the police had recommended closure for lack of evidence, because the complainants had taken too long to complain or there were difficulties in identifying perpetrators because many victims could only report having been assaulted by perpetrator(s) in uniform. A team from the DPP analyzed the files according to the Sexual Offences Act 2006 and sent back all of the complaints to the police for further investigation. To date the task force has not delivered any report.

The National Police Service Act provides for gender considerations in the staffing of its Police Force;<sup>31</sup> however, these necessarily intersect with ethnic loyalties and linguistic abilities. For example, words used to describe sexual violence are often nuanced and specific to a community. In instances where a survivor can only speak his or her local language, ethnic and regional balancing plays a key role. Ethnic representation is also important to ensure that ethnic prejudices do not play a role in preventing women from reporting crimes.

## Three Key Laws

Following the passage of the 2010 Constitution, the government passed three key laws to promote institutional accountability and credibility: 1) the National Police Service Act, 2) the National Police Service Commission Act, and 3) the Independent Police Oversight Authority (IPOA) Act.

Pursuant to these laws, two civilian oversight institutions were established: the National Police Service Commission (NPSC) and the Independent Policing Oversight Authority. Section 7 of the National Police Service Act requires all police officers to be vetted by the NPSC in order to assess their suitability and competence to serve. The Independent Policing Oversight Authority (IPOA), established under the IPO Act 2011, is expected to monitor the police service for accountability and functions. The mandate of the IPOA includes receiving public complaints regarding police misconduct and undertaking independent investigations into complaints with a view to restoring public confidence in the police service and stemming political interference, which had been a major obstacle to effective police operations. With respect to SGBV, the capacity for the IPOA to deter police officers from committing SGBV is dependent on training and increasing the awareness and sensitization on SGBV of police officers responsible for investigating complaints into police misconduct.<sup>32</sup> Given that the second stage of the vetting process commenced in February

<sup>29</sup> CIPEV Final Report, 257.

<sup>30</sup> Human Rights Watch, "'Turning Pebbles': Evading Accountability for Post-Election Violence in Kenya," 2011, 21, [www.hrw.org/sites/default/files/reports/kenya1211webwcover\\_o.pdf](http://www.hrw.org/sites/default/files/reports/kenya1211webwcover_o.pdf)

<sup>31</sup> Kenyan National Police Service Act of 2011, Section 5, 11.

<sup>32</sup> United Nations General Assembly, Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, 2 February 1998 (New York: Official Record A/RES/52/86, 1998). Such initiatives include the Sexual Offences Act Implementation Workshop, which brought together actors from the judiciary, police, government, chemists, and health service providers for the implementation of the Sexual Offences Act and continues to follow up to ensure that the prosecution of cases of sexual violence are properly investigated and evidence preserved and presented in court cases. See Sexual Offences Act Implementation Workshop (May 25-27, 2011) Summary Report, [www.law.berkeley.edu/HRCweb/pdfs/SOA\\_Summary\\_Report\\_April-2012.pdf](http://www.law.berkeley.edu/HRCweb/pdfs/SOA_Summary_Report_April-2012.pdf)

2014, increasing the capacity of the IPOA and the NPSC with respect to SGBV is an urgent priority for combatting systemic impunity for SGBV, including by the police force.

### Criminal Prosecutions

In early 2012, the DPP appointed a task force to review, reevaluate, and examine files related to the PEV. According to the status report released by the task force, the DPP's office reviewed 4,408 of 6,081 files relating to the PEV. Of these, only 1,000 had sufficient evidence to pursue prosecution and only 24 PEV suspects were prosecuted, of which 11 cases were related to SGBV. Unfortunately, the quality of evidence available was insufficient to sustain SGBV convictions, as there were difficulties in gathering and preserving evidence during the crisis.

Further, certain types of SGBV crimes could not be prosecuted because they were excluded under the Penal Code,<sup>33</sup> which contained scattered provisions on rape, defilement, and indecent assault. The Sexual Offences Act, which redefined sexual violence as a crime of violence instead of morality, was in force at the time of the PEV and can be used to prosecute a wide range of sexual violence offences, albeit not as international crimes.

In late 2012, following the DPP's recommendation,<sup>34</sup> an International Crimes Division (ICD) of the High Court was to be established to prosecute mid- and lower-level perpetrators of PEV. However, because only one-sixth of cases have sufficient evidence to proceed to trial, the creation of the ICD cannot address the challenge of widespread impunity. In fact, the DPP appears to have shifted its position, arguing that most cases under review do not meet the threshold for prosecution to warrant establishment of an ICD.<sup>35</sup>

The DPP established the SGBV Offences Division to manage and prosecute cases of SGBV. Counsel in this division is required to study and evaluate case files on SGBV and decide whether to prosecute suspects. They advise government departments, especially investigation agencies, on SGBV and treaties and other instruments that have a bearing on the prevention, control, and prosecution of SGBV. Furthermore, the division carries out research to support recommendations by the Kenyan Law Reform Commission on the status and quality of the policy and laws on SGBV. It also advises on victim protection, compensation, and restitution. The first is to allocate resources to experts in the SGBV Offences Division to review the available evidence and investigate PEV SGBV allegations further to confirm whether in some cases there may be sufficient evidence to prosecute.

The DPP acknowledges that SGBV is one of the most heinous forms of criminality and has been used to commit international crimes, like crimes against humanity,<sup>36</sup> but that prosecuting SGBV is severely hampered by poor investigations due to a lack of tools and facilities to collect and preserve evidence.<sup>37</sup> Worse still, prosecutors lack appropriate training and skills to prosecute SGBV, which compounds other challenges, such as delayed reporting of cases, lack of medical records, and difficulty in identifying perpetrators, particularly when the accused are security or police officers. However, given the systemic disregard of SGBV by police, it is likely that previous investigations were not thorough and that there may be scope to strengthen the evidentiary basis for SGBV charges, particularly in cases where the identity of the perpetrator is known.

Further, according to the DPP, invoking provisions of the International Crimes Act could improve SGBV prosecutions, because their effect is to lower the required standard of proof and

33 Chapter 63 the Penal Code, Laws of Kenya, ch. XV, [www.issafrica.org/cdct/mainpages/pdf/Terrorism/Legislation/Kenya/Kenya%20Penal%20Code%201-100%20of%20119%20A%20.pdf](http://www.issafrica.org/cdct/mainpages/pdf/Terrorism/Legislation/Kenya/Kenya%20Penal%20Code%201-100%20of%20119%20A%20.pdf)

34 Athman Amran, "Post-election Violence Suspects may face International Law," *The Standard*, May 18, 2012, [www.standardmedia.co.ke/?articleID=2000064300&story\\_title=Kenya:%20Post-election%20violence%20suspects%20may%20face%20international%20law](http://www.standardmedia.co.ke/?articleID=2000064300&story_title=Kenya:%20Post-election%20violence%20suspects%20may%20face%20international%20law)

35 See also <http://iwpr.net/report-news/fresh-doubts-about-mandate-kenyas-special-court>

36 Keriako Tobiko, 2011, "Responses to Sexual and Gender based Violence (SGBV) in Kenya," A speech by the Kenya Director of Public Prosecutions during the National Consultations leading to the International Conference on the Great Lakes Region (ICGLR) special session on SGBV, October 2011, 25-26.

37 Ibid.

broaden the elements of crimes. However, in order to prosecute sexual violence as international crimes, the DPP would need to rely on Kenya's constitutional obligations to adhere to international law, including customary law, which establishes the obligation to prosecute and punish crimes against humanity. The unlikely success of such a strategy suggests that it will be almost impossible to prosecute PEV crimes as crimes against humanity.

In the meantime, the Coalition on Violence Against Women (COVAW) and a number of civil society organizations filed a petition in early 2013, claiming:

Kenya violated its duty to investigate and prosecute violators of the fundamental rights of the victims as protected by the Constitution and International Law, failed to issue lawful orders on the use of force, and failed to adequately supervise the police and Kenyan government has denied justice, compensation, and rehabilitation to the victims of police shootings during the post-election violence.<sup>38</sup>

They further claimed that the government denied emergency medical services to victims and failed to provide necessary care and compensation to address their suffering.

Respondents to the claim include the Attorney General, the Director of Public Prosecutions, the Inspector General of the National Police Service and the Independent Police Oversight Authority, the Ministry of Medical Services, and the Ministry of Public Health and Sanitation. They oppose the claim on the grounds that the police did offer protection to victims, that victims received attention in both public and private hospitals, that policing is not exclusive to the government but also includes the duty to report crime, and that the police force performed its functions to capacity but simply could not protect all civilians during the PEV.

While a preliminary inquiry was opened in the High Court of Kenya on January 22, 2014, it was adjourned to March 25, 2014, on the grounds the respondent had not filed any responses to the claim. At the same time, the Inspector General of Police argued that a case regarding sexual violence committed against eight women should be dismissed because the attacks were indiscriminate and that "allegations that police officers perpetrated violence against the victims is a general assertion as the police cannot be held responsible for all crimes that happen in the country."<sup>39</sup> Coupled with the absence of proceedings against any police officers known to have committed SGBV, the defensive response of government ministries and police suggests that the obstacles to securing convictions for SGBV are not only intractable but are also likely to be wilfully left in place.

## Recommendations

### To the Government of Kenya

- 1. Implement a reparations program for victims of sexual and gender-based violence committed during the PEV**, as recommended by the TJRC, as a means to both provide a remedy in respect of violations for which it bears responsibility and to restore public trust in state institutions.
- 2. Identify victims of SGBV as a priority group for distributing modest assistance and rehabilitation services**, such as medical assistance, including surgery for those with life-threatening or debilitating conditions resulting from sexual violence, complemented by legal assistance for those needing government-issued identification to access such services.

38 International Commission of Jurists Kenya, "Sexual and Gender-based Violence Case Hearing Adjourned to March" (2014), [www.icj-kenya.org/index.php/media-centre/news/584-sexual-and-gender-based-violence-case-hearing-adjourned-to-march](http://www.icj-kenya.org/index.php/media-centre/news/584-sexual-and-gender-based-violence-case-hearing-adjourned-to-march)

39 Millicent Kawii, "Kimaiyo Wants PEV Sexual Abuse Case Dismissed," *News 24 Kenya*, January 23, 2014, <http://m.news24.com/kenya/MyNews24/Kimaiyo-wants-PEV-sexual-abuse-case-dismissed-20140123>

### Acknowledgements

ICTJ is grateful for the support of the Kingdom of the Netherlands.



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### To the Attorney-General's Office

3. **Properly resource the SGBV Offences Division and adequately staff it with counsel who are well trained and experienced in investigating and prosecuting SGBV.** Further, put in place procedures to ensure that their work is appropriately prioritized within the DPP's caseload such that cases of SGBV are not systematically deprioritized.
4. **Execute recommendations from the Sexual Offences Act Implementation Workshop** as soon as practicably possible, to maximize the number of successful prosecutions of sexual offences defined by the Act.

### Recommendations to the National Police Service Commission and Directorate for Criminal Investigations

5. **Ensure police vetting procedures explicitly address the police culture that trivializes sexual violence.** NPSC and IPOA should include a focus on gender awareness and sensitivity and ensure that all vetted officers endorse a commitment to ensure that SGBV issues are not trivialized.
6. **Establish a department devoted to SGBV within the police service** to create a pool of experts and facilitate integration in multidisciplinary investigations. Provide mobile services that will maximize evidence-gathering and offer health and psychological support.
7. **Integrate gender training into the curriculum for police officers** as well as administrative and support staff who are likely to interact with victims, survivors, and/or witnesses at any stage in the process. The training should explicitly identify sexual violence as a violation of a person's fundamental right to bodily integrity, rather than an offence against honor.
8. **Encourage an increase in the proportion of police women at recruitment drives.** Greater staffing by women police officers should result in an increase in women's comfort when reporting crimes to the police and challenge the dominant masculine environment of Kenya's police forces. Policies that ensure women police officers are adequately protected and have equal opportunities for promotion are also necessary, given the prevailing negative police culture toward women.