

**WOMEN'S BODIES AS TOOLS OF WAR AND TERROR DURING THE POST
ELECTION VIOLENCE (PEV) IN KENYA (December 2007- 2008) AND THE
IMPLICATIONS FOR JUSTICE (Experiences of the Internally Displaced Women at
Nakuru/Naivasha area)**

Abstract

Two years after the horror of Kenya's inter-tribal post election violence (PEV), the writer of this dissertation [a member of the Federation of Women Lawyers of Kenya (FIDA K)], courageously investigates why justice still eludes the female victims (ranging from teenagers to grandmothers) of the widespread politically-motivated serial rapes (especially gang rapes) instigated by the country's two major warring political parties. Still traumatised by and ashamed to speak about their experiences of these gender-specific crimes against humanity (a taboo subject grossly underreported in the public and private, local and international domains), these brutalised women silently suffer living as Internally Displaced Persons (IDPs) herded into impoverished camps around the country which lack any/sufficient shelter, water, food or medical attention. At worst, these women have been infected with HIV/AIDS and, shorn of all their possessions, families and jobs, are forced to raise, single-handedly and without any state help, the children of the savage rapes whom the state (having denied them abortions) has forced them to bear. Guided overall by the Women's Law Approach, the writer skilfully combines several methodologies, including the Grounded and Human Rights Approaches, to conduct her research scientifically, collecting and analysing the relevant law and literature on the subject, as well as valuable evidence from a large number of women victims, some young male perpetrators of the violence, policemen, camp and NGO officials. She presents her findings through the 'lived realities' or eyes of these tragic victims and within the context of the multiple breaches of their human rights caused during and after the PEV which HRs are protected by various HR instruments binding on Kenya. These violations include the State's violation of its duty during the PEV to protect the women from physical attacks against their person, families and property (members of its police force often perpetrated or condoned the violence) and its violation in the IDP camps of their rights to reproductive and general health, water, food, shelter and resettlement. Despite clear evidence of these breaches they remain unredressed, essentially because the PEV was largely sanctioned by men who were and still are competing for state power over which they wield control. Therefore, despite growing local and international pressure, they lack the political will to hold themselves and their stooges publicly accountable for atrocities caused by their abuses of power. Finally, the writer suggests several Constitutional, legal and social reforms which should help to realise some measure of justice for these all-but-forgotten women who feel justifiably betrayed by both the Kenyan State and an apparently well-meaning, but currently underperforming, local and international HR community.

BY

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**A Dissertation submitted in partial fulfilment of the requirements of the Master's Degree
in Women's Law, Southern and Eastern African Regional Centre for Women's Law,
University of Zimbabwe**

2010

DECLARATION

I, CAROLINE SHILAHO, do hereby declare that this dissertation is my original work and has not been presented or submitted anywhere else before.

SIGNATURE

.....

Caroline V. Shilaho

DATE

.....

DEDICATION

This work is dedicated to my husband Dr. Maurice Podho, without whose support and daily encouragement I would not have managed.

I also dedicate it to the best sons a mother could ever have, Collins and Danni .Your resilience in my absence was awesome. To my parents, and my sisters Eve and Violet for filling in when I was away.

I further wish to dedicate this work to all those violated women who have tried to bring out their stories to the world and to those whose stories have remained a sad, painful and untold secret.

To all of You, I dedicate this Dissertation to your resilience and courage despite all the Odds stacked against you.

Perhaps, just perhaps, tomorrow will be a much brighter day than today!

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I also wish to acknowledge all the respondents who made this thesis possible including Anastacia and all the women who gave me their personal stories.

LIST OF STATUTES

The Constitution of Kenya

Penal Code Chapter 63 Laws of Kenya

Police Act Chapter 84 Laws of Kenya

Sexual Offences Act, Act No. 3 of 2006 (SOA)

Witness Protection Act

LIST OF INTERNATIONAL CONVENTIONS, PROTOCOLS AND DECLARATIONS

Universal Declaration of Human Rights, 1948 (UDHR)

Convention on the Elimination of all forms of Discrimination against Women (CEDAW)

International Covenant on Civil and Political Rights

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa ('The Women's Protocol')

United Nations Declaration on the Elimination of Violence against Women (DEVAW)

The UN Guiding Principles on Internal Displacement

United Nation Security Council

LIST OF CASES

Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, 500-01 (ICTR Sept. 2, 1998)

Prosecutor v. Kenya, ICC-01/09-1

Prosecutors v. Hirohito Emperor Showa

LIST OF ABBREVIATIONS

AG	Attorney General
CIPEV	Commission of Inquiry into Post-Election Violence
FIDA (K)	Federation of Women Lawyers Kenya
KNCHR	Kenya National Commission on Human Rights
KHRC	Kenya Human Rights Commission
ICC	International Criminal Court
SOA	Sexual Offences Act, Act No. 3 of 2006
UDHR	Universal Declaration of Human Rights, 1948
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
DEVAW	United Nations Declaration on the Elimination of all forms of Violence against Women

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CHAPTER ONE:

1.0 INTRODUCTION AND BACKGROUND TO THE RESEARCH

Up until now I do not know how to face my son. I feel such pain and such shame that my son was forced to sleep with me. Only God can take away this pain in my heart .Whom do I tell? Nobody can help, so I keep quiet and I pray to God daily to remove this shame and this pain.¹

This is the despair of 58 year old Wambui*, who was raped by 7 youths and her 18 year old son forced to sleep with her during the post-election violence in Kenya. Wambui's pain is personal and heartfelt yet hers is not the only voice of hopelessness and despair. Millions of women the world over have had their bodies turned into battlegrounds. Many conflicts that arise are fought through women's bodies to revenge, humiliate and to prove male superiority over other men and women. Sexual violence against women has become so rampant and increasingly more brutal in each war and each conflict.

The story is the same everywhere from Yugoslavia, to Rwanda to Congo to Bosnia, Zimbabwe and Kenya. By 1993, 40,000 cases of war-related rape had been documented in Bosnia. Of Rwandan women surveyed in 1999, 39% reported being raped during the 1994 genocide, and 72% knew someone who had been raped. An estimated 23,200 to 45,600 Kosovo women were raped between August 1998 and August 1999, while in Sierra Leone, approximately 50,000 to 64,000 internally displaced women may have been sexually victimized during the protracted armed conflict (IRIN/OCHA:2005).

Kenya had been considered an oasis of peace by the world amidst fighting nations like Somalia and Sudan amongst others. Its citizens and women took that peace for granted until the December 2007 when Kenya had elections and the nightmare for women began.

*NOTE: All names in this dissertation have been changed to protect the privacy of the respondents.

¹ Interview of Wambui on 7th November 2009.

Following the Electoral Commission's (ECK) declaration of Mwai Kibaki as the winner of the presidential contest, subsequent to which he was swiftly sworn in as President on the evening of 30 December, 2007, Kenya descended into chaos and violence that left at least 1,162 people dead and about 350,000 others displaced from their homes in just over a month. About 1171 women were confirmed to have been raped during the violence but this was considered just a small percentage of the real number (CIPEV; 2008). It was concluded that, while irregularities in the election process were the primary trigger of the violence, underlying causes, including discrimination, poverty and disenfranchisement fuelled the crisis.(OHCHR:2008).

Most of the displaced people went into camps since they had nowhere else to go. Thousands of the internally displaced remain in Kenyan camps to date. The majority of those in the camps are women and a good number of them are those who also suffered sexual violence. Following international and regional pressure, a fragile peace was achieved after the formation, on 28th February 2008, of a coalition government in terms of which the country is governed by a President and a Prime Minister. Sexual violence was put on the backburner as the jostle for ministerial positions and power play games took centre stage. Yet it follows that in a world where sex crimes are often regarded as misdemeanors during times of law and order, rape will not be perceived as a high crime during conflict (Europe council:2009).

Politicians were blamed for causing the violence yet with political settlements meaning that warlords become part of the governments, the irony is that we have perpetrators overseeing legislation on how to punish their own crimes. Kenya has a Parliament that has criminals on both sides of the house who have no reason to go after themselves. (Kwayera; 2010).

This research dissertation discusses and analyses the findings of research carried out in the Nakuru and Naivasha area, Kenya from October 2009 to January 2010 on the issue of women's bodies being used as tools of war during the post-election violence in Kenya from December 2007 to February 2008 and the implications for justice. The first Chapter gives the background of the study, the statement of the problem, the objectives of the research, the research questions and assumptions and the significance of the study. Chapter Two consists of the research methods and methodologies used during the research and an explanation as to how each was used. The

limitations of the research are also found in this Chapter. The findings of the research, the discussions and analysis are found in Chapter four and Chapter Five. Chapter Six contains the conclusion and recommendations of the study.

1.1 BACKGROUND

After the disputed elections of December 2007, Kenya joined the unenviable ranks of those countries where conflicts have been fought out through women's bodies. The electronic and print media showed and printed stories of fleeing women with their houses and belongings burning behind them, holding tightly onto their children's hands. The despair on their faces was not just about the lost property and livelihoods but about their broken bodies and spirits through rape and sexual violence. Despite the silent screams and the bruised bodies, the women had no choice but to act as though nothing had happened to them, if only for the sake of that innocent child clinging tightly to 'mama's' hand and expecting comfort and protection from her.

Looking at these women, as a woman and as a legal practitioner who is a member of Federation of Women Lawyers (FIDAK), I asked myself, but what are 'mama's' needs and experiences? What would she like to see done to give her a semblance of justice? Who will vindicate these women and girls who have lost almost everything including themselves? I wondered about what I could do to assist in view of the fact that more emphasis was being put on the killings, burning of property and displacement than on the sexual violence.

I did not want the ordeal of Kenya's women to be just another story. It should be a story of a woman's resilience and strength in the face of adversity and a society that still treats her like a second class citizen. This could only be done by looking at where the violence began and what can be done about it. That prompted my research on this topic. "Physical wounds and scars may disappear, but the stigma of losing one's dignity stays on" (Omondi, July 12:2008).

1.2 DEFINITION OF GENDER BASED VIOLENCE

Gender based violence has been described as various types of violence that are directed at a person on the basis of 'gender' or 'sex'. It includes acts that inflict physical, mental or sexual harm or suffering, the threat of such acts, coercion and other deprivations of freedom (Lindorfer; 2005). The word gender has however been used almost synonymously to mean 'women'.

The United Nations Declaration on the Elimination of Violence against Women (DEVAW) of 1993 considered a landmark document for placing violence against women within the context of human rights describes violence against women as including physical, sexual and psychological violence occurring in the family and in the community and violence perpetrated or condoned by the State.

1.3 STATEMENT OF THE PROBLEM

Kenya is a signatory to many international instruments but it is a dualist nation which requires that this instruments be passed into legislation for them to become effective and applicable in Kenya. The Kenya Constitution has no explicit provision prohibiting violence. The government does not seem to regard sexual violence as a human rights violation or a crime against humanity. Despite the fact that women suffered rape during the post-election violence, priority has been given to death, loss of property and displacements, relegating rape and sexual violence two secondary issues. Sexual violence has been treated as a normal everyday affair by the government and its agents, including the police. The physical, psychological and social consequences that women have suffered have not been fully appreciated or dealt with. Despite the gravity of sexual violence, there has been no common data or records kept by the different organizations and government ministries resulting in a failure to estimate the numbers of affected women who need urgent assistance.

Further, 2 years down the line, no one has been prosecuted for masterminding the violence that brought so much suffering to women. The perpetrators of the violence alleged to be leading politicians sitting in Parliament, continue living normal lives while the women languish in

poverty and misery in the camps. Justice remains elusive for the victims. The research anticipates finding out the degree of sexual violence that occurred. It also seeks to find out what other causes, be it culture, religion, politics, patriarchy, ethnicity, amongst others, play a part in exposing women to violence and the impact they have on the justice the women seek and receive. The research further attempts to evaluate any gaps in the Kenya Constitution, other laws and policies relating to violence against women in times of conflict and whether enough is being done to ensure that women are protected in times of such conflict from sexual violence and whether the women affected have received some form of justice after being sexually attacked.

1.4 RESEARCH OBJECTIVES

The main objectives of this research were:

1. To assess the extent to which women's bodies were used to instill fear and submission during the post-election violence in Kenya.
2. To evaluate the nature of gender based violence women suffered during the violence.
3. To assess the impact of the gender based violence on women.
4. To find out the measures, if any, the State has taken to redress the problems faced by women affected by the violence.
5. To assess if justice has been done for the victims of sexual violence.

1.5 RESEARCH ASSUMPTIONS

1. Women suffered gender based violence during the post election period.
2. Rape was the main form of violence suffered by women during the post-election period.

3. The violence was used as a weapon of war between the rival warring parties.
4. The rape and violence led to unwanted pregnancies and the contraction of HIV-AIDS.
5. The State failed to adequately protect the women from the violence.
6. Women victims of the gender violence have not received justice.

1.6 RESEARCH QUESTIONS

1. Did women suffer any gender based violence during the post election period? If so, what kind?
2. What reason if any was attributed to this violence?
3. What were the consequences of the gender violence for women?
4. What measures has the State put in place to address this violence?
5. Have the perpetrators of this violence been arrested or charged in Court?
6. What are the outcomes of these charges if any?
7. What redress has been availed to the women as a result of the gender violence they suffered?
8. What forms of redress would the women like to receive?

1.7 DEMARCATION OF THE STUDY

This research was carried out in the Nakuru and Naivasha area of Kenya. Nakuru is about 200 kilometres from the capital city of Nairobi in Kenya, while Naivasha is about 100 kilometres from the City. These two towns were amongst the worst hit by the post-election violence in Kenya and ended up harbouring many internally displaced people from different parts of the country. The areas have a mixed ethnicity and hence the clashes which were fought on an ethnic basis were more strongly felt by both sides of the ethnic divide than in other areas where only one tribe predominantly suffered. It was more conducive for me to research these areas since I live and work in Nakuru. The camps for the internally displaced around Nakuru, Naivasha area are harboring probably the highest number of internally displaced people from different tribes; therefore it was the best place to research for purposes of all round information. I however had to extend the research to Nairobi because organizations like Federation of Women Lawyers (FIDA K), the Kenya Human Rights Commission (KHRC) and the Kenya National Commission on Human Rights (KNCHR) are also found in Nairobi. The Nairobi Women's Hospital which treated and documented rape cases at their hospital is located in Nairobi too.

CHAPTER TWO:

2.0 LITERATURE REVIEW

Before embarking on the research, I undertook a study of literature relating to sexual violence against women in conflict situations. I reviewed the literature relating to both Kenya and other countries that have had similar situations in Africa and elsewhere. I further reviewed the human rights provisions and laws and policies relating to violence against women. I have consequently looked at previous research and findings on these issues. These findings will in a later chapter be linked to current findings to determine the issues affecting women who are sexually violated in conflict situations, and who have been displaced from their homes. The literature review assisted me in the provision of the theoretical framework within which to operate.

2.1 SEXUAL VIOLENCE AGAINST WOMEN IN KENYA

I have to a great extent relied on the report of the Commission on Post-election Violence (CIPEV: 2008), which was set up to investigate post-election violence in Kenya. CIPEV, also known as the “Waki Commission” after Chairman Judge Philip Waki, was established as part of the March 4 2008 power-sharing agreement negotiated by Kofi Annan and the Panel of Eminent African Personalities. The government constituted the Commission on May 23, 2008 while the Commission’s report was released on October 15, 2008. The Commission’s work was considered comprehensive and critical as it took into account the views of the human rights bodies, KNCHR and the KHRC, forty groups² representing women under the cluster of Inter Agency Gender

² 40 organizations in Kenya gathered under the auspices of the Inter-Agency Gender Based Violence sub-cluster co-chaired by the United Nations Fund for Population Activities (UNFPA) and the National Commission on Gender and Development. It included different groups from departments in the ministries of gender and health, and the judiciary, various UN agencies (e.g. UNFPA, the United Nations Development Fund for Women (UNIFEM)), the

Based Violence (GBV) supported and funded by UNIFEM and UNFPA, the police and victims of the violence amongst others.

2.1.1 Rape as the main Form of Gender Violence

Violence during conflict may be both gender specific or neutral to both sexes. In Kenya, the post-election violence constituted both. The gender neutral violence resulted in the reported deaths of several people, the displacement and the destruction of property as indicated in the introduction. Despite men being the majority of those killed, women were however the main victims of multiple violations of their rights during the violence (KHRC: 2008). The main form of violence which was gender specific was rape.

Sexual violence has been described as one of history's great silences. Victims most frequently fail to talk or report rape due to the fear of being stigmatized by the communities and the fear of repercussions from the perpetrators. Acknowledging this fact, the chairman of the Commission, described sexual offences as "silent crimes in conflict situations, much ignored and underreported." The Commission was the first of its kind in Kenyan history to look at sexual violence. Similar to most conflict situations where women and children form the majority of the affected population, the Commission found that sexual violence was rampant during the period between December 2007 and March 2008, consisting mainly of rape and gang rape, defilement, genital mutilation, sodomy, forced circumcision, and sexual exploitation. Boys and men were targeted through forced circumcision and penile amputation, while women and girls of all ages and backgrounds formed the majority of those who suffered multiple consequences.

For several reasons, data on rape in conflict are exceedingly difficult to capture as seen in the variance in estimates from any given country, such as those from Bosnia that range from 14,000

Red Cross and Red Crescent Movement, and from various local and international non-governmental organizations (NGOS).

to 50,000, and from Rwanda that range from 15,700 to a half million (IRIN/OCHA:2005). In a similar fashion, the GBV sub-cluster, on presenting its report to the Waki Commission through the FIDA (K) representative, stated that there was a lack of data from the state agencies making it impossible to ascertain the exact number of sexual victims. The only available data of 1171 was collected where women went to hospitals or sought help from a few organizations (CIPEV: 2008).

2.1.2 The Violence as a Weapon against rival Parties/Tribes

The perpetrators of sexual violence in conflict situations vary from rival groups, security agents, or personnel sent in to help the victims who take advantage of the breakdown in law and order to rape. Kenya was no exception. The Commission found that attacks came from amongst others, the police, members of organized gangs (for example Mungiki, Kalenjin warriors,) neighbours, relatives, supposed friends, and individuals working in camps for internally displaced persons (IDPs).

The violence during conflict can be opportunistic, due to the collapse in social and moral order or it may be used to humiliate and shame the 'enemy' (IRIN/OCHA; 2005). The rape in Kenya was used to pressure people to leave their homes, to retaliate against them for having voted for the wrong candidate, tribe or party and consequently humiliate and degrade them and their communities, according to the Commission findings. In other areas, sexual violence was used to force IDPS to trade sex unwillingly for basic needs.

2.1.3 Consequences of the Rapes

Rape is a brutal act which brings with it devastating physical, psychological, and social consequences. The circumstances under which it occurs in conflict situations is even more agonizing since victims are unlikely to receive immediate attention whether medical or psychological. Psychological torture due to being forced to witness killings and maiming: getting unwanted pregnancies, contracting HIV AIDS after being raped, and being abandoned by

husbands were among the consequences suffered by victims who testified before the Commission. The insecurity and lack of means of transport during the violence meant that most women could not get to medical hospitals and clinics in time for prevention of HIV/AIDS or for proper treatment with long term consequences. As Dr. Nthenya from NWH indicated to the Commission that survivors of sexual violence who are administered a drug called Post Exposure Prophylaxes (PEP) within 72 hours drastically reduce their chances of being infected with HIV/AIDS and other sexually transmitted diseases (STDs).

2.1.4 The Role of the State in the Prevention and Combating of the Violence

When issues of sexual abuse that happen during internal conflict are left to the devices of officials, crimes committed against women are often ignored, mischaracterized, or just completely under-investigated (Africa Renewal:2005). This was evident in Kenya when the State organs and the police failed to treat rape as a serious issue during the post-election violence. The police had no data on sexual violence cases. The then Commissioner of Police told the Commission that the police had not collected any information or statistics on rapes, and he was not sure whether sexual violence was fit to be reported. Kenya's Attorney General (AG) also did not have any data on sexually violated women despite Section 26 of the Constitution of Kenya which vests all investigative powers in him.

Of note is that the KNHRC, the main body mandated to advise the government of human rights, only talked about sexual violence in one paragraph in its report. Despite having the mandate to investigate, the KNCHR did not have any data on women who were affected by sexual violence, instead referring the Commission to the police. Given the priority KNCHR gave to the loss of life and the loss of property in its report, neglecting sexual violence is questionable. This is especially in view of the fact that the KNCHR is the body which is leading the call for the trial of suspects at the International Criminal Court (ICC) which Court recognizes rape and sexual violence as crimes against humanity.

It was not only the State agencies who seemed to take sexual violence lightly. The UN Human Rights team's (OHCHR: 2008) fact finding mission to Kenya in January and February 2008 also

had no data on violated women, claiming limited investigations. Considering that the mission commented comprehensively on all other aspects of the violence, it is surprising that they had no time to investigate sexual violence.

The State uses its organs, mostly the police and other security organs to protect its citizens. How well these organs function in combating violence speaks a lot about the commitment of that government. In the Kenyan scenario however, the police were not protectors; in fact, many were found guilty of murder, rape, theft, bribery or failing to act. Witnesses also complained that police acted in a biased manner along ethnic lines. The Commission report however failed to make a determination as to action to be taken against police officers who were guilty of criminal acts. This was an extremely serious omission especially in view of the Commission's otherwise exemplary work.

2.1.5 Justice

The under-reporting of rape is commonplace even in times of peace; in times of conflict, factors such as stigma and shame are compounded by political instability and threats to personal safety, making rates of reporting to be even lower (UNFPA:2006). CIPEV, in its findings, learned that 82% of the victims did not report their experiences of sexual violence, especially to the police. The reasons for non reporting included the fact that it was the police who committed some of the rapes, the fear of repeat attacks, inability to identify rapists and belief that nothing would be done. Because of the failure to report and to seek justice, the perpetrators of the violence get away with no punishment while the victims suffer. In Kenya, thousands of women and girls who were sexually assaulted and raped during the post-election mayhem are still waiting for justice (CARE K: 2009).

2.2 THE INTERNATIONAL CRIMINAL COURT

Kenya ratified the Rome Statute of the International Criminal Court (ICC) on 15th March 2005. It thereby bound itself to the jurisdiction of the court in cases where genocide, war crimes or

crimes against humanity are committed within its territory or by its citizens. Consequently, it opened doors for the ICC prosecutor to investigate acts which are not being investigated and prosecuted by national authorities.

The ICC included rape and sexual slavery as a war crime and a crime against humanity in 1998 marking a major step forward. In Article 7(1g) rape and other forms of violence constitute crimes against humanity. In a landmark Rwandan case of Akayesu in 1998, pressure from human rights organizations and other civil society organizations contributed to an amendment of charges, against the former mayor to include rape. In *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 500-01 (ICTR Sept. 2, 1998, for the first time in history, rape was included as an act of genocide and rape was defined as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive (inside justice: 2009). It further held that rape included acts which involve the insertion of objects. On October 2, 1998, Akayesu was sentenced to three life sentences for genocide and crimes against humanity and to 80 years for other violations including rape.

Article 15(3) of the ICC allows the prosecutor to open an investigation into a country on his own initiative especially where the country fails to refer the case to the Court on its own motion. Kenya missed the ICC deadline for initiating local prosecutions by the end of September 2009. The government further refused to formally refer its case for crimes committed during the post-election violence to the ICC on the 5th November 2009. This resulted in the historical first time the ICC Prosecutor sought to open an investigation on his own initiative in accordance with article 15(3) of the Statute. On the 26 November 2009, the Prosecutor of the ICC, Moreno-Ocampo requested the authorization of the Court to open investigation into crimes allegedly committed in Kenya in relation to the post-election violence. In presenting Kenya's case, *ICC-01/09*³, to the Chamber, the ICC Prosecutor also used Article 7(1) (g) which includes rape and other forms of sexual violence as constituting a crime against humanity in the case. The ruling is

³ Appendix 3

still pending. The ICC is also the first international treaty listing forced pregnancy as a crime in terms of Article 8 (2) (b).

2.3 REPARATION FOR RAPE VICTIMS IN CONFLICT

The primary function of corrective or remedial justice is to rectify the wrong done to a victim. The right to a remedy when rights are violated is expressly guaranteed by global and regional human rights instruments.

Section 75(1) of the Rome Statute mandates the ICC to offer restitution, compensation and rehabilitation to victims on the application of victims or on its own motion. The ICC is significantly different, since, for the very first time in international crime, victims of crimes and their families can express their views and ask the Court for reparation for the violation of their rights on their own behalf or through representatives under rule 94. The Court decides which kind of reparation to give including compensation for physical, moral and material harm. Restitution for loss of property and rehabilitation which covers costs of medical, psychological or psychiatric care may also be granted. Section 75(2) provides for a reparation order directly against the convicted person while under section 79 of the Rome Statute, a Trust Fund for victims established by ICC State parties can be used to provide some reparation for victims where the convicted person lacks sufficient assets (ICC: 2007). The victims of violence in Kenya may thus ask for reparation if the judges allow the case against Kenya to proceed.

While perpetrators may be charged in criminal proceedings in local jurisdictions, the sentence does nothing for the victims personally. Victims benefit only when compensation is paid directly to them. As Wright M (1991) points out, most western countries including Britain, two thirds of USA states and Norway have accepted that states should compensate victims of violence with details of compensation varying from state to state. Britain compensates the victims for loss of earnings, expenditure incurred because of disablement, and pain and suffering with medical care provided by the National Health Service. Wright proposes that the risk should be shared by all citizens through taxation or national insurance.

In support of reparation, the KNCHR (2008), in its findings, recommended that IDP's in Kenya should be provided with restitution, compensation, apology or rehabilitation. In a ruling against a country, the Women's International War Crimes Tribunal in the case of *Prosecutors v. Hirohito Emperor Showa*,⁴ found Japan responsible for violations of its treaty obligations relating to slavery, forced labour, and rape, amounting to crimes against humanity; while Emperor Hirohito was found guilty on the basis of command responsibility. The tribunal recommended a range of reparations including monetary compensation.

2.4 CULTURAL AND SOCIAL ATTITUDES TOWARDS WOMEN AND SEX

In most African cultures, Kenya included, a woman's consent to sex is not important. Patriarchy is rampant since most communities believe in men's superiority and entitlement to sex whenever a man feels like, thus contributing to sexual violence towards women. This is linked to the excuses men have for infidelity and polygamy which are treated as 'normal' by society. Sexuality is however a taboo subject especially for women and is almost never discussed in Kenyan society. Through dowry, women are further reduced to property bought and sold by men. In his article, Muchoki S (2000) found that the major enabling factor to rape in Kenya is the culture and the society's attitude that men are superior to women and have entitlement to sex. One of his respondents said:

Where I come from, men do not seduce women. We force them into sex and then marry them.

This view of Kenyan women goes hand in hand with the view of radical feminists who argue that the patriarchal system characterized by male power and dominance oppresses women. This school of thought believes that women's biological status subordinates them to men. It is thus

⁴ Trial of Japan's Military Sexual Slavery. Judgment 4 December 2001.

argued that other than the female biology being oppressive in itself, men have taken advantage of women as child bearers and childrearers to control women's sexuality for male pleasure through rape and battery amongst others. In order to liberate women from this domination, it is proposed that patriarchy's whole system of legal, political, social and cultural structures must be done away with (Dahl T.S:1987).

In conclusion, each of the Commissions set up discussed issues within a particular context. The KNCHR focused too much on other rights but barely mentioned sexual violence against women. The CIPEV did a good job within the limited time given but the report failed to look at the social reasons as to why rape and sexual violence happens. The views of the perpetrators of rape were missing. Socialization and upbringing were not given much importance, yet for men and youths to believe they must rape women in order to air their political grievances means a wholesome solution beyond legalities must be looked into.

The GBV clusters had very useful findings but they glossed over the underlying reasons of the violence like unemployment, perceived discrimination of some tribes, social and cultural factors. With the underlying reasons unresolved, violence may erupt again with the same disastrous consequences for women. As Shepherd L (2008) says,

Addressing violence against women in isolation will not reduce the incidences. Any gains made would be temporary, resources would be directed towards shelters, counseling and treatment of victims, which are worthy and necessary but none of which challenges the underlying problem.

With my women's law approach which crosses individual disciplines including social, legal, medical or cultural ones in a bid to understand women's lived realities, my research seeks to look at the gaps listed above in an attempt to find a holistic solution to the Kenya sexual violence against women.

CHAPTER THREE:

3.0 RESEARCH METHODOLOGIES AND METHODS

3.1 METHODOLOGIES

The methodologies used to collect and analyze the data were dependent on the research assumptions, research questions and the objectives of the research. The methodologies further depended on the practicability and the convenience of the methodology considering that the time of the research was three months.

3.1.1 The Women's Law Approach

This approach is based on exploring the reality of women's lives and from this perspective, investigates the law (Bentzon et.al, 1998:91). My research was based on the experiences of women during the post-election period hence my starting point was the women living in the camps and those displaced during the violence and the lived experiences they had gone through during that period. I then related these experiences and the laws existing in place regarding violence and specifically rape against women in conflict situations, how conducive/rigid the law is when it comes to reporting of crimes and punishing perpetrators of such violence. I therefore had to find out the interplay between these laws and the women's actual lived lives at the time of the violence and in the camps.

To determine whether the law in place provided adequately for the protection of women and ensured that they received justice, I interviewed women in four camps and two other groups who were living as integrated displaced persons. I found out what the women went through during the post-election violence, the ones who were raped and their current living situations. Based on the data collected, I was able to assess whether and how the existing laws like the Constitution and the Sexual Offences Act amongst others could assist women. This was done from a feminist perspective which included; the description of the existing laws: identifying areas of strong legal

support and weak legal support and the legal voids. I was then able to determine which laws need expansion, contraction or replacement (Dahl 1987:20). This method was useful in all my assumptions.

3.1.2 The Sex and Gender Approach

Sex refers to the biological differences between men and women while gender refers to the socially attributed roles. Kenya is predominantly a patriarchal society with certain tasks and roles ascribed to as 'feminine' which women are expected to perform, while other roles are seen as 'masculine' thus for men. In answering my research questions as to whether women suffered any gender based violence during the post-election period, the reasons attributed for the violence and the consequences of the violence for women, I had to use the sex and gender approach. This approach assisted me in determining which violence was specific to women as a sex at that time which was rape. It was also essential in looking at whether gender ascribed roles (like being child bearers and rearers) made women more vulnerable to the violence perpetuated against them than men. For example, how easy was it for a woman who was pregnant or who had just delivered a baby to run away from the attackers so as to avoid rape even when she had some prior warning that there was going to be an attack? Based on those roles, I was able to determine whether men were less burdened and at an advantage when it came to running away than the women with children.

With regard to accessing justice, this approach was essential in the determination of whether being child bearers and rearers and having the responsibilities to look after the families contributed to the failure by women to report the rapes and violence against them to the police in time or at all and to seek treatment in good time. For mothers with children, it helped determine whether their first priority was to themselves or to the children's welfare first hence relegating their own needs for justice and protection to second place. This approach was therefore quite crucial in my research.

3.1.3 Legal Pluralism: The Impact of Semi-Autonomous Social Fields

Under this approach, it is recognized that there are other normative orders apart from the formal law which influence and shape women's legal and social positions. Semi-autonomous bodies like culture, religion and socialization affect women's lives and decisions. This approach was relevant to all my assumptions. When it came to which gender based violence women suffered during the post-election period, I used this to determine whether the rampant raping of women was associated with culture and how women are viewed traditionally by men. In researching rape, I had to look at the African culture where violence against women is legitimate and normal and whether this attitude contributed to the raping of women. In looking at the reasons as to whether women reported the violence and rape against them to the police, I used this approach to consider whether cultural and religious perceptions which look at sex as a private issue not to be discussed in public contributed to the failure of women to report rape to the relevant authorities.

The approach was also important in understanding the police reaction/non reaction to the women who were violated. It helped to analyze whether their socialization and the culture they were brought up in considered violence against women seriously or just a normal issue simply to be ignored. I was able to analyze the contradictions in the law and the practices as influenced by the semi-autonomous bodies above mentioned.

3.1.4 Actors and Structures

This method is based on the assumption that strategic human action may be directed at maintaining or changing structures or finding ways to explore opportunities within social, administrative or legal structures (Bentzon et al, 1998:91). I used this approach to identify the key players who influence the decisions affecting women's lives. These included Parliament, the Judiciary, the Police, the KNCHR, Civil Society, Women's organizations, and the Church amongst others.

This approach assisted me to look at whether Parliament had played its role in passing necessary laws which would enable the victims of post-election violence receive justice like the Local

Tribunal Bill which was to enable Kenya try the perpetrators of the violence through the use of special Courts, the Witness Protection Act amongst others. I was further able to look at the police as a structure and whether they helped to prevent violence against women during and after the election violence or if they failed. Further, I looked at whether the police made it possible for women victims of violence to receive justice.

In addition, the roles of Non Governmental Organizations (NGO'S') and specifically women rights organizations like FIDA Kenya were assessed through this approach to ascertain if they played their role effectively in seeking justice for women victims of violence .It was thus a vital approach especially with regard to the assumption on the State's role and whether women had received any justice. KNCHR, an independent national human rights body and the KHRC were also part of the structures looked at as they kept the government on its toes regarding crucial human rights that had been violated with the KNHCR even putting forward names of perpetrators of the violence which list was mainly used as the basis by the ICC and the Waki Commission. Although they attempted to play a role in the search for a political settlement, religious groups were not seen as neutral arbiters by the key actors and their mediation efforts were largely unsuccessful.

3.1.5 The Human Rights based Approach

Since my research was about the experiences of internally displaced women who had also suffered rape during the post-election violence in Kenya, I used this approach to examine the multiplicity of rights that had been violated by the State which the women in question were entitled to. These included the right to non-discrimination, the right to life and integrity of the person, the right to property, the right to shelter and adequate housing, the right to health, food, safe and adequate water and a clean environment and the right to work. Sexual violence has been dealt with by human rights instruments like the Convention on elimination of Violence against Women (CEDAW) and the Vienna Declaration which have conceptualized women's rights as human rights. Kenya is a signatory to a number of international instruments which put the duty on the state to protect civilians including women in times of conflict against attacks on their honor in particular against rape. These human rights instruments have been more critically

analyzed partly in the literature review and in the findings on the role of the State. The approach assisted me in ascertaining whether the State was meeting its international obligations or violating them.

3.1.6 The Grounded Theory Approach

I used this methodology as my starting point for the research. I went to the field with my assumptions and an open mind and tried to keep in mind the guides of an open mind, next question technique, concept building, constant comparative method, theoretical sampling and the limitations on theory building (Glass and Strauss: 1967).

When I started the research, I let the respondents tell me their stories and through their responses, I was able to know what to ask next and who to interview next. For instance, from the questions I asked, I was able to gather that the police played a very crucial role both during and after the violence which impacted a lot on the women's quest for justice. Following these responses, I then followed up and interviewed the police to establish their role and get a clearer picture.

By interviewing the medical nurse who was in charge of the internally displaced at the Nakuru Showground, I got more women respondents to interview and I also got information as to what was going on in the camps immediately after the violence even though some of the victims had left camps. Through the use of my assumptions, my interviews and the emerging issues, I was able to do a deeper analysis of the data together with the emerging issues like how culture and socialization greatly impacted on the way women were viewed and made them more vulnerable to sexual violations. I was thus able to test if my assumptions were holding or not.

3.2 METHODS OF DATA COLLECTION

The methods utilized in the research are essential as they determine the kind of results one collects. My choice of methods was determined by my research objectives and questions. The

time frame for the research and the practicability also played a part in the choice of my methods. Both qualitative and quantitative methods were used. The methods included: in-depth individual interviews, key informant interviews, focus group discussions, observations, photography and secondary data. Discussions of the methods used in the collection of data, together with the illustrated tables of respondents are found below.

3.2.1 In-depth Individual Interviews

As a method of interview this is considered an effective way of gathering information because the interviewer can observe facial expressions, gestures and the body language as well as probe for more. (Cohen and Manon: 1980). This was the main method I used in gathering data in view of the questions under research. I conducted in-depth interviews with 35 women and girls who were victims of rape during the post-election period. I traced the interviewees through a lawyer who had taken some of them to testify in a Commission, (CIPEV), discussed in the literature review, while I traced others through a nurse who had treated the women in the camps after the rapes. I also talked to three male perpetrators of the violence aged between 24-29 to get a perspective on why youths were the most involved in the violence and rape on women. I further used this method to interview two FIDA K officials, the litigation officer and the programmes officer.

This method allowed me to have a face to face sharing of experiences with the respondents. I had a chance to witness the despair, the tears and the hopelessness on most of the women's faces as they narrated their painful experiences. I also had the opportunity to witness the resilience of a few of the women who had decided that fate had given them a second chance at life and they would make the best of their situation. This method was the richest in the output of data.

The challenge of this method was that I got so emotionally affected by the lived realities of these women and girls that it was a struggle to move on to the next respondent. I also felt inadequate because what most of the women needed was a counsellor and I was not one so I had to be careful not to add to their despair with either my words or actions without the benefit of proper training in that field.

Table 1: List of Respondents who gave in-depth Interviews

Women Victims	Ethnic group	Age range	Place of violence	Nature of violence
Wambui	Kikuyu	58	Enoosipukia	Rape
Mburu	Kikuyu	67	Sagutwek	Rape
Wanjiru	Kikuyu	54	Mau Summit	Rape
Akinyi	Luo	24	Lakeview estate	Rape
Atieno	Luo	30	Lakeview estate	Rape
Achieng	Luo	32	Rhonda	Rape
Njeri B	Kikuyu	35	Burnt Forest	Rape
Moraa	Kisii	25	Kaptembwa	Rape
Jean	Kisii	50	Kaptembwa	Rape
Awino	Luo	24	Naivasha	Rape
Momanyi	Kisii	52	Kaptembwa	Rape
Nancy	Kisii	48	Kaptembwa	Rape
Lutia	Luhya	46	Kaptembwa	Rape
Amolo	Luo	37	Langalanga	Rape
Anita	Kikuyu	17	Koru, Kisumu	Rape
Joy	Kikuyu	22	Koru	Rape
Chege	Kikuyu	18	Nakuru Showground	Rape

Wanja	Kikuyu	24	Burnt Forest	Rape
Mercy	Kikuyu	48	Kipkelion	Rape
Wangui	Kikuyu	34	Molo	Rape
Waithera	Kikuyu	60	Mogotio	Rape
Njoki	Kikuyu	43	Molo	Rape
Wairimu	Kikuyu	57	Mau Summit	Rape
Wangechi	Kikuyu	66	Kipkelion	Rape
Njehia	Kikuyu	50	Ndeffo	Rape
Mary	Kikuyu	60	Burnt Forest	Rape
Aliviza	Luhya	35	Kisulisuli estate	Rape
Mercy	Kikuyu	65	Githima estate	Rape
Joyce	Kikuyu	48	Githima	Rape
Jane	Kikuyu	47	Kokwet	Rape
Wanjiku	Kikuyu	55	Molo	Rape
Njambi	Kikuyu	48	Mlima	''
Muthoni	Kikuyu	25	Kericho	''
Gina	Kikuyu	46	Kipkelion	''
Sarah	Kikuyu	47	Mau Summit	''
Total				35

FIDA K officers Tom and Mary	2
3 male youths Maina, Karis and Ochieng	3

3.2.2 Interviews with Key Informants

Key informants are people who have a professional background or unique skills relating to the issues under study. Keeping this in mind, I chose to interview individuals I thought were critical to the research. I managed to interview one nurse who was in charge of treating women in the camps including those raped and referring them to counsellors where necessary. The nurse was quite helpful as she gave me approximate figures of women and girls she treated at the Nakuru Showground where she was based. She also gave me the type of violence which was going on in the camps against girls and women. Further, when I had despaired of getting more women affected by rapes during the post-election period to interview, she called one of the women she had treated, sought her permission to talk to me and connect me with other women who had suffered the same ordeal. When the woman agreed, she personally took me to her and introduced me and I got to know thirteen other respondents through her.

I further interviewed a lawyer who is a FIDA member (the lawyer) and was actively involved in preparing and taking women victims of rape to testify at the CIPEV above indicated. She had firsthand knowledge of the working of the organization and the strengths and weaknesses of its response to the sexual violence women suffered. She also gave me some of the names of the women she had taken to the CIPEV to testify after seeking their permission and introduced me to them through phone. She gave me the name of the nurse since they had worked together to assist the women victims and further gave me the problems encountered initially since records of rape victims were not being kept by the relevant bodies like hospitals and counsellors. Having worked with FIDA, the church and the donor groups of UNIFEM and UNFPA, she was able to give me information on the working and the limitations of the said groups during the post-election period.

The limitation I had with this method is that I did not get all the key informants I had wanted to interview. The nurse I interviewed was in charge of only one camp. The main psychologist who was in charge of all the camps in the Nakuru area and who therefore had detailed information on all women affected refused to grant me an interview. She claimed professional confidentiality and even though I tried to convince her that she did not need to give me the names but only figures, she still refused to grant me the interview. I therefore had to use other means to approximate the figures of affected women.

3.2.3 Focus Group Discussions

I used this method to get general views from women as to the extent of rape violations during the post-election period. I talked to 14 women in Naivasha in a group discussion and 10 women at the Holy Cross Church, Kaptembwa in Nakuru. Apart from general information, I used this method to identify women who had personally suffered rape. I would talk with them generally, and then invite any who had specific information to come and talk to me outside. I was advised to do it in this manner by the organizers of the group since the women needed to first know me a bit and relax before talking to me.

I also used this method to interview the Officer Commanding the Police Division (OCPD), Nakuru and 6 other officers whom he arranged for me to talk to. The police officers included three women and four men. Two of the officers were from the police gender desk, Nakuru. I was able to get a police response to the feelings and accusations of women victims who had blamed police for inaction when they sought their help.

This method while essential was not as helpful in the collection of very detailed information. In the groups, the respondents tend not to give deep personal details and I would therefore end up with a group thought and not individual thoughts. With a topic that is private like rape, some victims fear that others will know they were raped so while I could tell for example amongst the women in Naivasha that more of them had personal stories to tell, they were unwilling to come out in a group and discuss them. My invitation to talk to me outside personally was not accepted by some of them since I could tell that they did not want the others to know that they had been

sexually violated. As indicated earlier, I had to do a focus group meeting first to get the women to feel comfortable with me, then get their personal stories and because I did not at first know who of them was a victim of sexual violence. I got 14 women out of this group who gave me individual interviews.

As for the discussion with the police ,I got valuable information but I felt that I would have got more personal reactions of the police especially regarding the post-election violence period if I had got the opportunity to talk to them one on one. The meeting was after all held in front of their boss who is the OCPD and it was, I believe, difficult for the juniors to go against the officially acceptable responses. My efforts to get a discussion on a one to one basis did not yield much as I was told that the meeting with the OCPD answered all my questions. A table illustrating the groups interviewed under this method is given below.

Table 2: List of Focus Discussion Groups

	Venue	Age range	Male	Female
Women	Naivasha	24-68		14
	Kaptembwa	25-57		10
Police	Nakuru		4	3
Total			4	27

3.2.4 Observations

With this method, a researcher is able to observe the surroundings, facial expressions and the body language of the respondents. Considering that my topic was centred on sexually violated women who were in the camps and those integrated into homes, this method was very useful as it helped me observe the emotions on the faces and body language of the women who had suffered sexual violence. The despair, the tears, the hopelessness of a number of the victims when recounting their rape ordeals and the manner in which they were forced out of their homes was captured more eloquently and movingly by observation. I had a chance to see the resilience of a good number of the women too, who accepted that life had dealt them a hard blow but life had to

go on no matter how dramatically altered. I also witnessed the intense dislike / hate that some victims had for those they considered responsible for the chaos in Kenya which resulted into the rapes and violence against the victims. It was not just in their words but in their expressions and body gestures too. For those who had contracted HIV/AIDS, the wasted state of some of their bodies spoke a lot in addition to the despair in their eyes.

With this method, I had the opportunity to make out the interaction of a young woman and her daughter whom she conceived out of rape and tell that despite the difficult circumstances under which she conceived, she loved her daughter.

The deplorable state of life in the camps was also best captured by observation. I went to the Rongai camp at a time when it was raining, the tents, made of torn polythene paper were of no help since water was pouring straight into the tents. I witnessed the hopelessness of the women, especially those who had small babies, with no place to keep them warm and no food.

The method was useful but the trips to meet the respondents were tiring and costly. Most of the camps which were right in the Nakuru town had been closed down and I had to make longer trips to Naivasha and Mawingu which were slightly far in order to observe and talk to the respondents.

The Rongai (Mawingu) camp and the Mawingu camp are in remote places with minimal cars and security therefore it was difficult to feel too free. This did not compromise my research though, as I went with some other people who provided extra security.

3.2.5 Voice Recordings

Tools which aid in the keeping of exact data and words are vital to a research. I used a voice recorder in three instances of my research involving about 15 of the respondents. I recorded the voices of the respondents with the help of the voice recorder and then typed them after the interviews. I used this method sometimes in addition to writing down notes especially when noting the facial expressions or surroundings which the recorder could not capture. I found it

invaluable especially when I was interviewing a group of 10 ladies, one by one and the writing became tiresome. It was also the best way to remember each word that was said without relying entirely on my mind to recapture what was said. Some respondents lost track of their story when I had to keep noting down information first. The recorder therefore assisted a lot as there was no interference with the flow of the story. I had to seek permission from the respondents first, each time I needed to use it.

The limitation of this method was that some of the respondents declined to be recorded as they feared being identified either by their attackers or their families. The reassurance that the information was confidential did not totally rid them of their fear. The recorder also could not properly play the interview when there was a lot of noise in the background at the time of the interview. To complement it, I took notes when there was noise at the venue of the interview.

3.2.6 Photography

I used this method to a small degree to capture the conditions of living at the camps for the internally displaced. This was at the Rongai camp which is 20 kilometers from Nakuru town. The photography had its limitations since most of the women were unwilling to be photographed and in two instances, the Chairman of the camps would not allow photographs to be taken since they did not want me to talk to the women victims.

3.2.7 Secondary Data

Without the use of secondary data, my research would have been incomplete especially considering that my area of research made both local and international news. Both local and International media took interest in the violence in Kenya and international bodies including the United Nations sent teams to monitor the situation and the progress.

Undertaking my research almost two years after the post-election violence occurred, meant that I had to rely on the media and other reports for that period to get a more comprehensive understanding of the issues I was to cover. Based on the newspaper reports, books, newsletters,

United Nations Reports and internet material ,I was able to use the material to enable me have a starting point for the collection of my material. Where I had some gaps in my information, the above secondary data sources assisted me in filling them up.

3.3 GENERAL LIMITATIONS OF THE RESEARCH

When I first set out to research sexual violence in the camps for the internally displaced, I figured that I would just go and ask directly from the women and they would tell me that they were raped. I used the first one a half weeks going from camp to camp and none of the women admitted to being sexually violated during the post-election period. This was due to ignorance on my part on the best way to approach the victims. I finally got a breakthrough through a lawyer who had taken the victims to testify in a Commission looking into Post-election violence in Kenya (CIPEV).She introduced me to some of the women and told them that I could be trusted, and that is when they were finally able to trust me enough to talk.

Some of the respondents I needed for my research were evasive and unwilling to be interviewed. I sought an interview at the Nairobi Women's Hospital (NWH) which was the only hospital strictly keeping records of women who sought treatment for sexual violence during the post-election period. I was told to leave my proposal for the managing board's consideration after which they would get back to me. Despite leaving my contacts and the proposal, and continuously checking, I did not get any response from them. The hospital information was intended to assist me approximate the general number of violated women and the consequences they suffered. I finally used the data the hospital had put on the internet and what they had submitted to the CIPEV Commission.

Similarly, I had to go to Nairobi at least three times trying to get an interview with the FIDA officials. They were apparently busy so I only managed to be given a brief interview on the third try. Even then it was not as detailed an interview as I would have wished. The senior woman officer in the organization I interviewed gave me five minutes within which to have concluded the interview. She also said that she was tired of students from Women's Law coming there all

the time. This is in spite of the fact that I informed her that I was a FIDA member. I however got more information from the Programme Officer, who was more approachable.

Another challenge that I had to deal with stemmed from visiting camps for the internally displaced. Faced with hungry faces, it was challenging to have to do my interviews without at least trying to assist in some way. It turned out to be costly since I had to buy a lot of food and give some money after the interviews for their use. Some of the women believed that I came from a big Non-Governmental Organization (NGO) and I would solve all their problems and it was disheartening to have to tell them that I was a student simply carrying out a research but I could assist as a lawyer and give advice where necessary.

In two of the camps, Mawingu and Rongai (Mawingu), the Chairman of the camp was not friendly to visitors. I had to organize to meet two of the respondents in Gilgil town, away from the camp in order for me to get a complete story from the women. In the other camp, I had to wait until the Chairman had left for Nakuru town before I could talk to the women.

Additionally, I was conducting research almost two years after the event happened. The government had in the meantime resettled a few of the internally displaced back where they came from and others were given small plots elsewhere to resettle. A good number of the internally displaced had been absorbed by relatives and friends. In effect, while I was told that there had been many more women who used to be in the camps and had been affected by sexual violence, I could not trace them since they had long moved to other provinces out of my research area while others' whereabouts were unknown. For example, it was difficult to trace victims who suffered sexual violence within the camps in January-February 2008, despite the fact that it came out that there were such victims. This did not totally affect my research as I still got other respondents to talk to just maybe not in the numbers that I would have otherwise interviewed.

CHAPTER FOUR:

4.0 FINDINGS, ANALYSIS AND DISCUSSION

In this Chapter, I have discussed the findings of my research. The findings are based on the research assumptions and research questions outlined in Chapter One. I will discuss the findings under the themes of gender neutral violence during the post-election period, rape against women as the main form of gender based violence, the violence as a weapon of war against rival parties, the consequences of the rape on women including contraction of HIV and Sexually Transmitted Diseases, the state's role in protecting the women during and after the violence and whether women victims have received justice.

4.1 GENDER NEUTRAL VIOLENCE

This discussion emanates from my first assumption that women suffered gender based violence during the post-election period in Kenya. The research found that there was violence which was both gender centred and gender neutral during the post-election violence period. All of the 45 women interviewed in focus group and individual interviews and 3 of the youths had suffered some violence. These included loss of spouses, children and other relatives through murder, loss of property and loss of contact with family members.

All the women and the men had lost their property which included houses, shops, farms and this is why they were either still in the camps or were living with well wishers as integrated internally displaced people. 20 of the respondents had their houses, crops and businesses razed while the rest were forcefully evicted and their farms taken over by the attacking groups. 3 women had their husbands killed in the clashes by rival groups. Muthoni's husband was slashed to death right in front of her. At least 21 of the women and the youths had lost relatives in the killings that took place who included parents, sisters and brothers. Another respondent Wanja had lost contact with her parents and two siblings since the time of the violence. She used to live at Burnt Forest and lost contact with them when they were escaping attackers. She could not tell whether they

were alive or dead. I advised her to contact Red Cross Nakuru for assistance in trying to trace them.

4.2 RAPE AS THE MAIN FORM OF GENDER VIOLENCE

The other form of violence was directed specifically at women and girls. The research findings showed that rape was the main type of violence which targeted women simply due to their gender.

I interviewed a total of 45 women and out of these, 35 of them had personally suffered rape during the post –election violence. 6 of the remaining women had witnessed rape of their sisters and neighbours with one woman stating that her 14 year old daughter was raped. Karis, one of the boys interviewed, witnessed youths rape his neighbour in Kipkelion and thereafter cut off her vagina parts with a machete. The elderly woman, died later that evening from the intense bleeding. Rape was therefore a gender specific form of violence targeting women. Although the media and the OCPD Nakuru stated that there had been some cases of sexual violence against men through forced circumcision and penile amputation in Nakuru and Naivasha, I did not succeed in tracing any male victim.

While the CIPEV report estimated that 1171 women had been sexually violated, in the field, one got the sense that the figures could be much higher as one of the recurring themes was non-reporting. Only 8 of the 35 women respondents had attempted to report the rape. Rape records were not being kept by hospitals either, especially outside Nairobi. This was confirmed by the nurse in charge of Nakuru Show ground camp who admitted that they had been too focused on patching up the injured, the dying and giving first aid that cases of rape did not become a priority until about one month after the violence when it was happening even in the camps.

The women's organizations did not compute any figures of raped women either. The FIDA (K) official, I interviewed instead referred me to NWH stating that FIDA'S role did not include the collection of data. This was left to the hospitals and the police. The police, as discussed in the literature review had no rape records. It seemed probable that there were a lot of women who

were violated sexually but had not reported or talked about it to the relevant organizations in order for the correct data to be recorded. For instance, I had been invited to go and interview a further 10 sexually violated women in Naivasha who had failed to make it the first day I conducted my interviews. My time for research was up and I could not go and talk to the women but it is evident that there were a large number of women who were raped with no reports made or records kept. The utter brutality of the rapes was brought out by Wangeci, a 66 year old widow who described her ordeal;

I tried to run away as fast as I could from the boys but I am old and they were many and young. I fell and they caught up with me. One held my legs apart and the others took turns raping me including the one holding me. They were four boys. I asked them why they were doing that to me and I was an old woman. One answered that my private parts were still there even if I was old. They slapped me, and to date my one ear on the left does not work properly. They did shocking things to me. Some carried me high up so they could rape me while standing up. They raped me from the front and behind. They did very bad things to me. All styles, lying down, standing up. (Covering her face).I don't even want to rememberI was in the Londiani Hospital for three weeks. I was torn up; bleeding and later my private parts got swollen. I still have a lot of pain until now.

The ages of the women and girls who were raped seemed immaterial to the rapists. The above respondent was 66 years old; while one girl was 15 years at the time she was raped. The respondents who were raped ranged in age from 17 years to 68 years of age. 21 of these women were over the age of 45 as shown in the table of women victims in the methodology chapter. On her visit with me to some victims of violence in the Mawingu camp, the supervisor had a chance to witness that apart from two young women, four of the women who were interviewed ranged in age from 45 years to about 65 years. This was the trend duplicated in the other places. It is possible that the older women were the ones who were mostly still in the camps and available for interview while the younger women may have moved out of the camps, so it is difficult to decide from the data that older women were the most affected .

A running similarity in the rapes committed against the respondents was the fact that these were gang rapes. Out of the 35 women respondents, only 4 had been raped by a single person. The rest of the 31 women were raped by between two to twelve young men. Atieno described her attack;

Some held my mouth shut while the others forced my legs apart as they raped me. A total of 12 boys raped me. I lost consciousness at some point. I was so torn up in my private parts and bleeding profusely .I lost control of my bladder for several months as urine would just come out.

The affected women did not belong to specific socio-economic backgrounds. The rapes were done randomly to both the employed and unemployed. My findings, based on research from towns and farming areas where the internally displaced came from, suggested that women of all age groups and economic backgrounds were victims to rape. In Nakuru for instance, both lower and middle class estates were attacked although women from the lower class estates were the most affected.

In a few instances though, the findings showed that women perpetrated violence against other women. The nurse referred to earlier, and the lawyer who was consulting for FIDA (K) during the violence, confirmed that some women came to the camps to pick up young girls on the pretext that they were giving them employment only to sell them to men who would rape them and dump them back at the showground. In other instances, young girls aged between 12 years to 18 years were forced by their mothers to sleep with men in exchange for food. The nurse treated 10 girls in these categories. I was unable to trace any of the said girls since most had left the main camps for their former homes or were settled elsewhere.

The sex and gender roles of women emerged as a contributing factor to their vulnerability to rape and the failure to get justice in time. Sex and gender roles have been described in the methodologies chapter and include child bearing and rearing. Jane, for instance, could not run fast enough since she was five months pregnant. The attacking youths caught up with her and raped her. Additionally, they hit her stomach repeatedly saying they did not want more Kikuyus to be born. She was therefore being punished for being a child bearer. Two of the women had delivered, two and three months respectively, before the violence. They were unable to run because they were still recovering from the birth process. Both women, heard screams when the chaos started and would have managed to run away and hide if they had been physically able. The two were both found in their houses and raped.

57 year old Wairimu had a 20 year old son who had been circumcised the day before the violence. He could not walk as he was still weak. She was warned by the neighbours to run away to the police station as Kalenjins had started attacking Kikuyus. She tried to move her son but he could not walk. In her words;

Kamau could not walk. I tried to lift him but he was too heavy .I decided that I was not leaving my son. Even if death came, I would die with him.

Wairimu was found hiding under the bed with her son by the youths who broke into the house. She was raped by six Kalenjin youths in the presence of her son. Another respondent was hiding in the forest with her 3 children and her attackers were passing by, not having noticed her. She said that just as she thought she was safe, her 6 months old baby started wailing .The youths heard the sound of the baby and located her, raping her in the process. With an exception of 8 of cases, the women had either their children or their grandchildren with them and could not run away from the attacking youths in time. It was a finding of the research that majority of the men had an advantage as most of them ran off alone and it is the women who were left with the children. Some men went off to fight.

4.3 VIOLENCE AS A WEAPON AGAINST RIVAL PARTIES/TRIBES

Apart from the two respondents who were raped by a policeman and the other by a fellow tribe mate who took advantage of the situation, the rest of the 31 women and girls were raped on the basis of the tribe they belonged to and presumed political affiliation. It was evident from the research that belonging to the Kikuyu tribe was taken to mean that one supported the President's PNU party while being Luo, Luhya or Kalenjin meant that one was in the Prime Minister's party. The women interviewed at Naivasha, Mawingu and Rongai Mawingu camp were all Kikuyus save for one who was a Luo. The findings were that they were attacked by Kalenjins and Maasais who were supporting the party of the current Prime Minister's ODM. On the other hand, the respondents interviewed at Alko camp and at Kaptembwa were predominantly Luos, Luhyas and

Kisiis. These 11 respondents said that they were attacked on the basis of not being Kikuyu by the Kikuyu gang of “Mungiki” youth.

From the findings, it was evident that rape was done by all the attacking sides who included Kalenjins, Maasais and Kikuyus with one Luo boy being mentioned. This was a surprise finding to me since the media had majorly portrayed kikuyu women as the victims of rape and Kalenjins as the only rapists in towns other than Nairobi.

In the course of the rape, at least twenty of the women were told it was because of the political parties they were associated with or because of their tribe. Wanja was raped by four young Kalenjin youth. They kept telling her;

Mlitaka kazi iendelee, sasa inaendelea. (You wanted work to go on, it is now going on).

This was in reference to the PNU campaign party slogan (Kazi iendelee), where the President was campaigning on the basis that he should be re-elected for a second term. Wangui, 34, was raped by 5 Kalenjin boys. She was 5 months pregnant at the time. She said that as they raped her they kept hitting her bulging stomach really hard and saying;

This small Kibakis (Kenya’s President) are the ones we do not want. They must die.

Her baby miraculously survived but he was born with some kind of deformity on the head and poor mental ability. Two of the women were asked to identify themselves by speaking Kalenjin and Kikuyu languages by the attackers, and when they could not, they were marked as enemies and raped.

The rape was also a weapon of forcing out certain tribes from areas considered not indigenous to them. The majority of the women who were raped by Kalenjins and Maasais on being interviewed said that they were told to leave the area and go back to Othaya or Muranga where

Kikuyus are supposed to have originated from. The non –Kikuyus who were raped in Nakuru on the other hand were told that Nakuru was for Kikuyus and they should leave.

At least 12 of the women who were from Burnt Forest, Kericho and Mau Summit said that they heard politicians from the said areas say that ‘stains’ should be done away with .The respondents said they did not understand at the time that the stains meant their removal until much later after they were forcefully displaced.

Rape and the violence was also a ploy to take control of the property, especially the land of the displaced. In at least ten of the interviews, the respondents from Burnt Forest, Narok and Njoro areas said that the attacking groups took over their land and still use the said land despite the displaced women being the true owners. Due to the risk of getting killed, the women cannot insist on having their land back.

Another finding that arose was that the rape was a way to humiliate the ‘enemy’ tribe or party. One respondent, who lived in Narok before the clashes aged 68 years old who did not want to be named, said that the attacking Maasai raped her daughter and her, while her husband was forced to watch. Her husband was then forced to sleep with his daughter and his wife in front of the men who were heckling and laughing the whole time. She described her ordeal;

At about 4p.m, 5 Maasai men came to our house. They grabbed me and my daughter and tore off our clothes. When my husband tried to intervene, he was slapped so hard that he fell on the floor. The men proceeded to rape me first, then my daughter. My husband tried to turn his head away so that he would not see the rape. Instead two of the men held his face and forced him to watch as they took turns. When they were done with us, they dragged my husband to me and told him to sleep with us or we would be killed. My husband was forced to sleep with his daughter and me in order to save our lives. The men were clapping and laughing all the time. My husband hung himself three (3) days later .The note he left behind said that he could not bear the humiliation of being forced to sleep with his own daughter. He could not face her any more.

In the other instance, the 18 year old son of Wambui , was forced to sleep with her while the attacking Maasais stood guard cheering. They were armed with Maasai swords and arrows and

the son had no choice but to sleep with his mother if he wanted to save his and her life. Her feelings of shame and despair have been quoted in the introduction.

It is evident from these findings that the intent was to directly humiliate the men belonging to 'rival' tribes in the most demeaning way possible. To humiliate the women, the gangs raped 9 of the women in front of their children. The intent to humiliate was confirmed by the 3 youths interviewed, Maina said;

Men are very jealous people and therefore the only way to humiliate a man deeply is to take what is his, be it a wife or daughter and spoil or contaminate her through raping her. If you do that the 'enemy' can never forget the 'lesson' you have taught him.

4.3.1 Culture and Socialization

Besides the reasons discussed earlier, what further emerged from the research was that culture and socialization played a big role in the commission of the violence based on the societal attitude of men towards women.

There was the attitude by women themselves of acceptance/resignation that it was normal for them to suffer violence. This was brought out by 2 respondents who said that they did not sustain any injuries during the rape, so they saw no need to report. One of the woman said if she had suffered severe injuries or contracted AIDS that is when it would have been a problem. Another woman, Wangare, however went against this socialized acceptance by successfully fighting off her rapist with the help of her 12 year old son. In her words;

When they were busy tearing off my clothes, my 12 year old son took a stone and hit the boy closest to him hard on the head. The boy fell down .In the confusion, I pulled very hard on the penis of the boy who was about to rape me. He fainted and we ran off with my son before he recovered.

Also challenging their socialization where sex matters are considered taboo, it emerged that more women are ready to come out and have their stories told. In the beginning of the research it was

difficult to get respondents to talk to, but as more women heard that others were talking about their ordeals, I got several requests from women who wanted their story told. One woman I had interviewed even got the courage to have her story told in the newspaper⁵. Yet another of the respondents is a potential major witness in the ICC case. She had gone to record a statement with the ICC investigators who came to Nairobi in January 2010. She did that despite the fact that the culprits had threatened her to keep quiet.

Another aspect of socialization was brought out by, Awino, who was the only respondent raped by a man from her own tribe. He took advantage of her seeking refuge in his house to rape her. When Awino contacted a lady lawyer to sue for the rape, the family of the man talked with the woman's family and convinced her that the matter should be settled out of court because both she and the rapist were from the same Luo tribe. While Awino was reluctant, the families agreed that the man pay maintenance for the baby and also marry her. At the time of concluding my research, the lawyer had convinced the respondent to accept the maintenance and the discussion of marriage to the man as a second wife was also at an advanced stage. The man was never charged with her rape.

Culture formed the focus of the group discussion with women who were displaced from Narok. It was indicated that amongst some Maasai, the highest honour for male visitors was to give them the host's wife to sleep with. The women's consent is not sought yet this is not considered rape. The belief that men are superior to women and have an entitlement to sex therefore greatly contributes to sexual violence towards women. It is possible that police and youth who have been brought up in a society with such beliefs of entitlement would find rape normal. This could have partly influenced the response of the police to rape victims. Possibly, if male children are brought up realizing that girls and women have the same rights as they, they would be likely improve their view of the opposite sex and accord them more respect.

⁵ Appendix 1

4.3.2 Youth's views: Why rape?

On the basis of the research findings that 90% (32) of the attacks were committed by male youths ranging in age from 15-25 years, I felt compelled to follow up and interview three male youths to find out why youths raped women during the violence. I believed that to get a wholesome solution, sexual violation issues should not be looked at in isolation and therefore men and youths views had to be taken too. They gave as their reasons/excuses the following:

(a) Biological

Karis said that men's bodies reacted to beautiful women instantly causing men to think of sleeping with them. Asked why even old women were raped, he said that some men do not discriminate. He appeared to think it was excusable if the woman raped was young and beautiful. One respondent, giving an almost similar account said that before the elections, she heard some of the youths at Mau Summit joke about how if they killed the man of the home; they could then take his wife. She thought it a joke until their husbands were targeted for murder while they were raped. While men's reaction was said to be biological, I found that it was the culture and patriarchy discussed above that caused men and youths to believe that they are entitled to sex with a woman as long as they desired her.

(b) Peer Pressure

Giving the explanation as to why several boys would sleep with one woman, Maina said that he knew a friend of his who was pressured into raping by his peers. When he refused to sleep with the woman like the others had done, he was taunted that he was a coward and not a real man. To prove that he was a man and to avoid being made a laughing stock, he had to take part. Maina believed a lot of young men were dared into raping by their peers.

(c) *Unemployment*

The youths knew that some of the boys who burned and raped were paid Ksh 10,000/= by politicians for each person killed or house razed. 5 of the women respondents also said that the boys who attacked them had been paid between Ksh 5,000-10,000 by politicians. Money and unemployment seemed to go together, as one youth said:

Like any other human being, youths can do anything for money especially if they are unemployed.

2 of the women thought that if the youths had employment and some money, they would not be easily misled into crime. Humiliation and revenge on the rival tribes was another reason given, with Karis having been quoted earlier on the issue.

4.4 UNWANTED PREGNANCIES AND HIV/AIDS AS A CONSEQUENCE OF RAPE

This discussion is based on the assumption that women suffered HIV/AIDS and unwanted pregnancies due to rape. Other emerging consequences have also been looked at.

The findings showed that 4 of the 35 respondents became pregnant after the rape. The common factor amongst the four who got pregnant was that they were fairly young. They were aged 17, 22, 24 years and 30 years respectively. Two of them miscarried. Awino, carried her baby to term as discussed earlier. Muthoni also carried her baby to term and she now has a daughter, who was fourteen months at the time of the research. Muthoni's husband was slashed to death with a machete right in front of her; immediately thereafter the same 7 men who killed her husband raped her. The despair and confusion Muthoni suffered when she discovered that she was pregnant from the rape is captured below:

3 months after the rape ordeal and while in the Nakuru Showground camp, I noticed that I had not had my periods. I went and reported to the doctors who had a desk in the camp. They told me not to worry and refused to confirm whether I was pregnant or not. I was still confused and in trauma so I was not thinking straight. In the 6th month, I went

back to the doctors after seeing for sure that I was pregnant and demanded that they abort the baby as I did not want it. The doctors told me that it was too late to abort since my life would be endangered. I was furious and disappointed. I had no money to go to an alternative place for the abortion so I had no choice but to carry the baby to term.

Muthoni was not pleased to carry the pregnancy and had she been allowed to abort the baby, she would have done so. As she told me;

I asked myself, if I carry this baby to term and he/she asks me who the father is, what will I say? Other women were raped during the clashes, why is it me who had to get pregnant with a rapist's child?

While she has adjusted to having her baby and even loves her, looking at Angel also causes her depression as her baby is a stark reminder of the brutal events that resulted in her conception. Looking at this case, the role of doctors came into play here together with the Kenyan laws on abortion. Sections 158 and 159 of the Penal Code⁶ prohibit abortion and impose a sentence of 14 years imprisonment against the procurer and 7 years of imprisonment against the woman. Doctors' hands are therefore tied by the law even in situations of rape as they would be charged if they aid in abortion. Perhaps the law should give women the right to choose whether to keep their babies or not, especially when raped.

Besides the pregnancies, the research revealed that other women contracted HIV/AIDS from the rapes. 6 out of the 35 women respondents contracted HIV/AIDS while one, a 58 year old woman contracted Gonorrhoea. There was a possibility that the HIV/AIDS may have been contracted before the rape so I asked questions to clarify this. 4 of the respondents had been negative before the rape. Two were employed in hotels in Eldoret whose management made it mandatory to take HIV/AIDS tests regularly as a term of their working conditions. They had done tests which confirmed their negative HIV/AIDS status before the rape. Another confirmed that she had been negative since a Molo hospital had done tests on her before the rape when she had a stomach

⁶ Chapter 63 Laws of Kenya

operation. The 4th woman said both she and her husband had tested their status prior to the incident and they had both been found negative. The husband confirmed this position; he remains negative while she became positive after the rape. While the other two respondents said that they had been negative before the rape, they had no sure way of confirming this. Two other respondents looked very sickly but they had not done any tests and did not know their status. I advised them to seek treatment. As one of the 66 year old lamented:

Can you imagine how I feel, getting AIDS at my age? My husband died nine years ago in an accident and I have never been with another man since then. What do I tell people when they ask where I got the disease? I am so bitter that young boys who should be my sons did this to me.

The majority of the respondents did not get immediate medical attention .Only two of those interviewed were rushed to hospital by good Samaritans on the same day they were raped. Most of the women were busy running for their lives and it was unsafe to venture out and seek medical assistance as they risked getting killed. As Dr.Sam Nthenya, the CEO of NWH testified, if survivors of sexual violence are given a drug, known as Post Exposure Prophylaxes (PEP) medication within 72 hours of rape, chances of the victim being infected with HIV/AIDS and other (STDs) was drastically reduced (CIPEV:2008).

Based on these medical facts and the fact that the women only got to hospitals weeks and months later, it is reasonable to conclude that had the respondents been given the above drug within 72 hours, they may not have contracted HIV/AIDS or Gonorrhoea and other complications. It is noteworthy that the Sexual Offences Act of Kenya makes the deliberate transmission of HIV/AIDS and life threatening STD'S an offence in Section 26, punishable with a 15 years sentence.

Apart from the above consequences, what emerged from the research was that women suffered many other harmful consequences. At least 10 of the women still had intense pains in the abdomen and in their private parts due to the rape. As one 58 year old woman said:

I still feel a lot of pain in my abdomen and there is a swelling that comes and goes on my private parts which is very painful. I cannot walk for

long distances. I use hot water and salt when I get pains and I also use some herbs .I was getting a lot of headaches all the time after the rape ordeal .It was not until I came to this Mawingu camp that I was told I had high blood pressure. Some people told me that the stress of the rape caused the blood pressure problem.

Some of the respondents still had pains which were associated with being thrown roughly on the ground while at least three women and a girl had ear problems with two who could not hear well. They stated that since the attackers slapped them so hard near the ear area, they had problems hearing.

Two of the respondents aged 17 and 22 years, earlier referred to under this Chapter who got pregnant and miscarried, incidentally suffered similar consequences thereafter. While they conceived easily the first time after the rape, they have subsequently tried to get pregnant without success. Another respondent got pregnant by her husband after the rape but miscarried. She has failed to conceive again and the doctors at Nakuru General Hospital told her that some organs were damaged in the course of the rape. Jean, aged 50 had her leg broken by the boys who raped her. The leg broke as they were forcing her legs apart .She was in a plaster for 7 months and she still had a limp at the time of the interview.

However the research found that the isolation and triple tragedy of women was more strongly felt by women who, apart from being raped and losing property and homes were also abandoned or chased away by their husbands and their husbands' families. 3 of the respondents suffered abandonment by their husbands after the realization that the respondents had been raped. In 2 of the instances, the husbands moved out without telling the women where they were going. In the other instance, the man simply stopped coming to visit the respondent in Naivasha from Eldoret where he was working. In one of these cases, the husband psychologically tortured the respondent, calling her names and telling her that she enjoyed sleeping with the attackers. Narrating the abuses she got from her husband, Moraa, 25 year old mother of three repeated the abuses he shouted at her:

Do not lie! You enjoyed sleeping with those men. I look at you and I see a corpse. You are full of disease! You are a walking corpse. Stay away from me!

He got a transfer from Nakuru to an unknown place and calls to his phone only yielded more abuses so she stopped calling him. The common factor with the three women abandoned by their husbands was the fact that the husbands refused to give any form of support to the children too. The women therefore have been left as the sole breadwinners in spite of the fact that they are jobless and 2 of the women are HIV positive and physically weak and therefore unable to work.

The psychological trauma suffered by all the victims was plain to see. Almost all of them cried while narrating their ordeals. For some, they had the dazed confused look of someone sleepwalking. One woman at the Rongai Mawingu camp who was said to have been raped together with her 11 year old daughter had subsequently become mentally unstable and would just stare in the air and not talk. Her story was communicated by a former neighbour who was raped alongside them.

Another general consequence suffered by the 45 women including the ones who were not raped was the resultant impoverishment of all the women interviewed. The women all lost property, houses and some farm animals, while others lost their jobs. While the research findings showed that the loss of property was applicable to both men and women, the loss of farm crops, cattle and small animals like chicken and goats affected women more since a good number depended on the farms and the animals for their livelihood. 6 women lost their jobs in the hotel industry and in the tea and wheat plantations due to the forceful displacement. At the time of the interview they still did not have jobs. At least 15 of the women who came from Burnt Forest, Njoro and Narok areas were farmers. Explaining her loss, Wairimu, who used to live in Narok said;

I used to own 20 acres of land in Enoosipukia. I used to grow wheat and it would be taken by the factories which make bread. My wheat was burnt down by the Maasais who told us to leave the area immediately. I do not have anything now as that was my only source of livelihood.



Photograph: Though unclear, this woman was boiling the covers of wheat due to lack of food

Some of the women were running small businesses including selling vegetables and fruits. Their sources of livelihood were taken away from them leaving women and their children at the mercy of well wishers for food and other needs. Considering that the majority of people in the camps are women, the finding was that the state of women is worse than that of men. It was evident that about 90% of the women in the camps visited were single mothers either as a result of being widowed, abandoned or divorced. They are thus the sole breadwinners for themselves and their children. Getting employment or casual jobs for survival is difficult in a country where the unemployment rate is so high⁷. The research noted that the older women whose ages ranged from 45 years and upwards had more difficulty getting even casual jobs.

⁷ 40% unemployment rate according to CIA index

One 60 year old said:

We suffer a lot .We do not have money for food or for other needs. When I try to get casual work like washing clothes or digging in the farms in exchange for money, people refuse to take me. They say that I am too old to wash their clothes properly or to till well.

Photograph: A view of Rongai Alko camp



CHAPTER FIVE:

5.0 THE STATE'S ROLE DURING AND AFTER THE VIOLENCE

This chapter discusses the findings under assumption number five that the State failed to protect women from the violence. It will be combined with the assumption number six that women victims have not received justice. These findings will include what the State did or failed to do during and after the violence. The role of the police will also be discussed in depth because they are the agents of the state directly entrusted with keeping the peace, receiving complaints, arresting and prosecuting offenders; the safety of and justice for the victims depends a lot on the police. Whether Kenya handled the sexual violence against women in a manner that was consistent with its international obligations will also be examined. The discussions and analysis will include the measures taken by the State and whether they are adequate in the process of addressing sexual violence and the redress provided for the victims.

5.1 The State's Duty to Protect its Women Citizens

Under international law, states bear the primary responsibility for protecting the rights of all individuals within their territory from violence. Protection is a function performed by the State primarily through the police, the army and other administrative officials. States are therefore responsible for the acts or omissions of officials committed within their general or apparent scope of authority.

The respondents all agreed that, through its organs, the State failed to adequately assist women during and after the election violence. The findings showed that there was a lot of violence during the post-election period. Like OHCHR's (2008) findings, I also found that the scale of the violence was a violation of the right to life, security and property. Women were subjected to rape and other violence as a result of the state's failure to protect them therefore compromising their liberty and security which is their right under Article 3 of UNDHR, Articles 6, 7 and 9 of the ICCPR and the ICESCR. Further, Kenya has no explicit provision prohibiting violence in its

current Constitution. To remedy this, Kenya's draft Constitution, section 29 provides for the right not to be subjected to any form of violence from either public or private sources. The draft will be put to the referendum in June 2010.

With regards to the state protection during the violence, only 2 out of 48 respondents including the youths, acknowledged that the police helped them during the violence. The majority of the respondents stated that the police were present when they were being attacked but they either did nothing or they seemed to collude with the attackers. Wanjiku, who was attacked while living in Nakuru Githima estate said;

How could whole lorry loads of youths have arrived in the estate without police knowledge yet the police were patrolling the estates because of threats received earlier that there was likely to be an attack? It was a conspiracy between the police and the attackers.

Moraa, from Kaptembwa said that it was 2p.m in the afternoon, when she was raped and her house burned. There were some police near the road, but they just watched as the attacks went on. This was the uniform story of 47 of the respondents including the youths. The United Nations Security Council (UNSC)1325⁸ echoed by the Geneva Fourth Convention calls on state parties to take special measures to protect women and girls from gender based violence particularly rape and sexual abuse during conflict. Kenya violated these provisions by doing little to protect women and girls from rape during the post-election period.

The Police were helpful to those who shared their ethnic or political affiliation while showing hostility or disinterest to those who did not, as indicated earlier. This was in breach of section 14(1) of the Police Act⁹ which provides that the police should be impartial and objective especially in political matters and shall not accord different treatment to different persons on the

⁸ Article 10

⁹ Cap 84 Laws of Kenya

basis of political opinions. The State has not fully implemented this law. This is evident from the fact that to date, not a single policeman has been charged under this section.

Although some respondent said that the police failed to protect them, the research also found that apart from about 5 of the respondents, the rest of them took refuge at police stations and chiefs' camps throughout the affected areas until they were able to go to the main camps. There was no incidence of physical harm to the victims while inside the police stations. Two of the respondents also thought the police helped. One stated that had the police not come in an aeroplane and shot down some of the attacking youths, they would not have made it alive out of Githima Estate.

5.2 The State's Duty to guarantee Justice for its Women Citizens

This discussion is based on assumption number 6 that women have not received justice for the sexual violence suffered. It looks amongst other findings at the role of the police as the state organ in charge of arrests and prosecutions, whether perpetrators of the violence have been charged in court, the outcomes of the charges, if any, and what kind of redress the women and girls would like to receive.

The respondents all overwhelmingly felt that they had not received justice from the government or other bodies. Some emphasized that the government was wholly liable for their predicament since it failed to protect them. At least 4 of the women respondents expressed their willingness to testify if the government was sued. Muthoni stated:

If a case was filed against the government, I would be very happy to go and testify in court. The government is responsible for the violence. They could have prevented what happened to me so they should compensate me for what I lost and for the care of my baby whom I got through rape.

Despite the women's desire, it emerged that that no case has been filed in Court by any individual or organizations against the government on behalf of women. The research revealed that while many organizations dealing with women rights came together and worked to ensure

that at least some of the physical, material and psychosocial needs of the sexual violence survivors were catered for, none had filed a case on behalf of the women.

On inquiry from FIDA K, whether any case had been filed against the government, the official in charge of public litigation said that there had been a notice of intention to sue served on the government in 2008 on behalf of the women who were raped in Nairobi's Kibera and Mathare areas by the police. The case had not been filed two years down the line apparently because they were still trying to convince the women to sue the government. Further probing as to why only the Nairobi women raped by police warranted a case and not all women who were violated nationally, the official said:

It is difficult to sue the government under ordinary circumstances. It is true that the government is responsible for protecting its people from violence. However, I do not think we can sue the government directly. Where it is the police involved, we have the guilty party first then enjoin the government. If it is civilians who looted and raped, it is difficult to hold the government liable directly. In my view, such a case would not go far and we would not win.

From a legal standpoint, I did not subscribe to this view, I therefore suggested to the official that it was still worth a try even if the case is not won but to make a statement that the government is under duty to protect its citizens from violence. The official said they would look at the issue and consider whether a case was possible. The general impression however was that there was no serious plan to sue the government otherwise the case would have already been filed either through the local courts or even through the African Union. Neither the Law Society of Kenya nor women lawyers in the country of which I am part of have done so.

Besides the government, the desire for the perpetrators of the violence to be taken to court, and given harsh sentences was a uniform response amongst all the respondents save for 2 who said that they should be forgiven since it was for God to punish them. The police role was brought out as being vital in achieving justice. The respondents were extremely bitter and most felt that they had been denied justice by the police and the courts who had failed to punish the perpetrators. This feeling was perhaps justified as, based on the findings, only one woman had her rapist convicted and jailed. The rest of the women and girls interviewed said their attackers had never

been punished by the police or a court of law. Despite this general feeling of anger at the lack of punishment, the research found that only 8 of the 35 respondents had attempted to report the cases to the police. The majority of them did not report at all and this was due to several reasons which will be discussed below.

As earlier indicated the police were found to have reacted in a biased way to the violence based predominantly along ethnic lines. Mercy from Kipkelion said that when she went to the Police Station to report the rape and the burning down of her property, she found 3 male policemen who were non-Kikuyus. They told her that they were not working that day. When she insisted they take down her statement:

They just stared at me and did not respond or write anything down. They continued talking in Kalenjin language. I got frustrated and left. If I was not a Kikuyu, I think they would have recorded my statement and taken action.

One of the respondents, who was raped while living in Koru, reported the matter to the police and identified one of the boys amongst the 2 who raped her. The boy was arrested. Two days later, she saw him walking about freely in public. Achieng, a different respondent, reported that she had been raped by six boys at the Bondeni Police Station Nakuru, and she was told:

You should be grateful that you are still alive. You are reporting petty things like rape while people are dead and more dying.

She left without her statement being recorded. The indifferent attitude of the police was further illustrated by another respondent who did not want to be named for security reasons. On reporting the rape against her, she was told by the police at Njoro Police Station:

Why are you complaining? Women feel pain when they give birth and they swear that they will never repeat the experience but they get pregnant again. I will not be surprised to find you sleeping with those boys again yet you are pretending they did it against your will.

Her statement was not recorded.

Sometimes, the police asked for bribes before taking action. When Atieno went to report her rape ordeal to the police in Bondeni Nakuru, she was asked to give KShs 1,000 for fuel for the police to go and arrest the suspect. She could not afford the money at the time, having lost everything and she was living at the camp, where she still is to date. Atieno identified one of the suspects who was one of a group of 12 Kikuyu youth who raped and infected her with HIV/AIDS. To date, Atieno says, the police have never arrested the culprit even though he works at the bus stage in Nakuru as a conductor. Expressing her bitterness, Atieno says:

I feel so bitter when I see that boy at the bus stage. Nothing has been done to him. He is moving on with his life while I got infected with AIDS.

In some instances, the police took advantage of the chaos to rape. Lutia, one of the respondents interviewed at Kaptembwa said that a policeman attached to a police station in the area came to her house at the time of the chaos in Nakuru and raped her at gunpoint. She was the only one among the 35 respondents who was raped by a policeman. She feared reporting him in case he decided to harm her. As indicated in the literature review, the GBV cluster testified that police and General Service Unit (GSU) raped several women especially in Nairobi's slum areas of Mathare and Kibera¹⁰. This information was confirmed by the FIDA(K) officer in charge of public litigation who said:

There are about 30 women who were raped by the police and General Service Unit officers in Kibera and Mathare. We are still working with them in the hope that we can bring a case against the responsible officers. In some instances, the women can identify the policemen responsible.

It is in light of this evidence the Committee against Torture on 19th November 2008 urged Kenya to take immediate action to ensure prompt investigation of all allegations of excessive use of

force and torture by the police during the post-election period, including sexual violence and gang rape, with the aim of prosecuting and punishing perpetrators.

In terms of Kenya's Sexual Offences Act (SOA), offences committed by persons in authority or positions of trust¹¹ may be charged and prosecuted. The fact that no policemen have been charged with rape implies that the state is condoning violence against women and has gone contrary to the Committee's recommendations.

It is evident from the above findings that women were discriminated against on the basis of their gender by both the rapists and the police. The state is thus in violation of the CEDAW Committee's general recommendation 19¹² which states that gender based violence during conflict is a form of discrimination and states have a duty to protect women. Section 82(4b) of Kenya's Constitution specifically exempts matters of customary law from the general prohibition against discrimination. By specifically protecting violence against women which is entrenched as 'normal' in certain Kenyan cultures, this exemption violates international norms and the rights of women.

Besides the police attitude, other issues emerged which prevented women from reporting the rapes against them. The volatile security situation prevented women from accessing police stations. The majority of the women interviewed were running for their lives and those of their children. Their priority was to run to a safer place, therefore it was impossible to go to a police station to report the rape. Even out of the 8 women who eventually tried to report to the police, 7 reported after a week and some after two months.

Intimidation by the suspects was also an issue. One respondent knew all four of her rapists as they were boys from the same village but belonged to a rival community. The danger lay in the fact that the youth who raped her were the sons of the area chief and the area councillor. Her

¹¹ Section 24 of the Sexual Offences Act (SOA)

¹² 1992

attempt to report to the police was dismissed and she believed it was due to the close association between the police and the said officials. The respondent subsequently received threats that if she talked about the incident and gave the names of the culprits, she would be killed. Considering that where she has been resettled by the government is not very far from where the attackers live, the respondent still fears for her safety.

There was also the failure to identify the attackers. Out of the 35 women respondents, only 8 of them knew at least one of their attackers. The constant refrain was that the attackers were strange youths, who were not from the area. The four women who had been raped by a single individual knew their attackers. The other 3 respondents knew at least one of the several boys who raped them. Only the respondent referred to earlier, knew all her four rapists.

The research also found that in some of the cases, the respondents were ignorant of reporting procedures. Some did not know that they were required to report immediately to the police while one did not know that she should have testified against the accused. Despite the tough security situation, at least 20 of the respondents did not know that it was necessary to go for a check-up in hospital first and have the evidence of the rape to make it easier for the police. Others reported one week to two months after the rape incidents when the necessary evidence had been destroyed.

Stigma and embarrassment contributed to non-reporting of the rapes as well. Several of the women failed to report the cases, due to the embarrassment and stigma that they felt being raped brought on them. This was more noticeable amongst the older women aged 50 years to 68. Their constant view was how embarrassing it was for people to know that they were raped. As one respondent, 60 years old put it:

It is so embarrassing to tell people that young boys who should be my sons and even grandsons opened my legs. It is so embarrassing. I told nobody, not even my own children. The shame is too much.

None of the women above 50 years reported the rape either to the police or to anyone else. However one girl aged 24 years also refused to tell her mother since she felt really embarrassed

about the rape. The fear of abandonment by spouses was an issue in 2 cases. The women agreed not to tell anybody because once their husbands knew about the rape, they would leave them.

The consequence of all the above factors was that rape cases were seriously under reported and women failed to get justice. This was brought out when I checked the police record of cases reported at the Nakuru gender desk for the relevant period. Only 5 rape cases were reported to the gender desk Nakuru in the period between 27th December to February 2008 according to the officer in charge. Out of the 5 cases whose charge sheets I saw, only one was directly attributable to the post-election-violence. The others did not specify a connection to the violence. None of these cases had been concluded. The finding was interesting considering that the previous months before the election, 8 cases of rape were reported and the subsequent months of April and May had 9 cases. At the height of the violence, rape reports were less, due to reasons enumerated earlier.

The desire for justice was however also reflected by the fact that at least 6 of the women respondents testified before the CIPEV. FIDA (K) and the Catholic Church worked together to bring the respondents before the Commission when it was sitting in Nakuru, in order to give evidence of their experiences.

5.2.1 The Police's Side of the Story

In a bid to find out the police's views on the issues raised by respondents, I interviewed the Officer Commanding Police Division (OCPD) Nakuru and six other officers, two of them attached to the gender desk, Nakuru and the officer in Charge of Crimes (OCS) amongst others. The officers, while friendly, denied that police were biased in the course of their duties during the post-election period. To prove his point, the OCPD told me to check out the officers who were in the room who indeed came from different ethnic communities. The OCPD indicated that with a mixture of different tribes as policemen it was impossible for them to be biased in favour of any one tribe. One lady officer said the public were suspicious of police who were not of their tribe during the election period. They refused to approach them for help once they knew that the police officer was from a rival community. It had nothing to do with police being biased.

But respondents especially from the smaller towns indicated that the policemen at those stations were predominantly from the indigenous tribes in the areas. This was so in Njoro, Burnt Forest, and Kipkelion and in Narok. The police collectively felt that they were misjudged by the public who viewed them negatively regardless of what they did. The OCPD said:

The public still believe that we are the same kind of colonial police who were always the aggressors, harassing people. This is a changed generation of police.

On the failure to prosecute rape cases the OCS said:

The police cannot work and succeed by themselves. Victims should come and report rape immediately so that we can have them taken to the hospital for P3 and record statements immediately. Some victims bathe first, or take many days after the incident before they report, then the evidence is destroyed and our hands are tied. When there is no evidence, we cannot continue to keep suspects indefinitely in the cells. The law does not allow us to keep suspects beyond 48 hours after arrest unless we charge them. That is why some were arrested and released. Where rape cases were not reported to us, there is nothing we can do to assist the victims.

Even where rape was reported, the OCPD further felt that the police work was hampered by the inadequate DNA testing machines. With only one DNA testing machine in the whole of Kenya at Kenyatta National Hospital in Nairobi, the OCS confirmed that rape hearings were delayed as samples took too long to be attended to, resulting into acquittals of rapists by courts. The OCPD felt that victims of rape would be more effectively assisted if the machines were in every district in the country.

Despite their negative reputation, police had made an effort to encourage the reporting of cases. Most important was the introduction of gender desks at each police station in 2006. Due to a lack of financial resources, however, the desks only started operating in late 2008 and early 2009. The desks handle cases like rape and sexual violence. I observed the gender section at Nakuru Central Police Station (Central) and at the Railways Police station. The Central gender desk was in a section of its own thus ensuring some privacy for women reporting sexual violence. The railways gender desk was just a desk (which had a sign with the word “gender”

written on it) and which was squeezed into the main reception area offering no privacy for complainants. One respondent said that the Bondeni Police Station had no gender desk and all reports are made in the same place. For fear of everybody else hearing her talk about being raped, she failed to report the rape against her.

While the OCPD said that the desks are staffed by 80% women officers countrywide, the Central one is headed by a man. When I asked the officer whether women would fear reporting rape cases to men, he said he did not think so.

While the introduction of the gender desks is a good idea, the State has failed to introduce the requisite training for police officers. Some of police officers interviewed, said there was no gender training offered in Police Training Colleges in Kenya and it is not a component of the syllabus. If an NGO gives a seminar for a day or two to a section of police, then that constitutes the extent of the police's training on gender. Officers on gender desks do not get any particular training either. Confirming this, the FIDA (K) official stated that the organization used to offer lessons at the Police training College regarding the Sexual Offences Act (SOA) and even developed a manual together with the police. When FIDA (K) implicated police in rapes during the post-election violence, the police ended the lessons.

I found the lack of training a serious disregard for gender issues and perhaps a possible reason for the failure by officers knowing how to deal with rape and sexual violence matters with the expertise and sensitivity needed. Officers are also transferred after every 2 years including those who have gained some knowledge of gender issues, thus leaving the desks to new unqualified officers. The finding was that while gender desks are a noble idea their implementation is wanting due to a lack of sufficient funding and training.

5.2.2 *The Courts*

It was not just the duty of the police to ensure justice. Justice is also dispensed through the Courts. This is another organ that the State uses to punish offenders and thus achieve some justice for victims of sexual violence. It was a finding of the research that a majority of the respondents did not trust in the local courts' ability to deliver justice with respect to the main planners and organizers of the violence. At least 31 of the victims felt that the main perpetrators of the violence should be tried at the Hague because as Wanja put it:

In Kenya only the poor are ever found guilty while the rich go free. The rich will just bribe the Courts and you will see them out. The Hague is better since they cannot be bribed. I want the Court to hang the politicians who caused this violence until they are dead.

Wangui, on the other hand, was only one of two of the respondents interviewed who wanted local courts said that she wanted the politicians responsible tried in Kenya and jailed for a long time with hard labour. She wanted them to suffer for a long time and as they suffered they would be an example to others. Were the police and the courts to be effective, Kenya has the progressive Sexual Offences Act (SOA) in place which covers sexual offences. The findings earlier discussed showed that some women were infected with HIV/AIDS through the rapes. In compliance with Article 1(d) of the Women's Protocol (which gives women the right to be protected from HIV/AIDS and STD'S), the Kenya Government in terms of Section 26 of the SOA makes it an offence for one to deliberately transmit HIV/AIDS or STD'S. Had the rapists been charged in court, this section of the Act would have been applicable.

The lack of confidence in the local courts accounted for the findings that 90% (31) of the women violated preferred that the main masterminds of the violence be taken to the ICC. The majority of the women were more concerned about the main sponsors of the violence being brought to account internationally than the actual perpetrators being tried locally. Apart from one woman, who refused to commit herself, all 47 respondents including the 3 male youths I interviewed, named ministers and some members of Parliament as being responsible for the violence through incitement, organizing and paying young men to cause mayhem. When asked what sentence they thought was commensurate with the acts committed, the responses ranged from five years, to life

imprisonment with hard labour, with 3 respondents suggesting that the culprits should be hanged. Their expectation that the Hague would deliver justice was very high.

By failing to prosecute perpetrators of the violence, Kenya has failed in its obligations under Article 11 of UNSC 1325 and Article 4.2(e) the Women's Protocol which emphasize the responsibility of states to end impunity by prosecuting those responsible for crimes against humanity and war crimes including those related to sexual and other violence against women and girls. The literature review in Chapter 2 referred to Kenya's refusal to establish a local tribunal to try the perpetrators of post-election violence and its failure to refer its case to the ICC. This clearly indicates the lack of commitment by the government to pursue justice for the victims of PEV.

While the ruling of the ICC judges is awaited, the Kenyan newspapers have reported that witnesses are being threatened with death by police and politicians fingered as masterminds; some witnesses have been forced to leave the country or go into hiding (Odunga D:2010). It is a possibility that there may be few or no witnesses left to testify when the hearings finally begin thus denying the victims justice. The ICC court process seems to be taking too long.

The Government has however taken some local steps to improve the administration of justice. The Witness Protection Act was enacted in 2006 to primarily provide for the protection of witnesses in criminal cases. The Act targets vulnerable witnesses who fear victimization for giving evidence against accused persons. The AG is empowered to establish a witness protection programme, and he can establish new identities for witnesses, relocate, or accommodate them. The international community has pressured the Cabinet into making some amendments to the Act to ensure it offers foolproof protection to witnesses under an independent body. The Act is yet to be implemented and the witnesses' lives remain endangered. Should it be fully implemented, it will greatly help women who were sexually violated to testify freely against perpetrators of the violence without fear of repercussions.

5.2.3 *Health*

As discussed earlier, women who were raped suffered health consequences but they have not accessed proper health care to date. This is a violation of their right to health provided under the UNDHR¹³ which provide for the highest attainable standards to physical and mental health. This was established by the research when it was found that out of the 35 women respondents only 9 had received counselling after the rape ordeals. Some of these respondents had the benefit of counsellors who came to the camps to talk to them. The group which had received no counselling at all were those from Naivasha. Only about 5 of the women were receiving physical treatment. Most of them did not even have the money required to pay for a card at the government hospitals, let alone the money to buy the drugs. 3 of the older women over 55 years were using herbs and hot water to try and cure themselves. 2 of the women with HIV had access to medicine through a clinic near Rongai while the other four were far from the hospitals and it was difficult to access the drugs, hence their health was deteriorating fast.

The reproductive rights of women are also not fully protected by the Kenyan Government. While Kenya is a signatory to the Women's Protocol (which in Article 14.2(c) provides for the authorization of medical abortions in cases of sexual violence and rape), Kenya still prohibits abortion in its Penal Code as discussed earlier. The case of Muthoni, discussed in Chapter 4, who fell pregnant from a rape after the post-election violence, illustrates this violation of a woman's reproductive choice to decide whether to have a child or not. By forcing her to carry the baby to term through its laws and through the doctors, the state interfered with her right to decide whether to have children or not under Article 14.1(b) of the Women's Protocol.

Other rights violated are the rights to shelter, work, food and the right to proper living conditions since many women are still in the camps with no food or proper living conditions. My findings agreed with those of the OHCHR's (2008) mission to Kenya which stated that the access to food, health, decent housing and inequality, had deteriorated further due to the violence. Perhaps it was

¹³ Articles 12 and 25

easier to ignore these rights since they are not entrenched in the current Kenyan Constitution. The draft Constitution of Kenya, if passed in its current form will rectify this anomaly, as in terms of Section 43, it specifically protects the right to food, health and housing. This is in conformity with the concluding observations of the Committee on Economic Social and Cultural Rights (ECSR) to Kenya on the 19th November 2008 which urged the inclusion of these rights in the new Constitution and the need for the government to address the disparities between the enjoyment of the said rights.

5.2.4 Reparation and Redress for Victims

In an effort to ensure victims of sexual violence get some form of redress or compensation, the UN Commission on Human Rights stated in 1999 in a resolution on systematic rape, sexual slavery and slavery-like practices that states should provide effective compensation for violations in order to end the cycle of impunity with regard to sexual violence committed during armed conflicts. Kenya has not complied with this as it has no provision for reparation for victims of violence. The Penal Code and the SOA do not have any provision for direct compensation to a victim of sexual violence by either the offender or the State. The only sentence is the jailing of the offender which fails to benefit the victim directly. If the offenders were made to pay large sums of compensation, then the victims would directly benefit.

Furthermore, the country does not have any fund from which victims of such violence could be paid to ensure that they receive at least some compensation for the harm suffered. The government paid out Ksh 10,000- Sh 25,000 to some IDP's for resettlement. No money, however, was given specifically to compensate women for sexual violence. Although the government's gesture of offering some compensation to IDPs might have appeared to be helpful, the amount was actually inadequate, and at least 25 of the women respondents never received any money.

5.2.5 Resettlement

Most respondents wanted to leave the camps as a priority since life there was difficult. There was dire lack of food and the tents were inadequate and torn. During the course of the research, I witnessed tents which had been swept away by the heavy rains in the Mawingu camp leaving the occupants out in the open. In Mawingu Camp there are about 14,000 displaced people, the majority of them being women. The government had already resettled 400 of them in the Rongai area. This is however a very small percentage (2%) of the displaced population.

While the desire to be resettled was common to the majority of the respondents, the women strongly believed that they should be consulted before being resettled. All the women interviewed were categorical in their insistence that that they did not want to be taken back to the areas where the same tribes who attacked them resided. About 20 of the women in the camps said that while the camps were bad, they would rather stay in the camps than go back to where they were raped and their property looted or burnt. Wanjiku said:

How do I live next to a person who raped me, burnt my house and property and is comfortably tilling my land and milking my cattle while I have nothing? I feel really bitter. It is not safe to stay next to them. They should give us land this side of Mawingu, we feel safer here. I would rather stay here in the camp than be taken back to those sides of Molo.

The general consensus was that the government was ignoring their wishes by resettling some IDP's near the same tribes who attacked them and they did not feel safe. They felt that the government ignored their participation when it came to plans for resettlement. Principle 15 of the UN Guiding Principles on Internal Displacement provides that IDP'S have the right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk, while Principle 28 emphasizes that IDP'S should fully participate in the plans for their resettlement and reintegration. Furthermore, Article 29(2) puts the state under duty to help IDP'S recover their property, failing which they shall be assisted by being given compensation or just reparation. In trying to resettle the IDPS Kenya has failed to observe most of these provisions. The safety of the displaced is not assured as they were being resettled

in the same areas where violence was meted out against them. The respondents also felt that resettlement was too slow since most of them are still in the camps 2 years after the violence.

5.2.6 Ethnicity: Progress or Regress for Kenya?

Apart from the above issues, it emerged from the research that ethnicity needs to be seriously addressed for genuine peace to be achieved. While violence has decreased, tribalism, which is amongst the issues that caused the violence, is yet to be dealt with. In my field research, I went to 6 places. This included 4 camps and integrated IDP'S in Kaptembwa and Naivasha. What struck me was that, to date, IDPs still remain divided in camps on the basis of tribes and political affiliations of 2007 elections. The Mawingu, the Nakuru Pipeline and the Rongai Mawingu camps are predominantly occupied by Kikuyus. Luos, Kalenjins and others who were in the rival parties during elections do not share these camps but camp at the Rongai Alko camp where there are no Kikuyus. If the state is deliberately establishing and maintaining camps which separate IDPs into their separate ethnic groups, how can it expect to encourage Kenyans to mix with one another in society and reconcile? The resettlement of the IDP's follows the same pattern with similar tribes being resettled in one area while others are taken elsewhere. The integrated displaced who were not in camps actually seemed to be mixing a lot better even though they are from different 'rival' tribes.

The continued perception of 'my tribe' was reflected by the respondents with regard to who was to blame for the chaos that engulfed the country. Two years down the line, the respondents blamed the politicians from the opposing camps for being the masterminds of the violence and, in their opinion, it is they who should be prosecuted in the Hague. The ODM group blamed the PNU politicians and vice-versa. In fact when asked whether politicians from both camps should go to the Hague, the answers were protective of the politicians from their tribes. So while the women want justice, it is a selective justice. Only 2 women said that all the people who planned the chaos should be punished, regardless of their tribe. In other words, the problem of ethnicity seems to be as bad or worse than it was before the clashes and this is a recipe for disaster.

Despite the above violations, Kenya has made some effort to address the violence issue. As discussed in the literature review, Kenya established the CIPEV to investigate the causes of violence and its perpetrators. The CIPEV and KNHRC findings are being heavily relied upon by the ICC prosecutor in his application to open investigations into the perpetrators of post-election violence in Kenya¹⁴. One of the recommendations by the CIPEV and UN Human Rights bodies was a new Constitution which was seen as vital in preventing more bloodshed in Kenya's future. The new Constitution is on the verge of becoming a reality with the referendum scheduled for June 2010. The government has however been reluctant to fully implement the findings of the CIPEV.

In a further attempt at addressing the post-election violence and hopefully bring reconciliation to the country, a Truth, Justice and Reconciliation Commission (TJRC) was set up. Its mandate is to look into human rights violations of individuals and groups beginning in 1963 after Kenya's independence. It will look at corruption, economic crimes, illegal/irregular allocation of land and other historical injustices with the intention of paving the way for reconciliation for Kenyans (KPTJ:2008). The Commission began work in February 2010 but it does not have any prosecutorial powers. The FIDA (K) officer interviewed indicated that they were preparing women to go and testify at the TJRC. Whether healing will be achieved is in question since almost all the respondents I interviewed predominantly felt that unless the perpetrators of violence are punished for their crimes and the women resettled, there will not be any genuine reconciliation.

5.2.7 The Role of Women's Organizations and UN Bodies

Other than the state, it emerged that the role of women's organizations affected women's access to redress and justice. As discussed earlier, women's organizations under the GBV cluster assisted women who were displaced and violated. FIDA K further organized for the women in

¹⁴ Appendices 2 and 3

Nakuru to testify at the CIPEV and was organizing women to testify at the TJRC. While commendable, no organization has filed any suit against the government on behalf of women. Even in instances where women knew their attackers, they were not assisted in pursuing their cases. One of the respondents, Atieno, said she had thought her case would be pursued by FIDA but was disappointed that they did not get in touch with her or the 5 other women after the Commission hearings. It seemed reasonable to conclude that justice for women has not been as strongly pursued as it should have been.

As far as collecting statistical data concerning the women violated is concerned, it was discovered that these organizations did not have their own comparative figures as discussed earlier. FIDA (K) for instance, relied entirely on the Catholic Church in Nakuru to put them in contact with the violated women and the organisation did not make investigations of its own according to the lawyer referred to earlier. As an individual I was able to find several affected women who had never been approached by any organization and was able to obtain very valuable information from them. Surely, with greater resources at their disposal, these organizations should have done better. The research was however alive to the capacity limitations of these organizations who are dependent almost entirely on donor funding.

The lawyer stated:

I believe that the NGOs and the Civil Societies tried their best but would have done more. Women victims who testified at the CIPEV Commission were promised help by UNIFEM and UNFPA to rebuild their lives by setting up small businesses for them. I personally conveyed the message to the women but when I followed up on the help promised, I was taken round in circles. As for FIDA (K), I know that they did not follow up on the women after the CIPEV hearings. They did not even keep in touch with the women and the few cases that had been filed by victims were not followed up. Following up the women's issues to conclusion was never on the agenda. I think the donors and the organizations were slightly more interested in publicity than actually helping the women rebuild their lives.

The research was however alive to the capacity limitations of these organizations who are dependent almost entirely on donor funding.

It also emerged that while there was focus on the assistance of women, the violence seemed to be looked at in isolation by women's organizations. The underlying reasons for the violence like unemployment, perceived discrimination, and culture which had caused resentment and partly caused the violence were glossed over. I found it a possibility that by ignoring the underlying reasons, a wholesome solution to violence against women was unlikely to be reached. Perhaps a holistic approach incorporating both the causes and the outcome of violence is needed.

CHAPTER SIX:

6.0 CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion

Kenya has made minimal steps in addressing the violence issue of 2007-2008. The setting up of the CIPEV due to pressure from the international community was a good step, however, since it outlined the main causes of the violence and people bearing the greatest responsibility for the violence which report is being used by the ICC prosecutor as his main basis of investigating Kenya. The failure to prosecute any individuals responsible for the violence and the refusal to hand over the case and the suspects to the said Court, however, prove that the country is not serious in prosecuting the culprits. The main culprits are mainly politicians from across the political divide who are members of Parliament and who are obviously reluctant to pass laws or make decisions which are likely to be enforced against them. If the draft Constitution that is to be debated in Parliament is finally adopted in its current form after the referendum is also a step in the right direction as it addresses violence and affirmative action.

Most women affected by sexual violence in the meantime remain in the camps, with no food, water, access to treatment or employment. They still live in torn tents. My assumptions were confirmed with regard to the gender based violence suffered by women during the post-election period and the failure of the state to protect the women both during and after the violence. The assumption that women have not received justice to date was also confirmed. In view of my findings, I believe a multifaceted approach is needed to achieve a lasting solution to sexual violence against women. My recommendations which include Constitutional, legal and Social reforms are derived from the victims themselves, other respondents and from other sources.

6.2 Recommendations

The following recommendations are suggested.

6.2.1 Political Will

For any effective progress to take place especially in regard to ensuring that the perpetrators of the PEV are punished and to fighting the deep-rooted problem of ethnicity, all Kenyan leaders at every level of power within the society have to show their political will to make such progress by making every effort to support it. In fact all the recommendations that follow depend almost entirely on the political will of the country's leadership.

6.2.2 Legislative Reforms

Kenya should draft and adopt legislation that recognizes sexual violence as a crime, including rape during peacetime, conflict and post-conflict situations and addresses this crime from a rights based perspective in accordance with Kenya's international, regional and constitutional commitments and obligations. The draft Constitution presents a good opportunity to include a specific prohibition against such violence. Any legislative provision defining various types of violence should specifically include sexual violence.

To prevent a recurrence of the violence, Kenya should cooperate with the ICC court and willingly hand over to it the alleged perpetrators and planners of the PEV, a positive step which act as a strong deterrent to any future would-be culprits. The main perpetrators are well known even without the Commission naming them; therefore they should be brought before the relevant courts for justice to be done.

It is not too late for the Kenya Parliament to pass an Act of Parliament establishing a local tribunal to try other offenders of the post-election violence. While the main perpetrators are tried at the Hague, lower level offenders should be tried locally in this tribunal. The desire for justice is very high on the victims' minds and there is unlikely to be any reconciliation without culprits being brought to book.

Where rape occurs it is the woman who bears all the consequences of raising a child if falls pregnant. As has been seen in the case of Muthoni, the government has failed to assist such victims. Therefore, the law on abortion should be changed to make it legal especially where one is raped so that it rightly becomes the woman's choice whether to carry the baby to term or not.

6.2.3 Administrative Reforms

The government needs to urgently implement, the recommendations by CIPEV to appoint a Special Rapporteur on Sexual Violence to monitor the gender Commission as well as the gender units in various ministries, and to provide an annual report to Parliament.

The implementation of the Witness Protection Act with the requisite amendments should be carried out urgently to ensure better protection of witnesses from perpetrators of crime. With protection, witnesses can be free to testify both at the ICC and in the local Courts. The state should investigate and prosecute claims of post-election violence witnesses being victimized by police and other suspects of the post-election violence.

Section 14 of the Police Act should be amended to reflect that police officers who discriminate the public on the basis of political opinions or on a gender basis should be severely disciplined. The government must send out a clear message that police officers may be dismissed if they cannot be relied upon to serve all Kenyans effectively regardless of their tribal affiliation.

6.2.4 Training

The Police Training Colleges should have a gender course which is mandatory for all officers. Those who have left college should attend mandatory continuous lessons on gender relations and dynamics. Police should receive training on handling gender matters like rape with knowledge and sensitivity. Officers who head the gender desks must specifically receive gender training.

Gender desks should be strictly staffed by female officers. All police stations should have the desks which should be in a separate room from the main reception. The privacy of women and children in reporting rape cases should be strictly adhered to and transfers should be minimized so that officers can follow some cases to conclusion.

A multi-sectoral approach to violence should be taken involving the media, government ministries, police, hospitals and civil societies with the shared long-term objective of substantially reducing violence against women.

6.2.5 Resettlement

The government should speed up the resettlement of the internally displaced. The respondents are living in very miserable conditions. MPs who earn salaries of about Kshs 1,000,000 (US\$13,330) per month should offer to take a cut to their salaries and channel the amounts raised from all their salaries to start resettling IDPS. IDPs, especially the victims of rape, should be fully consulted by those organising resettlement programmes. Understandably, most of the women do not want to go back to places where they suffered violence and they should not be forced to do so.

6.2.6 Health

The government should work in conjunction with hospitals, women's bodies and civil society to ensure the violated women and girls receive medical and counselling services urgently. Some women who had contracted HIV/AIDS especially in Naivasha area, Rongai area need urgent on-the-spot access to free anti-retroviral drugs as the clinics and hospitals are too far for them to go.

6.2.7 Education, Sensitisation and Public Awareness

Massive education campaigns need to be run targeting all concerned public and private offices and organisations and civil society in general explaining how sexually violated victims ought to be treated and how their records must be kept. Hospitals and medical personnel and the police should especially keep the records of sexually violated women separately so that they can get the necessary medical and legal assistance at the earliest opportunity. The media should be educated to report sexual violence instead of ignoring it in favour of other news.

There is a need for education of elders, chiefs, women and youth to change their attitudes towards women and violence. The whole community needs to know that women have rights and that when a woman is violated, the whole community is affected in one way or another due to the diseases or physical inability to function fully. Cultures and customs which promote or regard violence to women and girls as acceptable should be specifically targeted for eradication by the government, civil society and the media. As long as they exist and are condoned, violence against women will continue in all its ugly forms.

Women should be educated through the media that they have rights. Further, the procedures for reporting rape, and seeing the doctor immediately so that they can prevent the contraction of HIV/AIDS should be done. This should be done even on national television and on radio stations and at the village level so that all women get the information. Women should be sensitized about the important role they play as the ones who nurture children. Despite cultures that disregard women as equals, women themselves have to actively guide their children, especially sons from a young age, who must be taught gently but firmly that respect for a woman is crucial and that she has rights.

6.2.8 Civil Society and Women's Organisations

Civil Societies and especially women's organizations like FIDA(K), CARE K should be supported by the government both financially and with the supply of relevant information about rape victims since these organizations played a big role in helping women during the post-

election period by donating to them a lot of food aid and providing them with psychosocial, legal and medical support.

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APPENDICES

APPENDIX 1 – “ALL I WANT IS JUSTICE NOT REVENGE”

ALL I WANT IS

Nothing can compensate Ruth Njeri for the suffering she underwent during the post-election violence, but she hopes that ICC prosecutor Luis Moreno Ocampo's visit to Kenya last week will ensure that those behind the bloodshed are punished.
By MANPREET REHAL



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Even before International Criminal Court prosecutor Luis Moreno-Ocampo came to Kenya last week, displaced people had been pleading with the government to increase the promised compensation sum.

But for people like Ruth Njeri, monetary compensation is not enough. Njeri, who lives in Shalom City Mawingu, a camp for displaced people near Nyandarua, was raped and her husband brutally killed during the post-election violence. The painful memories haunt her as she worries about providing for her two young children.

"We want to see justice being done," she says, "As far as we are concerned, the future of this country lies in Ocampo's hands and we want him to know that thousands of people are looking to him for justice and also to ensure that this country does not have a similar experience such as the one that stole our loved ones and our livelihoods!"

Talk of the violence evokes gruesome memories for Njeri as politicians worry about the fate of those who

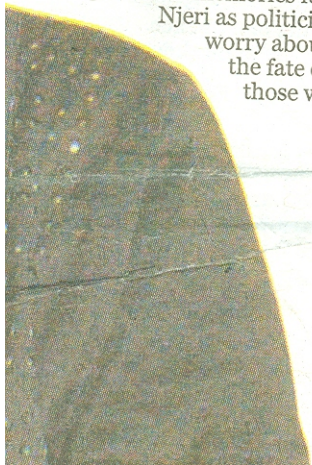
masterminded the post-election violence. "What happened cannot be wiped from my mind, and life has been hell for me," says Njeri quietly. "When we gather in the camp to discuss the issue, our main hope is that Ocampo will not allow politicians to convince him to let them off. We want him to conduct investigations so that the individuals involved can be charged and tried at The Hague, not in Kenya, because we have no confidence in the government."

Before all hell broke loose in January 2008, Ruth was living in Kericho with her husband and eight-month-old son, Douglas. Her husband owned a thriving shoe business and provided well for the family.

"That evening, my husband heard about the looting going on in town and decided to go and check whether his shop had also been broken into," she recalls. "I had prepared the evening meal and decided to do the laundry as I waited for him. When he came back, he was very shaken. He told me that the shop had been looted, but I told him that since it was happening all around, we should not worry too much because after things calmed down, we would work hard to regain what we had lost."

Phone call

Njeri's husband then went on to reveal that he had received a phone call from a friend in Londiani, where his parents lived. "He said he had been told that both his parents had been killed and buried in a mass grave," she says, "I could see that even as he spoke, he didn't believe what he was saying. He also told me that he had seen hundreds of youths wearing white T-shirts and red



shorts being brought to the town in a lorry. When the phone rang again, I answered it, and what he had told me was confirmed. We were advised to go into hiding as soon as possible to save our lives."

Still in a daze, Njeri left her husband watching the evening news while holding their son and went outside to hang the washing. Out of nowhere, an arrow landed next to her foot and then she heard a strange sound. She looked up to see the low walls of the compound surrounded by painted faces.

"They were howling like dogs and were dressed in white T-shirts and red shorts," she recalls. "I stood rooted to the ground with fear, knowing that these were the men my husband had referred to earlier. About seven of the men entered the compound and began kicking and pushing me into the house while the rest went away."

Once inside the house, they took the little boy from Njeri's husband and flung him against the wall. They then attacked her husband. "They were prepared and well-armed," recalls Njeri. "They had machetes, rungas, arrows and whips. I cried for mercy, then pleaded, but they would not listen. I ran to the bedroom and got them Sh40,000. I begged them to take the money and leave us but they just

laughed. One of them snatched the money from me, smelt it and threw it in my face. He reached into his pockets and pulled out many Sh1,000 notes, "We don't need your money, we have been paid well to do our job," he said.

"My husband cried out, telling me to look after our son – if we survived. I felt helpless as I watched them beat him ruthlessly," recalls Njeri, tears welling up in her eyes. One of the men came and brandished a panga in

her face before using it to slash her husband's neck. "They laughed. One of them picked my son from the floor, held him by his feet and then dropped him head first."

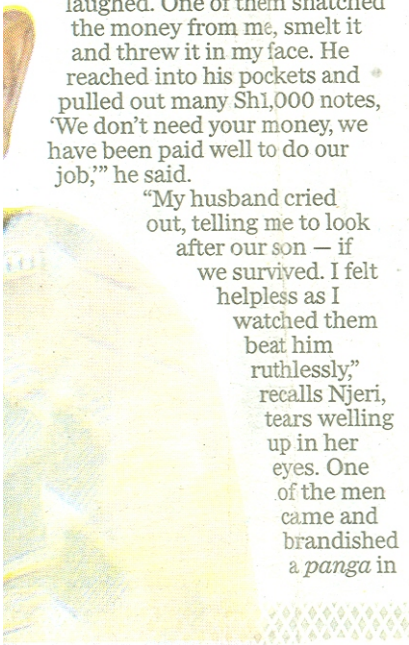
But they weren't done yet. Next, the men dragged Ruth into the next room, kicking and slapping her. "One cut me slowly and deliberating above my knee while another, who was smoking, burnt my thighs with a cigarette butt several times," she says, lifting her skirt to reveal the scars. Njeri was barely conscious when they began raping her in turns. But she

We want the
perpetrators of these
heinous crimes to
be brought to justice,
and the only way
that can be done is
through the ICC

remembers that each one would finish with her then help himself to some of the food she had cooked. Her last memory of that night is of the men pouring hot water on her naked body before leaving her for dead.

Nearly three days later, Njeri regained consciousness in hospital but had no idea how she got there. After recovering a little, she joined the hundreds of displaced people at the local district officer's compound, where she was reunited with her son, who had miraculously survived. Over the next few days, they were transported in lorries to the Nakuru Showground, where they would receive food and shelter.

"At the showground I met several women who had also lost everything," she says. "But that didn't make my loss any easier to bear. However, we all agreed that our politicians had turned the elections into a battle for power and used tribal tensions to disturb the peace in the country and the safety of the very people they claimed to speak for. It was the ultimate





difficult Photo/JOSEPH KIHERRI AND

betrayal.”

Unknown to Njeri, the attack would continue to haunt her in other ways. A couple of months after the incident, she reported to the health clinic within the camp that she has missed her period. She was tested, but the medical staff were evasive about the results although they continued counselling her. After six months, Njeri wanted to terminate the pregnancy but was not allowed to.

“I wondered how I could have a child whose father I did not even know, and who would be a constant reminder of my humiliation,” she offers. “I tried to convince the authorities to let me have an abortion but they said it was too late. They told me not to hate the child because it was part of me, and that it was innocent.”

Due to the damage to her body after the gang-rape, Njeri couldn't give birth normally. Apart from special counselling, she also received clothing, food and medical aid before the baby was delivered through a Caesarian section.

“I couldn't bring myself to look at the baby or hold her,” she recalls. “Several of my companions and the nurses tried to convince me but I was angry, bitter and helpless. I wondered why this had to happen to me. I knew many other women who had been raped during the violence, but why was I so ill-fated as to fall pregnant with a rapist's child?”

“It is God's will, breastfeed your child and your love for her will flow,” Njeri repeats the words of an old woman at the hospital who understood what she was going through. “On the third day I breastfed the baby, Miracle Wanjiru, for the first time, and the bond of love broke the regret of how she had been conceived.” Miracle is now an active 14-month-old baby.

Although the government is trying to resettle the displaced people, thousands like Njeri are still languishing in camps. Food and water are scarce, medical help is inadequate and diseases like cholera, typhoid, pneumonia and malnutrition continue to take their toll. Worst affected are young children and the elderly. Njeri and

promised by the government, but we wish they would speed things up and provide the compensation money quickly.”

Njeri has made no attempt to go back to Kericho because she feels there is nothing left to go back to. She works as a casual labourer on farms near the camp to pay for food for her family. Sometimes they sleep hungry because there is no food or no fuel to cook with. Their tent is leaking and when it rains, everything gets soaked. The nights are cold and several times her few belongings have been stolen by other desperate people.

Njeri finds herself swinging between depression and the will to rebuild her life. “At times I look at our condition and wonder whether it will ever end, or what kind of punishment this is,” she cries. “Then I look at others who are worse off... for women who were raped and contracted Aids, it is a sure death sentence. Then I count my blessings and console myself that although I lost my husband and my property, I still have the son of the man I loved, and I consider Wanjiru a blessing and another reason for me to live.”

Njeri is eager to receive her parcel of land and compensation money because it will help her rebuild her life. She also needs money to seek treatment for her back and pelvis, which were injured when she was assaulted. Her son also suffered an injury in his private parts that needs to be corrected surgically.

Suffering

“Nothing can wipe out our suffering and no amount of money can compensate what we have lost, that is why we want justice, not vengeance,” asserts Njeri, wiping away her tears. “We want the perpetrators of these heinous crimes brought to justice, and the only way that can be done is through the ICC. We don't want the politicians linked to these crimes to get off scot-free. We have seen criminals in high places walk away free when tried locally. We cannot allow them to continue living in luxury while thousands of innocent *wananchi* continue to live in squalid camps. These people have to answer to us and to the world for the crimes they committed. Aren't we all human beings at the end of the day? If Kenya is to be saved from the crimes of these power-hungry politicians who can go to any length for personal gain, the government has to set a precedent and allow the ICC to do its work to ensure that nothing like this ever happens again here, or anywhere else,” she says passionately.

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APPENDIX 2: Article in the Sunday Nation, 10.1.2010

Poll chaos witnesses 'receive police threats'

By DENNIS ODUNGA
and PETER NG'ETICH

Potential witnesses expected to testify about Kenya's post-election violence at the International Criminal Court (ICC) in the Netherlands are receiving threats from police.

Some of the witnesses have gone underground. They claim that police, who are supposed to protect them are instead intimidating them by accusing them of starting the chaos themselves.

Human rights organisations in the North Rift said they had recorded 18 cases of intimidation. The Centre for Human Rights and Democracy (CHRD) has recorded 15, while the Centre Against Torture (CAT) has three cases.

Sought for comment by the *Sunday Nation*, deputy provincial commissioner of Eastern Rift Valley Wanyama M-alambo said he was not aware of such incidents.

He said if there were such cases, the witnesses should record statements with the police.

"I am not aware of such an issue and if there are any, they should seek police assistance," Mr Musiambbo said.

A key witness who testified during the Justice Philip Waki commission sittings gave reports to the Kenya National Commission on Human Rights (KNCHR) and later briefed the police about what he knew about the post-poll

violence, last week received a letter with Sh3,000 enclosed, which turned out to be a death threat.

The message read: "Tofadhali mke wa Ken. Hui ndio mchango wetu ambao tumekuchangia khusaidie kununulia beana wetu gawaza (Please, you purchase a coffin for your husband). The letter was signed by 'The betrayed'.

According to the victim, the letter was delivered by his wife who works in a local sugar cane processing plant in Western Province on Tuesday at about 6.30 p.m.

Two smartly dressed people accompanied the victim's wife at the company's gate as she left for home after the day's work.

"It is like they knew my wife. They requested my wife to deliver the mail saying they had been looking for me for many days, before leaving aboard a four-wheel drive vehicle," the victim who cannot be named for security rea-

Human rights

organisations in the
North Rift claim they
have recorded 18 cases
of intimidation



International Criminal Court prosecutor Luis Moreno-Ocampo speaks during a news conference in the Hague. He is awaiting approval to prosecute key masterminds of post-election violence in Kenya.
Photo/FILE

with a rope before strangling him two weeks ago, using the same rope.

"It's like they were looking for this key witness who is due to testify before the ICC. The government should review the Witness Protection Act to ensure the Attorney-General and police are directly involved," said Mr Wafila.

He said an independent witness protection fund should be developed and be run by an independent body that is free of government interference to guarantee the witnesses adequate protection.

The official said security personnel expected to protect the witnesses had lost touch with majority of Kenyans and the violence victims as some of them were leaking vital information to masterminds of the violence.

"The police are divided along ethnic loyalties. Betrayal from within the force is bound to affect delivery of justice unless proper intervention measures are taken," said Mr Wafila.

He revealed that the 15 witnesses who had sought protection from CHRD, which coordinates the post-poll witnesses and victims' activities in the region, cited threats to their lives if they did not stop cooperating with ICC.

"One of the victims has suffered mental complications due to stress. The world has turned upside down for others as they live a hide and seek life in their own country," Mr Wafila said.

The witnesses, he said, were relocating from one place to another seeking refuge, and some have not even found peace in foreign countries as their tormentors follow them there.

David Korot of CAT said a potential witness from Nandi was nearly thrown into the cells after he went to report threats on his life.

sons said.

He said he had lost confidence in the police after some of them blatantly told him off, claiming the alleged incident was "mere empty threats".

The letter comes days after a man said to be a relative of the victim was killed in Kimilili by people said to be targeting witnesses of the post-election violence.

CHRD's executive director Ken Wafila said people who claimed to be police officers tied the victim's hands and feet

APPENDIX 3: KENYA ICC CASE NO 01/09

http://www.iccnw.org/

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor	Counsel for the Defence
Legal Representatives of the Victims	Legal Representatives of the Applicants
Unrepresented Victims	Unrepresented Applicants (Participation/Reparation)
The Office of Public Counsel for Victims	The Office of Public Counsel for the Defence
States' Representatives	Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia
Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations
Section

Other

KENYA ICC CASE 01/09

believe that the opening of an investigation into the situation would not be in the interests of justice.

Pursuant to Regulation 49 of the Regulations of Court, the Application includes 1) a statement of facts indicating the location of the crimes, time period, and to the extent possible, the persons involved, 2) the Declaration of the Prosecutor (Annex 1E), 3) a chronology of relevant events (Annex 1C), 4) a map that illustrates the relevant locations (Annex 1B), 5) an explanatory glossary of relevant names of persons, locations and institutions (Annex 1D) and 6) pursuant to Rule 50, public notice to the victims dated 23 November 2009 (Annex 1F).

II. Procedural History

1. By letter of 5 November 2009, the Prosecutor notified the President of the Court, in accordance with Regulation 45 of the Regulations of the Court of his intention to submit a request for the authorisation of an investigation into the situation pursuant to Article 15 (3) of the Rome Statute.
2. On 6 November 2009, the Presidency of the Court assigned the situation in the Republic of Kenya to Pre-Trial Chamber II.

III. Background

3. The situation in the Republic of Kenya has been under preliminary examination since the violence erupted in the context of national elections held on 27 December 2007.
4. On 30 December 2007, the closely contested presidential elections in Kenya resulted in a declaration by the Electoral Commission of Kenya that incumbent President Mwai Kibaki of the Party of National Unity (PNU) was re-elected over

8. On 26 August 2008, in response to its request, the Prosecution received a copy of the report from the KNCHR entitled, "*On the Brink of the Precipice: a Human Rights Account of Kenya's Post-2007 Election Violence.*"⁴

9. On 15 October 2008 the Commission of Inquiry into the Post-Election Violence (CIPEV) - also known as the Waki Commission, named after its chair Justice Philip Waki of Kenya's Court of Appeal - published its Final Report.⁵ The Report recommended the setting up of a special tribunal to seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 General Elections in Kenya. Short of the establishment of such a Special Tribunal, the Waki commission recommended forwarding to the Prosecutor of the ICC the list, placed under the custody of the Panel of Eminent African Personalities, containing names of those suspected to bear the greatest responsibility for these crimes and to request the Prosecutor to analyze the seriousness of this information with a view to proceeding with an investigation and possible prosecution.⁶

10. On 16 December 2008, President Kibaki and Prime Minister Odinga agreed to implement the recommendations of the Waki Commission and specifically to prepare and submit a Bill to the National Assembly to establish the Special Tribunal to seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 General Elections in Kenya.⁷

⁴ Kenyan National Commission on Human Rights (KNCHR), "*On the brink of the precipice: a Human Rights account of Kenya's post-2007 election violence*", 15 Aug 08, KEN-OTP-0001-0002to KEN-OTP-0001-0245 (Annex 4).

⁵ Commission of Inquiry into Post-Election Violence (CIPEV), "Final Report", 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892 (Annex 5)

⁶ CIPEV, "Final Report", 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, pp. 472-473 (Annex 5)

⁷ Kenya State House Statement, Special Tribunal to be set up, 17 December 2008, (Annex 25).

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⁴ Kenyan National Commission on Human Rights (KNCHR), "*On the brink of the precipice: a Human Rights account of Kenya's post-2007 election violence*", 15 Aug 08, KEN-OTP-0001-0002 to KEN-OTP-0001-0245 (Annex 4).

⁵ Commission of Inquiry into Post-Election Violence (CIPEV), "*Final Report*", 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892 (Annex 5)

⁶ CIPEV, "*Final Report*", 16 October 2008, KEN-OTP-0001-0364 to KEN-OTP-0001-0892, pp. 472-473 (Annex 5)

⁷ Kenya State House Statement, Special Tribunal to be set up, 17 December 2008, (Annex 25).

were transported to the locations of attacks by lorries and were allegedly paid to carry out the raids; funds were allegedly provided by members of the political and business establishment of the North Rift.⁸⁰

92. Counter-attacks were undertaken by other parties' supporters mainly in Nakuru and Naivasha and parts of western Rift Valley province. In the town of Naivasha, members of militia were reportedly paid by local businessmen to attack civilians, being promised money for each kill.⁸¹ The attacks also led to deaths and destruction of property.

(b) Acts constituting crimes against humanity committed in the context of a widespread or systematic attack

93. On the basis of the available information, and without prejudice to other possible crimes within the jurisdiction of the Court which may be identified during the course of an investigation, the Prosecutor declares that there is a reasonable basis to believe that during the post-election period, including but not limited to the time period between 27 December 2007 to 28 February 2008, at a minimum the following conduct has been committed:

- a. murder constituting a crime against humanity under Article 7(1)(a) of the Statute;
- b. rape and other forms of sexual violence constituting a crime against humanity under Article 7(1)(g) of the Statute;
- c. forcible transfer of population constituting a crime against humanity under Article 7(1)(d) of the Statute; and
- d. other inhumane acts causing serious injury constituting a crime against humanity under Article 7(1)(k) of the Statute.

⁸⁰ ICG, "Kenya in Crisis", 21 February 2008, KEN-OTP-0001-1076 to KEN-OTP-0001-1114 p. 11 (Annex 6).

⁸¹ HRW, "Ballots to Bullets. Organized Political Violence and Kenya's Crisis of Government". March 2008, KEN-OTP-0001-0248 to KEN-OTP-0001-0330, pp. 46 - 48 (Annex 3).